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FROM THE

UNITED STATES GOVERNMENT

MILITARY LAWS

OF THE

UNITED STATES

PREPARED IN THE OFFICE OF
THE JUDGE ADVOCATE GENERAL OF THE ARMY

1921

SIXTH EDITION

(IN TWO VOLUMES)
VOL. 1

WASHINGTON
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OFFICE OF THE ADJUTANT GENERAL.

WAR DEPARTMENT,
WASHINGTON, *April 6, 1921.*

The following publication entitled "Military Laws of the United States" has been prepared in the office of the Judge Advocate General of the Army and is published for the information and guidance of all concerned.

[300.1, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
Major General, Chief of Staff.

OFFICIAL:
P. C. HARRIS,
The Adjutant General.

PREFACE.

This compilation contains all statutes of the United States now in force directly affecting the War Department and the Military Establishment, including the legislation enacted by the Sixty-sixth Congress, which adjourned March 4, 1921. In addition, there are a few sections which contain provisions falling into one of two classes: (1) Statutes in force on June 4, 1920, impliedly repealed or rendered inoperative by the amendment to the national defense act of that date; (2) statutes, perhaps temporary or obsolete, inserted for the value of the precedent established or as indicative of the kind of treatment given the subject by Congress in the past. In the first class of cases an annotation is added, as a suggestion to the inquirer that the provision is perhaps no longer law, giving the reference to the section or sections which are assumed to have repealed it. In the second class of cases there is usually an annotation pointing out the supposed temporary or obsolete nature of the provision, but no attempt has been made to pass on doubtful implied repeals, this work being merely a compilation and not a codification. Therefore, the inclusion of an act, or part of an act, in this book is not necessarily to be considered as indicative of a conclusion that the same is in force at the present time.

Very recent repeals of sections already given a place and number in this book have made it necessary to mark such sections "Vacant."

Each numbered section of this book is a faithful quotation from the statutes. Asterisks are used to show any omissions.

The annotations have been taken chiefly from the "United States Compiled Statutes, 1916" and "Federal Statutes Annotated," second edition, and opportunity is here taken to acknowledge the courtesy of the publishers of these excellent works in granting permission to make gratuitous use of, and reference to, their notes. These annotations have been brought down to April, 1921, in respect to Federal cases. Attention is invited to the frequent use of bracketed notes, e. g., "[C. S. p. __]," referring the reader for further notes to the specified page of the United States Compiled Statutes.

A comprehensive table of statutes is included, so arranged, with reference to citations to sections in this work, that where particular excerpts have been taken from a statute and placed herein according to subject-matter the reader may gather the whole text of the statute used by assembling the numbered sections and placing them in the order given.

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MILITARY LAWS OF THE UNITED STATES.

THE DECLARATION OF INDEPENDENCE

IN CONGRESS, JULY 4, 1776.

The Unanimous Declaration of the Thirteen United States of America.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness: that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world:

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his Governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and, when so suspended he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation to the legislature; a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining, in the meantime, exposed to all the danger of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose, obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislature.

He has affected to render military independent of, and superior to, the civil power.

He has combined, with others, to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock trial, from punishment, for any murders which they should commit on the inhabitants of these States:

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefits of trial by jury:

For transporting us beyond seas to be tried for pretended offenses:

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the powers of our governments:

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is, at this time, transporting large armies of foreign mercenaries to complete the works of death, desolation and tyranny already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections among us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose

known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions, we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attention to our British brethren. We have warned them, from time to time, of attempts made by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace, friends.

We, therefore, the representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as FREE AND INDEPENDENT STATES, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT STATES may of right do. And, for the support of this declaration, with a firm reliance on the protection of DIVINE PROVIDENCE, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

The foregoing declaration was, by order of Congress, engrossed, and signed by the following members:

JOHN HANCOCK.

New Hampshire.

JOSIAH BARTLETT,
WILLIAM WHIPPLE,
MATTHEW THORNTON.

Rhode Island.

STEPHEN HOPKINS,
WILLIAM ELLERY.

Connecticut.

ROGER SHERMAN,
SAMUEL HUNTINGTON,
WILLIAM WILLIAMS,
OLIVER WOLCOTT.

New York.

WILLIAM FLOYD,
PHILIP LIVINGSTON,
FRANCIS LEWIS,
LEWIS MORRIS.

New Jersey.

RICHARD STOCKTON,
JOHN WITHERSPOON,
FRANCIS HOPKINSON,
JOHN HART,
ABRAHAM CLARK.

Pennsylvania.

ROBERT MORRIS,
BENJAMIN RUSH,
BENJAMIN FRANKLIN,
JOHN MORTON,
GEORGE CLYMER,
JAMES SMITH,
GEORGE TAYLOR,
JAMES WILSON,
GEORGE ROSS.

Massachusetts Bay.

SAMUEL ADAMS,
JOHN ADAMS,
ROBERT TREAT PAINE,
ELBRIDGE GERRY.

Delaware.

CAESAR RODNEY,
GEORGE READ,
THOMAS M'KEAN.

Maryland.

SAMUEL CHASE,
WILLIAM PACA,
THOMAS STONE,
CHAS. CARROLL, OF CARROLLTON.

Virginia.

GEORGE WYTHE,
RICHARD HENRY LEE,
THOMAS JEFFERSON,
BENJAMIN HARRISON,
THOMAS NELSON, JR.,
FRANCIS LIGHTFOOT LEE,
CARTER BRAXTON.

North Carolina.

WILLIAM HOOPER,
JOSEPH HEWES,
JOHN PENN.

South Carolina.

EDWARD RUTLEDGE,
THOMAS HEYWARD, JUN.,
THOMAS LYNCH, JUN.,
ARTHUR MIDDLETON.

Georgia.

BUTTON GWINNETT,
LYMAN HALL,
GEORGE WALTON.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats

of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Procedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and

for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated

Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, [illegible]ny, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United

States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names.

Go WASHINGTON
Presidt and deputy from Virginia

New Hampshire.

JOHN LANGDON
NICHOLAS GILMAN

Massachusetts.

NATHANIEL GORHAM
RUFUS KING

Connecticut.

WM SAML JOHNSON
ROGER SHERMAN

New York.

ALEXANDER HAMILTON

New Jersey.

WIL: LIVINGSTON
DAVID BREARLEY.
WM PATTERSON
JONA: DAYTON

Pennsylvania.

B. FRANKLIN
ROBT. MORRIS
THOS. FITZSIMONS
JAMES WILSON
THOMAS MIFFLIN
GEO. CLYMER
JARED INGERSOLL
GOUV MORRIS

Delaware.

GEO: READ
JOHN DICKINSON
JACO: BROOM
GUNNING BEDFORD jun
RICHARD BASSETT

Maryland.

JAMES MCHENRY
DANL CARROLL
DAN: of ST THOS JENIFER

Virginia.

JOHN BLAIR—
JAMES MADISON Jr.

North Carolina.

WM BLOUNT
HU WILLIAMSON
RICHD DOBBS SPAIGHT,

South Carolina.

J. RUTLEDGE
CHARLES PINCKNEY
CHARLES COTESWORTH PINCKNEY
PIERCE BUTLER.

Georgia.

WILLIAM FEW
ABR BALDWIN

Attest:
WILLIAM JACKSON, *Secretary.*

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES, OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

[ARTICLE I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

[ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any

election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII.

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

CHAPTER 1.

THE PRESIDENT.

The executive power, 1.
  Term of office, 2.
  Succession of Vice President, 3.
  Succession of cabinet officers, 4.
    Restrictions, 5.
Commander in Chief, 6.
Advice of cabinet officers, 7.
Pardoning power, 8.
Treaties, 9.
Appointment of officers, 10.
  Recess appointments, 11.
  Commissions, 12.
Threats against the President, 13.

1. The executive power.—The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, * * * *Art. II, sec. 1, Constitution of the United States.*

Notes of Decisions.

Nature and extent of executive power in general.—The executive power is vested in the President, and so far as his powers are derived from the Constitution he is beyond the right of any other department except in the mode prescribed by the Constitution through the impeaching power. Kendall v. U. S. (1838), 12 Pet. 524, 610, 9 L. Ed. 1181; Marbury v. Madison (1803), 1 Cranch, 137, 166.

The President can use his power only in the manner prescribed by Congress. (1860) 9 Op. Atty. Gen. 517.

Departments of government.- In general, and except at certain points where they necessarily touch each other, the three great departments of the Government move apart, each in its orbit. (1854) 6 Op. Atty. Gen. 326, 344, citing Martin v. Hunter (1816), 1 Wheaton 304, 329.

The theory of the Constitution is that the powers of the Government are divided into separate departments, and so far as these powers are derived from the Constitution the departments may be regarded as independent of each other, but beyond that all are subject to regulations by law touching the discharge of duties required to be performed. Kendall v. U. S. (1838), 12 Pet. 524, 610, 9 L. Ed. 1181.

Status and operation of executive departments.—The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Wilcox v. Jackson (1839), 13 Pet. 498, 513, 10 L. Ed. 264; U. S. v. Eliason (1842), 41 U. S. (16 Pet.) 291; Williams v. U. S. (1843), 42 U. S. (1 How.) 290; U. S. v. Jones (1855), 18 How. 92; (1863) 10 Op. Atty. Gen. 527; U. S. v. Hay (1902), 20 App. D. C. 576.

The official acts of the heads of the executive departments promulgated in the regular course of business are presumptively the acts of the President. U. S. v. Farden (1878), 99 U. S. 10, 19; Wolsey v. Chapman (1879), 101 U. S. 755; Runkle v. U. S. (1887), 122 U. S. 543, 577; McElrath v. U. S. (1876), 12 Ct. Cl. 201; Belt v. U. S. (1879), 15 Ct. Cl. 92, 107.

The duty of the President of the United States, in general, requires his superintendence of the administration; yet he can not be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services, which, nevertheless, he is, in a correct sense, by the Constitution and laws, required and expected to perform. Williams v. U. S. (1843), 42 U. S. (1 How.) 290, 11 L. Ed. 135.

The President, in the exercise of his executive power, may act through the head of the appropriate department, and the heads of departments are his authorized assistants in the performance of his executive duties, and their official acts promulgated in the regular course of business are presumptively his acts. Perovich v. Perry (1909), 167 Fed. 789, 93 C. C. A. 209.

The President may act through the head of a department; and the acts of the head of a department are to be deemed the acts of the President, except where he must act judicially. Truitt v. U. S. (1903), 38 Ct. Cl. 398.

For an exposition of the Constitution of the office of Attorney General as a branch of the executive administration, see (1854) 6 Op. Atty. Gen. 326.

By the explicit and emphatic language of the Constitution, the executive power is vested in the President of the United States. In the perception, however, of the fact that the actual administration of all executive power can not be performed personally by one man, that this would be physically impossible, and that, if it were attempted by the President, the utmost ability of that one man would be consumed in official details instead of being left free to the duty of general direction and supervision, in the perception of this fact, the Constitution provides for the subdivision of executive powers, vested in the President, among administrative departments, using that term in its narrower and ordinary sense. What those "executive departments" shall be, either in number or functions, the Constitution does not say, any further than to determine that certain appointments may be made by their "heads," respectively, and that the President may require in writing the advice of any such "head" or "principal officer in each of the executive departments," for which reason those officers are sometimes characterized, and not improperly, as "constitutional advisers" of the President. (1855) 7 Op. Atty. Gen. 453, 460.

To constitute the "executive departments," through the instrumentality of which, in part, the President was to administer government, became one of the earliest objects of the first constitutional Congress; and we must look to its acts for knowledge of the administrative system, which, in its great outlines, the statesmen of the constitutional era established as it exists at this day. Id.

Many things may be done by the head of an executive department without the actual signature of the President, which, when done, are his acts; but in such case the documents should declare it to be the act of the President performed by the head of the department as his representative. (1898) 22 Op. Atty. Gen. 82.

Relation of executive to judicial department in general.—The relation of the executive to the judicial department stated in an opinion by Washington, J. Lockington *v.* Smith (C. C. 1817), Fed. Cas. No. 8,448.

The power of the President of the United States is independent of the judiciary in all duties imposed on him by law which are of a political and executive character. Guthrie *v.* Hall (1891), 34 Pac. 380, 1 Okl. 454.

Encroachment on executive by judiciary.—The courts can not rightfully interfere with executive action in any case where an executive officer is authorized to exercise judgment or discretion in the performance of an official act. Decatur *v.* Paulding (1840), 14 Pet. 497, 514, 10 L. Ed. 559; Taylor *v.* Kercheval (C. C. 1897), 82 Fed. 497; Dudley *v.* James (C. C. 1897), 83 Fed. 345.

While the head of a governmental department is not subject to mandamus or injunction in any matter involving the exercise of discretion, these writs may yet be issued against him in relation to matters wherein he performs a mere ministerial duty, or is without power to act at all. Marbury *v.* Madison (1803), 5 U. S. (1 Cranch) 137, 2 L. Ed. 60; Noble *v.* Union River Logging R. Co. (1892), 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123, affirming (1892) 20 D. C. 555.

The courts have no power to compel, by mandamus, an executive officer to perform an act which is discretionary with him. U. S. *v.* Seaman (1854), 58 U. S. (17 How.) 225, 15 L. Ed. 226; Gaines *v.* Thompson (1868), 74 U. S. (7 Wall.) 347, 19 L. Ed. 62; Browning *v.* McGarrahan (1869), 76 U. S. (9 Wall.) 298, 19 L. Ed. 579; U. S. *v.* Black (1888), 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354.

The President of the United States can not be restrained by injunction from carrying into effect an unconstitutional act of Congress, nor will a bill for that purpose be received by the Supreme Court, whether the President is described by his official title or simply as a citizen of a State. Mississippi *v.* Johnson (1866), 71 U. S (4 Wall.) 475, 18 L. Ed. 437.

The courts may compel an executive officer to perform a mere ministerial act. U. S. *v.* Schurz (1880), 102 U. S. 378, 26 L. Ed. 167. But the courts have no authority to enjoin Federal officers against performing any merely ministerial act. McElrath *v.* McIntosh (C. C. 1848), Fed. Cas. No. 8,781.

Mandamus will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do. Butterworth *v.* U. S. (1884), 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656.

While the head of a governmental department is not subject to mandamus or injunction in matters involving the exercise of discretion, yet such writ may be issued against the Secretary of the Interior, where he attempts, without authority of law, to annul the action of his predecessor in office, approving the location of a railroad's right of way over public lands. Noble *v.* Union River Logging R. Co. (1893), 147, U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123.

The executive power can not be revised and corrected by the judicial. Astrom *v.* Hammond (C. C. 1842), Fed. Cas. No. 596.

Equity courts have no jurisdiction or authority to enforce rules promulgated by the President placing office deputies in the marshal's office in the classified civil serv-

fice. Taylor v. Kercheval (C. C. 1897), 82 Fed. 497.

The validity of the title of the United States to land purchased and occupied by it as a military fort, and the identification and definite boundaries of the land, are matters within the scope of the powers and duties of the executive department of the Government to determine, and not subject to judicial scrutiny on the trial of a criminal case. U. S. v. Holt (C. C. 1909), 168 Fed 141; judgment affirmed, Holt v. U. S. (1910), 31 Sup. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

The judiciary has no power by mandamus or otherwise to compel the Secretary of State or the President through the Secretary of State to present and urge a claim of a citizen of this country against a foreign government to redress a wrong committed against him in such foreign country; the duty of righting such a wrong being a political one appertaining to the executive and legislative departments of the Government. U. S. v. Hay (1902), 20 App. D. C. 576.

Encroachment on executive by legislative power.- The proviso to appropriation act 1870 (16 Stat. 235) contains but a single provision which distinctively appertains to the Supreme Court. Throughout its entire scope it relates to the administration of justice in the judicial department of the Government, and its provisions relate to, affect, and in part nullify the official acts of the Executive. Therefore it was within the proper judicial province of the Supreme Court to hold in Klein's Case, 7 Ct. Cl. 240, that the entire act was unconstitutional, because it interferes with the constitutional functions of the judiciary and infringes upon the constitutional power of the Executive. Witkowski v. U. S. (1871), 7 Ct. Cl. 393.

Act of June 18, 1878 (20 Stat. 144), directed the distribution of a fund paid by Mexico to the United States under a decree and judgment awarded by a commission, as provided by the treaty with Mexico of 1868, on a claim by citizens of the United States against Mexico, but authorized the President to investigate any charges of fraud presented by the Mexican Government in respect to such claim, and if, in the opinion of the President, the honor of the United States, the principles of public law, or considerations of justice and equity, require that the award in the case should be opened, and the case retried, it should be lawful to withhold payment of the award to claimant until such case should be retried, and decided in such manner as the Governments of the United States and Mexico might agree, or Congress should otherwise direct. Act Dec. 23, 1892, conferred on the Court of Claims jurisdiction to hear and determine such allegations of fraud, with power to vacate and set aside the award. Held, that the former act was a mere expression of the desire of Congress to have the charges investigated, and the latter provided an appropriate and effective means of investigation in a judicial forum, and that neither act limited or increased the constitutional diplomatic powers of the President. U. S. v. La Abra Silver Min. Co. (1894), 29 Ct. Cl. 432.

Diplomatic powers.—Constitutional diplomatic powers of President as to international award. U. S. v. La Abra Silver Min. Co. (1894), 29 Ct. Cl. 432.

Protection of lives and property of citizens abroad.- The interposition of the President to protect abroad the lives and property of citizens of the United States is a matter resting in his discretion. Durand v. Hollins (C. C. 1860), Fed. Cas. No. 4186.

Surrender of fugitives from justice.—While an Executive order under act Aug. 12, 1848, to surrender to a foreign Government a fugitive from justice is a purely national act to be performed by the Executive, Congress may vest authority in judicial magistrates to arrest and commit fugitives preparatory to a surrender, and such judicial action may be independent of the demands of the Executive (Justices Catron, McLean, Wayne, and Grier, in separate opinions). In re Kaine (1852), 14 How. 103, 110, 14 L. Ed. 345.

Proclamation to celebrate anniversary.—It is within the power of the President to issue a general proclamation calling the attention of the people of the country to the fiftieth anniversary of the issuance of the Emancipation Proclamation and inviting them to unite in an appropriate celebration of that event. (1911) 29 Op. Atty Gen. 32.

Proclamation interdicting commerce.—The President's proclamation of Aug. 9, 1809, was without legal operation, and did not revive the nonintercourse act of Mar. 1, 1809 (2 Stat. 528). The Orono (C. C. 1812), Fed. Cas. No. 10,583.

The proclamation of Aug. 9, 1809, interdicting commerce with Great Britain, held not legal. President's Proclamation Declared Illegal (C. C. 1812), Fed. Cas. No. 11,391.

Protecting and retaking public property.—The President has the right to take such measures as may be necessary to protect the public property, as well as to retake public property in which the Government has been carrying on its business, and from which its officers have been unlawfully expelled. (1860) 9 Op. Atty. Gen. 517

Preservation of territory and protection of foreign interests.—The preservation of

our territorial integrity and the protection of our foreign interests are intrusted in the first instance to the President. (1898) 22 Op. Atty. Gen. 13.

Return of relics taken for safe-keeping during Civil War.—The Mount Vernon relics (so called), which were removed from Arlington by the military authorities in 1862 for safe-keeping, and deposited in the Smithsonian Institution, were the private property of George Washington Custis Lee, having passed to him under the will of his grandfather, George Washington Park Custis, on the death of his mother, Mary Ann Randolph Lee, and the Government having taken possession of these articles solely for their safe-keeping, and never having acquired title to them, the President has the power to return them to their rightful owner. Their restoration now is quite as much within the scope of Executive authority as has been their preservation. (1901) 23 Op. Atty. Gen. 437.

Power to forgive, discharge, or reduce debts.—There is no statute under which the President may forgive, discharge, or reduce generally debts due to the United States. (1864) 11 Op. Atty. Gen. 124.

Compromise of claims.—The Executive may compromise doubtful claims by taking a conveyance of lands, in satisfaction, and may afterwards sell and convey them. U. S. *v.* Hudson (C. C. 1843), Fed. Cas. No. 15,413. See, also, U. S. *v.* Lane (C. C. 1844), Fed. Cas. No. 15,559.

Right to decide as to withholding letter written to President.—In the case of a letter written to the President, and in the hands of the prosecuting attorney, the President alone can decide as to the propriety of withholding parts of it, and he can not delegate his discretion. U. S. *v.* Burr (C. C. 1807), Fed. Cas. No. 14,694.

Assent to proceedings as to deserting seamen.—A legislative act of the British Colony of New South Wales, enacted that certain proceedings may be had in its court as to deserting seamen of any foreign country in that colony, provided its Government assents. Held, that the President can not give such assent on the part of the United States, but that it can only be done by treaty or act of Congress. (1853) 6 Op. Atty. Gen. 209.

Disposition of buildings on land mistakenly supposed to be public land.—An application should be made to Congress to authorize a disposition of the buildings, placed on land mistakenly supposed to be a part of the public domain, as neither the President nor the Secretary of War has authority to dispose of the same. (1891) 20 Op. Atty. Gen. 284.

Disposal of public lands by lease.—The President of the United States has no authority by virtue of his office to lease the lead mines of Iowa. He can not dispose of public lands by lease without express authority from Congress. Lorimier *v.* Lewis (Iowa, 1843), 1 Morris, 253; 39 Am. Dec. 461.

2. Term of office.—The term of four years for which a President and Vice-President shall be elected, shall, in all cases, commence on the 4th day of March next succeeding the day on which the votes of the electors have been given. *R. S. 152.*

3. Succession of the Vice President.—* * * In Case of the Removal of the President from Office; or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected. * * * *Art. II, sec. 1, Constitution of the United States.*

Notes of Decisions.

Tenure of office.—The Executive power is continuous, without regard to the governing person, and there is no interruption of the authority or any necessity of the renewal of credentials of public ministers on a change of Presidents. (1855) 7 Op. Atty. Gen. 582, 590.

4. Succession of cabinet officers.—That in case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Treasury, or if there be

none, or in case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior, shall act as President until the disability of the President or Vice-President is removed or a President shall be elected: *Provided*, That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting. *Sec. 1, act of Jan. 19, 1886 (24 Stat. 1).*

5. Restrictions on succession of cabinet officers.—That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively. *Sec. 2, act of Jan. 19, 1886 (24 Stat. 2).*

6. Commander in Chief.—The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * * *Art. II, sec. 2, Constitution of the United States.*

Notes on Decisions.

Powers and duties in general.—The President of the United States, as Commander in Chief of its armies, has authority to employ secret agents to enter the lines of the enemy and obtain information respecting its strength, resources, and movements, and contracts to compensate such agents are so far binding upon the Government as to render it lawful for the President to direct payment out of the contingent fund under his control. Totten v. U. S. (1875), 92 U. S. 105, 23 L. Ed. 605, affirming (1873) 9 Ct. Cls. 506.

The object of this provision is to vest in the President the supreme command over all the military forces, such supreme and undivided command as would be necessary to the prosecution of a successful war. U. S. v. Sweeny (1895), 15 Sup. Ct. 608, 609, 157 U. S. 281, 39 L. Ed. 702.

The President, in regulating the execution of the selective service act (40 Stat. 76), is not exercising legislative power. U. S. v. Olsen (D. C. 1917), 253 Fed. 233.

The President, as Commander in Chief of the Army and Navy, held to have authority to arrest and remove to Washington a citizen of a State who, there is probable cause to believe, was implicated in the assassination of President Lincoln, and the officers making the arrest are not liable for false imprisonment. Lamar v. Dana (C. C. 1873), Fed. Cas. No. 8006.

The President, as Commander in Chief of the Army, is limited in the discharge of his duty by statutes enacted by Congress which do not impair his efficiency as Commander in Chief. McBlair v. U. S. (1184), 19 Ct. Cls. 528.

As Commander in Chief he is authorized to direct the movements of the land and naval forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operations of our institutions and laws beyond the limits before assigned to them by the legislative power. Fleming v. Page, 9 How. 603, 615.

The power of command and control reserved by the Crown was placed by the Constitution in the hands of the President. Street v. U. S. (1889), 24 Ct. Cls. 230; (1890) 25 id. 515, 113 U. S. 299. See also chapter 44, entitled "Employment of military forces."

The power of the President as Commander in Chief of the Army to appoint officers is subject to the consent of the Senate. Id.

The authority of the President as Commander in Chief to determine whether an officer incapacitated for service be placed on the retired list or wholly retired is wholly dependent upon the acts of Congress. Id.

The power of the President as Commander in Chief of the Army and Navy and the authority of Congress to make rules for the government and regulation of the land and naval forces are distinct, and the President can not by military orders evade the legislative regulations and Congress by rules and regulations can not impair the authority of the President as Commander in Chief. Swaim *v.* U. S. (1893), 28 Ct. Cls. 173.

The President is Commander in Chief of the Army and Navy of the United States at all times, and of the militia of the several States only when called into the actual service of the United States. Alabama Great Southern R. Co. *v.* U. S. (1914), 49 Ct. Cls. 522, 533, citing Johnson *v.* Sayre (1895), 158 U. S. 109, 115, 15 Sup. Ct. 773, 39 L. Ed. 914.

As Commander in Chief, the President can modify, suspend, or rescind an order issued to the Marine Corps. (1820) 1 Op. Atty. Gen. 380.

The President having, as Commander in Chief, satisfied himself that an exchange of Artillery and Marine Corps is consistent with the good of the service, and that the officers to be transferred have, respectively, assented to it, will then take care not to prejudice the rank of any officer of the regiment to which the transfer is made by nominating the officers transferred to take the same rank in that regiment which was held by the officers whom he substitutes. (1830) 2 Op. Atty. Gen. 355.

As Commander in Chief it is the right of the President to decide, according to his own judgment, what officer shall perform any particular duty, and as supreme executive magistrate he has power of appointment. (1860) 9 Op. Atty. Gen. 463.

Regimental officers of such regiments as may be formed by contributions of companies from two or more States are to be appointed by the President of the United States, under the constitutional provisions which make him the Commander in Chief of the Army and Navy and which authorize him to appoint all officers of the United States whose appointment is not otherwise provided for by law. (1898) 22 Op. Atty. Gen. 135.

Assumption or impairment of authority by Congress.—The power of the President to command the Army and Navy and of Congress "to make rules for the Government and regulation of the land and naval forces" are distinct; the President can not by military orders evade the legislative regulations; Congress can not by rules and regulations impair the authority of the President as Commander in Chief. Swaim *v.* U. S. (1893), 28 Ct. Cls. 173.

If Congress should attempt, by a provision in a statute, to make a military officer independent of the President, he might execute the law in disregard of such unconstitutional provision. (1860) 9 Op. Atty. Gen. 463.

Secretary of War as organ of Executive.—The power of the President to establish rules and regulations for the government of the Army being undoubted, it necessarily implies the power to modify, repeal, or create anew, and the rules and orders promulgated by the Secretary of War as the representative of the President must be regarded as the acts of the Executive. U. S. *v.* Eliason (1842), 16 Pet. 291, 10 L. Ed. 968.

Rules and orders promulgated by the Secretary of War for the government of the Army are presumed to be issued by the Secretary with the approbation and under the direction of the President as Commander in Chief, though they do not expressly so state. In re Brodie (1904), 128 Fed. 665, 63 C. C. A. 419.

The President has no power without an act of Congress to establish a separate bureau in the War Department to supervise and control the State militia. (1861) 10 Op. Atty. Gen. 11.

The President may remit a part of a court-martial sentence, but after confirming such sentence the proceedings are no longer subject to his review; his act in approving the sentence or in remitting a part thereof does not require his manual signature, but it is sufficient that his approval be signified through and attested by the Secretary of War in a statement signed by the latter. (1877) 15 Op. Atty. Gen. 290.

The Secretary of War is the regular constitutional organ of the President for the administration of the Military Establishment of the Nation, and as such the rules and orders publicly promulgated through him must be received as acts of the Executive, and are binding upon all within the sphere of his legal and constitutional authority. (1898) 22 Op. Atty. Gen. 54.

Calling militia into service.—The President alone is made the judge of the necessity of calling the militia into the service of the United States, and he acts on his responsibility under the Constitution. Martin *v.* Mott (1827), 25 U. S. (12 Wheat.)

19, 6 L. Ed. 537; Vanderheyden v. Young (N. Y. 1814), 11 Johns. 150.

Congress may "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions" (Const. Art. I, sec. 8), and the authority to call forth the militia has been exclusively vested in the President. Alabama Great Southern R. Co. v. U. S. (1914), 49 Ct. Cl. 522.

The Federal Constitution clearly distinguishes between the Army and Navy on the one hand and the militia upon the other. The latter may be called forth by the President for specific purposes, and when so called forth and assembled comes under the control of and into the service of the United States. Id.

The President, as Commander in Chief of the Army and Navy and of the militia, when in actual service of the United States, has authority to require the Quartermaster's Department of the United States Army to make disbursements on account of militia in the United States service. (1835) 2 Op. Atty. Gen. 711.

The President has power to call out the military in aid of the civil authorities of the District of Columbia. U. S. v. Stewart (Crim. Ct. D. C. 1857), Fed. Cas. No. 16,401a.

The power of the President under the Federal Constitution to call the whole militia of any part of the Union into service in case of invasion may be exercised by his delegate, i. e., a general commanding in chief in a particular district; and all citizens subject to militia duty may thereby be placed under military law; but this is the extent of martial law, and all beyond is usurpation. Johnson v. Duncan (La. 1815) 3 Mart. (O. S.) 530, 6 Am. Dec. 675.

Army regulations.—Army regulations derive their force from the power of the President as Commander in Chief, and are binding upon all within the sphere of his legal and constitutional authority, but such regulations do not confer authority on a peace officer or a private citizen without order or direction of a military officer to arrest or detain a deserter from the Army. Kurtz v. Moffitt (1885), 115 U. S. 503, 6 Sup. Ct. 148, 29 L. Ed. 458.

Declaration of martial law.—Neither the President, as Commander in Chief, nor Congress, nor the judiciary, can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right in certain cases to suspend the privilege of the writ of habeas corpus. Ex parte Milligan (1866), 4 Wall. 2, 127, 18 L. Ed. 281.

In time of insurrection the President has power to arrest and hold in custody persons known to have criminal intercourse with the insurgents or persons against whom there is probable cause for suspicion of criminal complicity, and may refuse to obey any writ of habeas corpus requiring him to show cause for such arrest. (1861) 10 Op. Atty. Gen. 74.

The President of the United States has a right to govern, through his military officers, by martial law, when and where the civil power is suspended by force; in all other times and places the civil excludes martial law, excludes government by the war power. Griffin v. Wilcox (1863), 21 Ind. 370.

The President of the United States, whether in his civil capacity or as Commander in Chief of the Army and Navy, has no power during an insurrection to arrest or authorize another to arrest any person not subject to military law without any order or process of some court of competent jurisdiction. Jones v. Seward (N. Y. 1863), 40 Barb. 563.

The President, as Commander in Chief, is entrusted with the duty of carrying on war and is clothed with authority himself or through his generals to declare martial law over rebellious States or over districts in a state of war, and within those limits subject all persons and things to its operation, but he can not subject to martial law a State not in rebellion and far removed from the scene of conflict. In re Kemp (1863), 16 Wis. 359, 376.

Appointment of courts-martial and review of proceedings.—The action of the President in twice returning the proceedings of the court-martial urging a more severe sentence held authorized by law and a sentence thereafter, and in consequence thereof, was valid. Swaim v. U. S. (1897), 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823, affirming (1893), 28 Ct. Cl. 173.

In detailing officers to compose a court-martial, the presumption is that the President acts pursuant to law, and its sentence can not be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to accused was or was not avoidable. Id.

The President, as Commander in Chief, has authority to convene a general court-martial even when the commander of the accused officer is not the accuser. Id.

The President, as Commander in Chief of the Army, has a right, *virtute officii*, to appoint a general court-martial. Runkle v. U. S. (1894), 19 Ct. Cl. 396.

The President, as Commander in Chief of the Army charged with the duty of reviewing court-martial proceedings, may approve, disapprove, or mitigate the sentence, but can not order a new sentence of a more severe character. Swaim v. U. S. (1893), 28 Ct. Cl. 173.

The President has power to appoint courts-martial. Id.

An officer who is authorized to order a general court-martial has no power under the former A. W. 112 (now A. W. 50) to pardon or mitigate the judgment after confirmation by him of the sentence. (1888) 19 Op. Atty. Gen. 106.

Interdiction or permission of commerce.—There is no doubt that, with the concurrent authority of Congress, the President may permit commercial intercourse with a public enemy. Hamilton *v.* Dillin (1874), 21 Wall. 73, 87, 22 L. Ed. 528.

Blockades and capture of hostile property.—Powers of President in establishing blockades, and directing capture of hostile property. The Sarah Starr (D. C. 1861), Fed. Cas. No. 12,352; U. S. *v.* The Tropic Wind (C. C. 1861), Fed. Cas. No.16,541a; The Amy Warwick (D. C. 1862), Fed. Cas. No. 341.

The President may lawfully proclaim a blockade of any of the ports of the United States when in his judgment the exigency for such action has arisen, though Congress alone has power, under the Constitution, to declare war and grant letters of marque. U. S. *v.* The Tropic Wind (1861), 6 App. D. C. 351.

Government of ceded and conquered territory in general.—The duties of the President, as Commander in Chief of the Army and Navy, are purely military, and he may do all necessary things to conquer and subdue the enemy, may invade the hostile country and subject it to the sovereignty and authority of the United States, but his conquests do not enlarge the boundaries of the Union nor extend the operation of our laws beyond the limits assigned by the legislative power. Fleming *v.* Page (1850), 9 How. 603, 615, 13 L. Ed. 276; Castillero *v.* U. S. (1862), 2 Black 18, 358, 17 L. Ed. 360.

The authority of the President over the Mexican port of Tampico after its conquest by United States forces did not constitute that port a part of the United States subject to the privileges of our revenue laws. Fleming *v.* Page (1850), 9 How. 603, 618, 13 L. Ed. 276.

The President, as Commander in Chief of the Army and Navy, having authorized the military and naval commanders in California to exercise the belligerent rights of a conqueror and to form a civil and military government with power to impose duties on imports and tonnage for the support of such government and of the Army, such duties and imposts were legally demanded and lawfully collected during the continuance of the war with Mexico and thereafter until the revenue system of the United States was put into operation in California under the acts of Congress passed for that purpose. Cross *v.* Harrison (1853), 16 How. 164, 14 L. Ed. 889.

The executive authority of the Government extends over territory acquired by conquest. Leitensdorfer *v.* Webb (1857), 20 How. 176, 15 L. Ed. 891.

The authority of the President as Commander in Chief of the Army and Navy and the authority of Congress extends to all territories wherever the Army and Navy may go. Ex parte Milligan (1866), 4 Wall. 2, 18 L. Ed. 281.

The appointment by the President of a military governor for a State participating in the rebellion did not change the general laws then in force for the settlement of the estates of deceased persons, nor did it remove from office those who were at the time charged by law with public duties in that behalf. Ketchum *v.* Buckley (1878), 99 U. S. 188, 25 L. Ed. 473.

The President, as Commander in Chief of the Army, had authority to legally exact duties upon imports from the United States to Porto Rico, and duties so collected by the military commander were legally exacted under the war power. Dooley *v.* U. S. (1901), 182 U. S. 234, 21 Sup. Ct. 762, 45 L. Ed. 1074.

The military power under the control of the President as Commander in Chief includes the power to govern ceded and conquered territory until Congress acts, and this power continues notwithstanding the inaction of Congress. Santiago *v.* Nogueras (1909), 29 Sup. Ct. 608, 609, 214 U. S. 260, 53 L. Ed. 989.

The right of the President as Commander in Chief of the Army and Navy to exercise government and control over Porto Rico did not cease upon the conclusion of peace with Spain until congressional legislation had been enacted. (1899) 22 Op. Atty. Gen. 560.

The President, by virtue of his constitutional authority as Commander in Chief of the Army and Navy, has adequate power to use and make disposition of property in Cuba formerly belonging to the Crown of Spain, or subject to the imperial prerogative, and this includes the right to dispose of mining or other property formerly belonging to the Spanish Crown. (1900) 23 Op. Atty. Gen. 222.

If he desires to do so, the President can authorize the military governor of Cuba to make grants of mining rights, but whether such power should be exercised is a question involving important and delicate considerations. Id.

The power of the President as Commander in Chief of the Army and Navy includes the authority during civil war or rebellion to establish a military government in

any State engaged in civil war or rebellion and to appoint judicial tribunals to enforce the laws. Scott v. Billgerry (1866), 4 Mis. 119, 133.

The appointment of the military governor of Tennessee, by the President, in 1862, was an exercise of constitutional power, and clothed such governor with all the powers, duties, and functions pertaining to the office, including the power to establish offices and tribunals. Rutledge v. Fogg (1866), 41 Tenn. (1 Cold.) 554, 91 Am. Dec. 299.

Establishment of military commissions and provisional or prize courts and powers thereof.—The President of the United States has no authority to establish a prize court in a conquered country; and any sentence of condemnation passed by a court so established is a nullity. Jecker v. Montgomery (1851), 54 U. S. (13 How.) 498, 14 L. Ed. 249.

When, during the Civil War, portions of insurgent territory were occupied by national forces, it was within the constitutional authority of the President, as Commander in Chief, to establish the provisional courts therein. The Grapeshot (1869), 9 Wall. 129, 131, 19 L. Ed. 651.

The establishment by the President of the provisional court of Louisiana in 1862 was a rightful exercise of the constitutional authority of the President during a state of war. Burke v. Miltenberger (1873), 19 Wall. 519, 523, 22 L. Ed. 158.

As Commander in Chief of the Army, the President was authorized to establish civil courts in insurgent territory occupied by the national forces during the War of the Rebellion. Mechanics' & Traders' Bank v. Union Bank (1874), 22 Wall. 276, 295, 22 L. Ed. 871.

The establishment of the provisional court of New Orleans by proclamation of President Lincoln during the rebellion while New Orleans was occupied by Federal troops was valid. Lewis v. Cocks (1874), 23 Wall. 466, 23 L. Ed. 70.

The creation of the provisional court for Porto Rico between Apr. 11, 1899, when ratifications of the treaty by which it was ceded were exchanged, and May 1, 1900, when act of Apr. 12, 1900 (31 Stat. 77), establishing a civil government, took effect, was within scope of the military power, acting by authority of the President as Commander in Chief, though peace then prevailed, and courts established under Spain were open. Santiago v. Nogueras (1904), 29 Sup. Ct. 608, 609, 214 U. S. 260, 53 L. Ed. 989.

Military commissions and their acts in the trial of persons not in the military service, during the Civil War, in States where the courts were undisturbed, were unconstitutional. Milligan v. Hovey (C. C. 1871), Fed. Cas. No. 9,605.

After the Rebellion had ceased, and the authority of the United States was acknowledged in a State, there is no jurisdiction to try offenses by citizens against soldiers by military commission. U. S. v. Commandant of Fort Delaware (D. C. 1866), Fed. Cas. No. 14,842.

The establishment of the provisional court for Louisiana by the President, as Commander in Chief of the forces of the United States, while they held the territory in which it was to exercise its functions, was an act warranted by the law of nations. U. S. v. Reiter (La. 1865), Fed. Cas. No. 16,146.

Such court continued rightfully to exercise its functions so long as its commission remained unrevoked, and the power of the United States continued to support it in the exercise of them. Id.

When the military authorities of the United States had captured and taken possession of any one of the insurgent States the President of the United States, being Commander in Chief, could constitute and cause to be established a judicial tribunal, and vest such tribunal with all the necessary authority for the administration of justice in said State under the Constitution and laws. Burke v. Tregre (1870), 22 La. Ann. 629.

When the United States captured the city of New Orleans in 1862 the civil government existing under the Confederacy ceased to have authority. As an incident of war powers the President had the right to establish civil government, to create courts to protect the lives and property of the people. Mechanics' & Traders' Bank v. Union Bank (1873), 25 La. Ann. 387. But the President, representing the United States in the exercise of its sovereign powers, could not create a court to decide any civil controversy. This could only be done by Congress under the limitations of the Constitution. Id.

The President of the United States, as Commander in Chief and the officer in command of the forces of the United States in any district of war operations or conquered territory, may establish legal tribunals for the adjudication and protection of civil rights. Hefferman v. Porter (Tenn. 1869), 6 Cold. 391, 98 Am. Dec. 459.

7 Advice of cabinet officers.—The President * * * he may require the opinion, in writing, of the principal Officer in each of the executive Depart-

ments, upon any subject relating to the Duties of their respective Offices, * * * *Art. II, sec. 2, Constitution of the United States.*

Notes of Decisions.

Opinion of Attorney General in general.—The President's right to call for an opinion from the Attorney General is not limited to questions of law. (1901) 23 Op. Atty. Gen. 360.

8. The pardoning power.—The President * * * and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment. *Art. II, sec. 2, Constitution of the United States.*

Notes of Decisions.

Power in general.—The pardoning power is coextensive with the power to punish, and is general and unqualified, except only in cases of impeachment and proceedings for contempts. (1830) 2 Op. Atty. Gen. 330; (1845) 4 Op. Atty. Gen. 458; (1901) 23 Op. Atty. Gen. 360.

After trial and conviction of a naval officer by court-martial and approval by the President of sentence of dismissal and execution of such sentence, the President can not reconsider his approval and revoke the sentence, but he may issue a pardon to the officer dismissed. (1864) 11 Op. Atty. Gen. 19.

The constitutional power of the President "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," considered and commented on. (1865) 11 Op. Atty. Gen. 227.

The question of the President's pardoning power reviewed and the authorities collated. Various proclamations of general amnesty appended. (1892) 20 Op. Atty. Gen. 330.

The pardoning power, whether exercised under the Federal or State Constitution, is the same in its nature and effect as that exercised by the representatives of the English Crown in this country in colonial times. People *v.* Bowen (1872), 43 Cal. 439, 13 Am. Rep. 148.

Legislative control or abridgment.—The power of pardoning granted to the Executive is without limit, and a pardon may be granted on conditions, and when so granted the legislative department can not change the effect of a pardon, and the proviso of act July 12, 1870 (16 Stat. 235), relating to the effect of any pardon or amnesty granted by the President, is invalid as invading the power of the executive department, U. S. *v.* Klein (1871), 13 Wall. 128, 147, 20 L. Ed. 519; Ex parte Garland (1867), 4 Wall. 333, 380; (1845) 4 Op. Atty. Gen. 458; (1890) 19 id. 476.

Although the Constitution vests in the President "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," this does not prevent Congress from granting amnesty, either before legal proceedings are taken, during their pendency, or after conviction and judgment; and it is therefore competent for Congress to provide that a witness who is required to give evidence tending to incriminate himself shall never be prosecuted for the offense to which the testimony relates. Brown *v.* Walker (1896), 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819.

The President's power to commute sentences is conferred upon him by the Constitution, and can not be affected by legislative action, or impaired or undermined in any particular. Thompson *v.* Duehay (D. C. 1914), 217 Fed. 484; judgment affirmed, Duehay *v.* Thompson (C. C. A. 1915), 223 Fed. 305.

The constitutional power of the President to pardon extends to all the elements of the subject matter, including as well pecuniary penalties as other methods of punishment of any Federal offense, except in the case of impeachment, and it can not be controlled or curtailed by act of Congress. (1857) 8 Op. Atty. Gen. 281.

Congress has no power to abridge the effect of the President's pardon. (1891) 20 Op. Atty. Gen. 178; (1898) 22 Op. Atty. Gen. 36.

The pardoning power of the President is absolute, and not subject to legislative control. (1892) 20 Op. Atty. Gen. 330.

Congress can not abridge, modify, or condition the exercise of this power. (1901) 23 Op. Atty. Gen. 360.

Infringement of power by Secretary of Treasury.—The power of the Secretary is wholly distinct from the constitutional pardoning power of the President, and its object is to afford merited relief, where the courts are obliged to inflict the penalty. U. S. *v.* Morris (C. C. 1822), Fed. Cas. No. 15,816.

R. S. 5294, providing that the Secretary of the Treasury may, in certain cases, remit

fine and penalties, etc., is not unconstitutional. It does not infringe the pardoning power of the President. The Laura (C. C. 1911), 8 Fed. 612; decree affirmed, Pollock v. Bridgeport Steamboat Co. (1885), 5 S. Ct. 881, 114 U. S. 411, 29 L. Ed. 147.

Before trial and conviction.—The President has power to grant a pardon, though the person pardoned has never been charged or convicted of the offense. U. S. v. Burdick (D. C. 1914), 211 Fed. 492.

Pardons may be issued before conviction. They presuppose an offense, and nothing more; and there is neither any constitutional nor legal provision which requires them to be preceded by a trial, a verdict, or a sentence. They may be founded on a confession in writing. (1820) 1 Op. Atty. Gen. 342.

It is generally inexpedient for the President to grant a pardon before the applicant is tried. Where an applicant was indicted for murder, the fact that his trial can not take place at the first term of court to be held after the indictment was found is not sufficient ground for a pardon. (1829) 2 Op. Atty Gen. 275.

The President of the United States has the constitutional power to pardon as well before trial and conviction as afterwards; but it is a power only to be exercised with reserve, and for exceptional considerations. (1853) 6 Op. Atty. Gen. 20, 1 Id. 341; 2 Id. 273; 5 Id. 467; Ex parte Garland, 4 Wall. 333, Dunnick v. Davidson, 44 Ga. 457; 5 Blatr v. Com., 25 Grat. (Va.) 850. It is competent for the President to grant a pardon after the expiration of the term of sentence, thereby relieving from consequential disabilities. Stetler's case (C. C. 1852) Fed. Cas. 13,380; Com. v. Bush, 2 Duv (Ky.) 264. The loss of rights of citizenship does not attach to those deserting the military or naval service in time of peace, after August 22, 1912. See post, 2713. See also, note, p. 40, post, as to "Operation and effect of pardon in general."

Expiration of term of imprisonment.—No rights under the Constitution are infringed by the provision of Penal Law N. Y. (Consol. Laws, c. 40), sec. 1941, under which a person committing a crime against the laws of that State may be punished as a second offender because of a prior conviction of an offense against the United States, notwithstanding a pardon granted by the President after the convict has completed his term of imprisonment under such prior conviction. Carlesi v. New York (1914), 34 Sup. Ct. 576, 233 U. S. 51, 58 L. Ed. 843.

A pardon is effectual so long as any of the penal consequences of a conviction remain, though the term of imprisonment has expired. Stetler's case (C. C. 1852), Fed. Cas. No. 13,380.

An offender may be pardoned after he has suffered the judgment adjudged for his crime. People v. Bowen (1872), 43 Cal. 439, 13 Am. Rep. 148.

Nature of pardon and amnesty in general.—Within the Constitution, giving to the President the power to grant reprieves and pardons for offenses against the United States, a pardon is the private, though official, act of the Executive magistrate, delivered to the individual for whose benefit it is intended, and is not communicated officially to the court. U. S. v. Wilson (1833), 7 Pet. 150, 160, 8 L. Ed. 640; Coke, 3 Inst., 233.

A pardon is a deed, to the validity of which delivery is essential, which delivery is not complete without acceptance; it may be absolute or conditional, and may possibly apply to a different person or a different crime; like any other deed, it ought to be brought judicially before the court by plea, motion, or otherwise. Id.

The pardon is of the offense, and, as between the offender and the offended Government, shuts out the offending act, but, if there is no offense against the laws of the United States, there can be no pardon. Young v. U. S. (1877), 97 U. S. 39, 24 L. Ed. 992.

"Pardon" is granted to an individual criminal by name, while "amnesty" is granted to classes of offenders or communities. They differ, not in kind, but solely in the number they severally affect. U. S. v. Hughes (D. C. 1892), 175 Fed. 238.

The legal appointment of a past midshipman under sentence of suspension and on half pay to the office of lieutenant in the Navy is an implicit pardon, and such officer is entitled to pay as lieutenant from the date of his commission. (1842) 4 Op. Atty. Gen. 8.

A pardon is a gracious act of mercy resting on any ground which the Executive may regard as sufficient to call for its exercise. (1892) 20 Op. Atty. Gen. 352.

Constructive pardon. An order of the President revoking his own approval of the sentence of a court-martial may operate as a pardon, but does not reinvest in the officer a right to forfeited pay. That right became vested in the Government, and its restoration is beyond the scope of the pardoning power. Vandersluice v. U. S. (1884), 19 Ct. Cl. 480.

The order of the Secretary of the Navy to an officer while under sentence of suspension to attend a court martial as a witness does not operate as a constructive pardon. (1854) 6 Op. Atty. Gen. 711.

Commutation of sentences. The President has the right to commute punishment for

a capital offense by directing imprisonment in the United States penitentiary, though there is no law directing imprisonment therein for such offenses. In re Wells (C. C. 1855), Fed. Cas. No. 17,387a.

The President may, by an exercise of the pardoning power, mitigate or commute a punishment imposed by any court of the United States. (Ex parte Wells, 18 How. 307; In re Ross, 140 U. S. 453.) In mitigating the sentence of a naval court-martial the President may substitute a suspension for a term of years without pay for an absolute dismissal from the service, as suspension is but an inferior degree of the same punishment. (1845) 4 Op. Atty. Gen. 433.

The constitutional prerogative of the President to grant reprieves and pardons includes the power to commute punishments. Ex parte Harlan (C. C. 1909), 180 Fed. 119; decree affirmed, Harlan *v.* McGourin (1910), 31 Sup. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849.

The reappointment by the President of an officer of the Marine Corps to a commission is a constructive pardon of a sentence of court-martial pronounced, but not yet executed. (1853) 6 Op. Atty. Gen. 123.

General pardon or amnesty.—The President's public proclamation of pardon and amnesty has the force of public law, of which the courts and officers will take notice, though not specially pleaded. Jenkins *v.* Collard (1892), 12 Sup. Ct. 868, 874, 145 U. S. 546, 36 L. Ed. 812.

This clause does not prevent Congress from granting amnesty either before legal proceedings are taken, during their pendency, or after conviction and judgment; and it is therefore competent for Congress to provide that a witness required to give evidence tending to incriminate himself shall never be prosecuted for the offense to which the testimony relates. Brown *v.* Walker (1896), 16 Sup. Ct. 644, 648, 161 U. S. 591, 40 L. Ed. 819.

An alleged pardon for treason in raising an insurrection by the operation of the President's proclamation ordering the people to disperse, to be available, must be pleaded. Case of Fries (C. C. 1799), Fed. Cas. No. 5,126.

A proclamation by the President ordering people in insurrection to disperse to their homes does not operate, even when it is obeyed, as a pardon of offenses, already committed. Id.

A grant of "a full and unconditional pardon," where the offense has been recited in the preamble, is not a general pardon, and is valid. Stetler's case (C. C. 1852), Fed. Cas. No. 13,380.

The proclamation of the President of Dec. 8, 1863 (13 Stat. 737), extends to persons who, at its date, had been convicted and sentenced for the offenses described in it. In re Greathouse (C. C. 1864), Fed. Cas. No. 5,741.

The proclamation of Dec. 8, 1863, extending amnesty to all who directly or indirectly participated in the Rebellion, included a citizen of Ohio under indictment for treason. U. S. *v.* Hughes (D. C. 1864), Fed. Cas. No. 15,418.

A citizen who has complied with such proclamation is not excluded from its protection by a subsequent explanatory proclamation debarring persons in civil custody from its operation. Id.

The amnesty proclamation of July 4, 1868 (15 Stat. 702), did not have the effect to restore property condemned in confiscation proceedings. Bragg *v.* Lorio (C. C. 1871), Fed. Cas. No. 1,800; U. S. *v.* Six Lots of Ground (C. C. 1872), Fed. Cas. No. 16,299.

The crime of being accessory to the murder of the President was not embraced in the amnesty proclamation of 1868. Ex parte Mudd (D. C. 1868), Fed. Cas. No. 9,899.

As to the power of the President to pardon political offenders by the amnesty proclamation of 1868. U. S. *v.* Crozier (D. C. 1869), Fed. Cas. No. 14,896.

A general unconditional amnesty proclamation is as efficacious as a pardon by deed. (1885) 18 Op. Atty. Gen. 180.

The President has the constitutional power, without congressional action, to issue a general pardon or amnesty to classes of offenders, including persons in Utah guilty of polygamy and unlawful cohabitation, etc. (1892) 20 Op. Atty. Gen. 330; (1893) 20 Op. Atty. Gen. 668.

The power to discharge or to remit the sentence in the case of a person committed to prison until payment of a fine, imposed as a punishment for contempt in violating an injunction, falls within the pardoning power vested in the President. In re Mullee (C. C. 1869), Fed. Cas. No. 9,911.

The court can not discharge such person on the ground that he is unable to pay the fine until the President has disclaimed the power to relieve by pardon. Id.

The fact that the amount of the fine, in the order imposing it, was directed to be paid to plaintiff in the injunction suit towards the reimbursement of his expenses in the attachment proceedings for the contempt, does not take the case out of the pardoning power of the President. Id.

After a judgment in proceedings for a fine, penalty, or forfeiture, the President

can not, by a pardon, remit or release the money accruing to the individual. U. S. v. Harris (C. C. 1872), Fed. Cas. No. 15, 312.

The power of the President to pardon has always been construed to extend to the remission of fines, penalties, and forfeitures accruing to the United States for offenses against the United States. The Laura (C. C. 1881), 8 Fed. 612, 614; affirmed (1885), 2 Sup. Ct. 881, 114 U. S. 411, 29 L. Ed. 147.

The Constitution gives to Congress the power to dispose of the public property, and to the President only the power to pardon crimes, and the President, having no title to forfeited property, like the king, can not restore it, though he may pardon the offense which caused the forfeiture. Therefore property confiscated by judgment to the United States is beyond the reach of the Executive clemency, and is absolutely national property. Knote v. U. S. (1874), 10 Ct. Cl. 397.

The President may remit the penalties inflicted by sentence of court-martial, though he can not reinstate the officer after the sentence has been carried into effect. Vandersluis v. U. S. (1884), 19 Ct. Cl. 480.

The pardoning power includes the power of remission of fines, penalties, and forfeitures under the revenue laws. (1830) 2 Op. Atty. Gen. 330. The power, however, does not go to the length of making restitution of fines, penalties, and forfeitures after they have been actually paid into the treasury. (1830) 2 Op. Atty. Gen. 330; (1861) 10 Op. Atty. Gen. 1.

The power of the Executive to grant reprieves and pardons extends to the remission of fines, penalties, and forfeitures, and suits in criminal cases, and may be exercised in degrees at different times, at the discretion of the President. (1839) 3 Op. Atty. Gen. 418.

And the same power is possessed by the President over a judgment, after security for its payment shall have been given as well as before. Id.

The President is invested with authority to remit judgments of forfeiture, pronounced against vessels, their tackle and apparel, for infractions of act of April 20, 1818, prohibiting the slave trade. (1847) 4 Op. Atty. Gen. 373.

It is not competent for the President, in the exercise of the pardoning power, to remit pecuniary penalties attached to an offense, unless those penalties accrue to the United States. (1852) 5 Op. Atty. Gen. 532.

The pardoning power of the President extends to all cases of penalties and forfeitures, as well as other punishment, provided by the acts of Congress regulating the transportation of passengers in merchant vessels. (1854) 6 Op. Atty. Gen. 393.

In cases of mere forfeiture or other penalties accruing to the Treasury under the acts of Congress relative to the transportation of passengers, the Secretary may remit, as in similar cases under the revenue laws, and this does not exclude the general power of the President to pardon; and where, under the same passenger laws, personal punishment is inflicted, the case can be reached only through the pardoning power of the President. (1854) 6 Op. Atty. Gen. 488.

Whether the President can, through the exercise of the power to pardon, lawfully discharge a prisoner confined for nonpayment of a penalty accruing as indemnification to the individual injured by the prisoner's act, *dubitatur*. (1854) 6 Op. Atty. Gen. 615.

When a pecuniary penalty, accruing to the United States, has been actually paid into the Treasury, although it may be remitted of right by the President, still by reason of constitutional prohibition, which is coequal in force with the constitutional power to pardon, the amount of the penalty can not be drawn from the Treasury without appropriation by act of Congress. (1857) 8 Op. Atty. Gen. 281.

The power of the President to pardon offenses against the United States does not embrace any case of forfeiture, loss, or condemnation, not imposed by law as a punishment for an offense. He can not, by virtue of that grant of power, surrender or give away the pecuniary or proprietary rights and interests of the United States. (1863) 10 Op. Atty. Gen. 452.

The powers of the President, in this respect, can not be enlarged by analogy to the power of an English King, as the powers of the two have their origin and mode of existence in different and opposite principles. Id.

The condemnation of a vessel and cargo, in a prize court, is not a criminal sentence. No person is charged with an offense; and so, no person is in a condition to be relieved and reinstated by a pardon. Id.

Where a fine was imposed on a person by judicial sentence on conviction for crime against the United States, but the sentence was not enforced during the lifetime of the party, the President has power to remit the fine after his death. (1864) 11 Op. Atty. Gen. 35.

The pardoning power of the President is limited to crimes and punishments against the United States, and does not embrace the remission of forfeitures or judgments. (1864) 11 Op. Atty. Gen. 122.

The President can not, by any exercise of his pardoning power, remit or mitigate the forfeiture of property confiscable as prize of war. (1866) 11 Op. Atty. Gen. 445.

Outside of the District of Columbia the President has no power to remit the forfeiture of a judgment or a recognizance. (1897) 21 Op. Atty. Gen. 494.

The President has authority to grant remission of forfeiture in cases of prizes of war after the vessels have been condemned, but before the prize money has been deposited in the Treasury of the United States. His jurisdiction in these matters rests upon his pardoning power, as defined in sec. 2, Art. 2, of the Constitution. (1901) 23 Op. Atty. Gen. 360.

The power extends to penalties and forfeitures, with a limitation that a fine or penalty may not be remitted if the money has been paid into the Treasury. Id.

Interference with prosecutions.—The President has no power to interfere with a public prosecution, except to put an end to it and discharge the accused. He has no power to change the proceedings, nor the place of trial. U. S. *v.* Corrie (C. C. 1860), Fed. Cas. No. 14,869.

Assurance of pardon by district attorney to counterfeiter disclosing accomplice, etc.—The district attorney may assure a pardon to a conterfeiter who shall disclose his accomplice and produce the plates and counterfeited paper. A mere disclosure of the name of the accomplice seems not to be enough. (1797) 1 Op. Atty. Gen. 77.

Pledges of protection to criminals by executive department.—Pledges of protection given to criminals by the executive department can not be redeemed by the courts. U. S. *v.* Blaisdell (D. C. 1869), Fed. Cas. No. 14,608.

Partial pardon.—A pardon may be partial. U. S. *v.* Six Lots of Ground (C. C. 1872), Fed. Cas. No. 16,299.

Conditions and exceptions.—The President may grant a conditional pardon to a person under sentence of death, offering to commute the punishment to imprisonment for life, and where the same is accepted by the convict he may not contend that the pardon is absolute and the condition void. Ex parte Wells (1855), 18 How. 307, 309, 15 L. Ed. 421; Osborn *v.* U. S. (1875), 91 U. S. 474; U. S. *v.* Wilson (1833), 7 Pet. 150.

A pardon may be special in its character or subject to conditions and exceptions. Semmes *v.* U. S. (1875), 91 U. S. 21, 23 L. Ed. 193.

A pardon granted by the President to a person convicted of defrauding the Government of certain public lands, and charged with fraud in regard to others, upon condition that he shall first have made full restitution to the satisfaction of the Federal district attorney in respect to all lands, land titles, or claims to lands, gives the latter no authority to bind the Government to reimburse the accused for the value of the improvements made by him and the taxes paid by him on any such lands. Bradford *v.* U. S. (1913), 33 Sup. Ct. 576, 228 U. S. 446, 57 L. Ed. 912.

The President of the United States has the power to grant a conditional pardon for a capital offense. In re Wells (C. C. 1855), Fed. Cas. No. 17,387a.

A prisoner confined under a legal sentence can voluntarily accept a conditional pardon. In re Greathouse (C. C. 1864), Fed. Cas. No. 5,741.

A party accepting and pleading a pardon in a judicial proceeding admits that he is bound by the conditions mentioned therein. Brown *v.* U. S. (C. C. 1868), Fed. Cas. No. 2,032.

A pardon may contain any lawful conditions. U. S. *v.* Six Lots of Ground (C. C. 1872), Fed. Cas. No. 16,299.

A pardon on condition of paying a fine and costs imposed with a sentence of imprisonment is wholly inoperative until such fine and costs are paid; and an application for discharge as a poor convict under R. S. 1042, can not be based thereon. In re Ruhl (D. C. 1878), Fed. Cas. No. 12,124.

When a pardon is granted with conditions annexed the conditions must be performed before the pardon is of any effect. Waring *v.* U. S. (1871), 7 Ct. Cl. 501.

One who claims the benefit of a pardon must be held to strict compliance with its conditions. Haym *v.* U. S. (1871), 7 Ct. Cl. 443; Scott *v.* U. S., 8 id. 457.

The condition annexed to a pardon must not be impossible, unusual, or illegal; but it may, with the consent of the prisoner, be any punishment recognized by the statutes or by the common law as enforced by the State. Lee *v.* Murphy (1872), 22 Grat. (Va.) 789.

The Government can not be made responsible for money expended on public lands by a wrongdoer by a conditional pardon by the President. Bradford *v.* U. S. (1911), 47 Ct. Cl. 141.

The power of absolute pardon given to the President by the Constitution includes the power of issuing a conditional one. Yet there is great danger that conditional pardons may result as absolute ones from the difficulty of enforcing conditions after the offender shall have been released from the custody of the law. (1820) 1 Op. Atty. Gen. 342.

The condition, in order to be effectual for any purpose, must be such that a resort need not be had to the power of arrest in the original case. Id.

The President may grant a conditional pardon provided the condition be compati-

ble with the genius of our Constitution and laws. (1821) 1 Op. Atty. Gen. 482.

The President may grant a conditional pardon, and he may remit a part of the penalty or punishment without remitting the whole. (1872) 14 Op. Atty. Gen. 124.

The President can pardon a deserter so as to re-enfranchise him, i. e., remove the disabilities imposed by sec. 21 of the act of Mar. 3, 1865 (13 Stat. 490), and at the same time make the pardon conditional upon his not becoming thereby entitled to any moneys forfeited; and a condition of this sort would exclude any right to the pay referred to in the joint resolution of May 1, 1870 (No 18). Id.

Misdemeanor.—If the action of the President on an application for pardon of an offense styled by the laws of the United States a misdemeanor depends simply on the question of necessity for pardon, such necessity exists, unless the applicant is to be prevented from freely changing his residence under penalty of losing his rights of citizenship thereby, for the reason that in some States a person convicted of a misdemeanor loses his right to vote, to sit as juror, etc. (1895) 21 Op. Atty. Gen. 242.

Offenses in territory.—The President of the United States alone has the power to pardon offenses committed in a Territory in violation of acts of Congress. (1855) 7 Op. Atty. Gen. 561.

Relief of sureties and remission of debts.—After return of execution on *scire facias* against the surety of an absconding criminal charged with violation of acts of Congress, the only mode of relieving the surety is by exercise of the pardoning power of the President. (1854) 6 Op. Atty. Gen. 466.

The pardoning power of the President does not embrace the remission of judgments against sureties on criminal recognizances or debts due the United States. (1804) 11 Op. Atty Gen 124. See, also, note, p. 40, post, as to "Operation and effect of pardon in general."

Prisoner being punished for contempt.—The President has power to pardon for contempt. Cantner v. Pocahontas Collieries Co. (C. C. 1902), 117 Fed 184.

The pardoning power applies as well to punishments imposed for contempt of the process of the United States as for the violation of any other law. (1845) 4 Op. Atty. Gen 459.

The President has power to grant a pardon to a prisoner undergoing punishment for a contempt of court. (1880) 16 Op. Atty. Gen 476.

Questions for consideration in exercise of power.—Where the accused who has been convicted of piracy, and the questions of law arising upon the facts in the case were referred to the Supreme Court and decided against him—sets forth in his petition for pardon an ex parte statement of facts which, if true, would show him to have been improperly convicted, the President is neither required nor authorized to inquire into the truth of the alleged facts, or to grant a pardon on the assumption that they are true. To do either would be an abuse of the pardoning power. (1820) 1 Op. Atty. Gen. 359.

Applications for pardon are addressed to the President, who may act on them upon his own examination simply, or, before acting thereon, may refer them to any of the executive departments for advice. (1872) 14 Op. Atty. Gen. 20.

An application having been with that view referred by the President to the Secretary of War, and the latter having afterward submitted the same to the Attorney General for his opinion thereon, the Attorney General declined to give an opinion on the ground that to do so would be merely to advise the Secretary as to what he should advise the President. Id.

Delivery and acceptance of pardon.—The provision of 16 Stat. 235, prescribing the mode of proving the loyalty of the claimant, under 12 Stat. 820, providing for the collection of abandoned and captured property in insurrectionary districts, and for the taking possession by the Government, for the true owner, of the proceeds of such property, and declaring, in effect, that the unqualified acceptance of a pardon by such claimant, without a disclaimer of guilt, is conclusive evidence of his having committed the acts pardoned, but that it shall be null and void as evidence of the rights conferred by it, is unconstitutional, as invading the powers of the executive branch of the Government. U. S. v. Klein (1871), 80 U. S. (13 Wall.) 128, 20 L. Ed. 519.

A pardon from the President, to be effective, must be accepted. Burdick v. U. S. (1915), 35 Sup. Ct. 267, 236 U. S. 79, 59 L. Ed. 476; Curtin v. Same (1915), 35 Sup. Ct. 271, 236 U. S. 90, 59 L. Ed. 482, reversing judgment U. S. v. Burdick (D. C. 1914), 211 Fed. 492.

A pardon is not effective until delivered to the prisoner or to some one for him, being until that time subject to withdrawal and being merely a promise of pardon. Ex parte Harlan (C. C. 1909), 180 Fed. 119; decree affirmed, Harlan v. McGourin (1910), 31 Sup. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann Cas. 849.

Where a pardon is to begin and take effect from the day on which a prescribed oath is taken by the person pardoned, such pardon does not take effect until the oath is taken, and the formal acceptance of the pardon does not supersede the necessity of

taking the oath. Waring *v.* U. S. (1871), 7 Ct. Cl. 502.

A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. * * * The pardon may possibly apply to a different person or to a different crime. It may be absolute or conditional. It may be controverted by the prosecutor and must be expounded by the court. These circumstances combine to show that this, like any other deed, ought to be brought before the court by plea, motion, or otherwise. U. S. *v.* Wilson (1833), 7 Pet. 150, 161; Ex parte Reno (1877), 66 Mo. 266.

The recital of a specific, distinct offense, in a pardon by the President, limits its operation to that offense, and such pardon does not embrace any other offense for which separate penalties and punishments are provided. Ex parte Weimer, 8 Biss. C. Ct. 321.

The conviction having been of two offenses, and the pardon reciting only one, the pardon operates upon the offense recited. State *v.* Foley (1880), 15 Nev. 64.

Notice of President's action.—A telegram signed with the surname of the Attorney General of the United States, purporting to state the decision of the President on an application by a convicted prisoner for a commutation of sentence will be presumed authentic and is sufficient notice of the President's action, which, as the court will take judicial notice, may properly be taken in such matters through the Department of Justice. Perovich *v.* Perry (1909), 167 Fed. 789.

Revocation.—A pardon by an outgoing President may be revoked by the incoming President before its delivery to the prisoner. In re De Puy (D. C. 1869), Fed. Cas. No. 3,814.

Operation and effect of pardon in general.—A pardon, if granted before conviction, prevents any of the penalties and disabilities consequent upon conviction from attaching, and if granted after conviction removes the penalties and disabilities, and restores the person pardoned to all his civil rights. A person pardoned by the President for participation in the Rebellion can not be excluded from the practice of his profession as an attorney before the courts by his failure to comply with the act of Jan. 24, 1865, requiring attorneys to take a test oath. Ex parte Garland (1866), 4 Wall. 333, 377, 18 L. Ed. 366.

Proclamation of the President of Dec. 25, 1868 (15 Stat. 711), granting unconditional pardon and amnesty to participants in the Rebellion, includes aliens domiciled in the United States who gave aid and comfort to the Rebellion. Carlisle *v.* U. S. (1872), 16 Wall. 147, 21 L. Ed. 426.

President's proclamation of December 25, 1868, granted an unconditional pardon to participants in the Rebellion and enabled persons otherwise entitled to recover from the United States proceeds of captured and abandoned property, though no proof be made that the claimant gave neither comfort nor aid to the rebellion. Armstrong *v.* U. S. (1871), 13 Wall. 154, 20 L. Ed. 614.

The President's proclamation of Dec. 25, 1868, granting unconditional pardon and amnesty to participants in the Rebellion, relieves claimants of captured and abandoned property from proof of adhesion to the United States during the Civil War and makes it unnecessary to prove such adhesion or personal pardon for taking part in the Rebellion. Pargoud *v.* U. S. (1871), 13 Wall. 156, 20 L. Ed. 646, reversing (1868), 4 Ct. Cl. 337.

The proclamation of the President extending unconditionally and without reservation a full pardon and amnesty for treason, with a restoration of all rights, privileges, and immunities under the Constitution, does not give a person pardoned a right to the proceeds of his property which had been confiscated by the Government, sold, and the proceeds paid into the Treasury. Knote *v.* U. S. (1877), 95 U. S. 149, 152, 24 L. Ed. 442.

Where property of a person has been confiscated for treason, pardon revests in him the power of disposition over the reversion of such property, expectant on the termination of the confiscated estate; it having been in suspension during his disability. Illinois C. R. Co. *v.* Bosworth (1890), 10 Sup. Ct. 231, 133 U. S. 92, 33 L. Ed. 550.

The full and unconditional pardon of a person convicted of larceny and sentenced to imprisonment therefor completely restores his competency as a witness, although it may be stated in the pardon that it was given for that purpose. Boyd *v.* U. S. (1892), 142 U. S. 453, 12 Sup. Ct. 292, 35 L. Ed. 1077.

A pardon is prospective and not retrospective in its operation, and where an alien convicted of felony was thereafter pardoned the pardon did not operate to obliterate or wipe out the fact of the commission of the crime nor make it appear that his behavior had been that of a man of good moral character to entitle him to admission to citizenship. In re Spenser (C. C. 1878), Fed. Cas. No. 13,234.

A "pardon" or "amnesty" secures against the consequences of one's acts, and not against the acts of themselves. It involves forgiveness; not forgetfulness. U. S. *v.* Swift (D. C. 1911), 186 Fed. 1002.

While the President's pardon restores a criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact that his service was not faithful and honest. (1898) 22 Op. Atty. Gen. 36.

A recruiting officer has the right to reject a candidate for enlistment in the Army whose service during his previous term was not honest and faithful, notwithstanding the President's pardon of the offense. Id.

The effect of a pardon is to obliterate the offense and make him who had been an offender as innocent, in legal contemplation, as if he had never offended, to remove all disabilities incident to the offense charged, and to restore to him all civil rights which he would have had if he had not offended, so far, at least, as it is in the power of the Government to make it so. (1908) 26 Op. Atty. Gen. 617.

An Executive pardon is effective to remove from the offender the disability which follows conviction of a felony. People v. Bowen (1872), 43 Cal. 439, 13 Am. Rep. 148.

Subject to exceptions therein provided, a pardon by the President restores to its recipient all rights of property lost by the offense pardoned, unless the property has, by judicial process, become vested in other persons. Osborn v. U. S. (1875), 91 U. S. 474; (1852) 5 Op. Atty. Gen. 532.

Relief from fines, penalties, and forfeitures. A full pardon and amnesty by the President for all offenses committed by the owner of property seized under act Aug. 6, 1867, "to confiscate property used for insurrectionary purposes" relieves such owner from the forfeiture of the property seized so far as the proceeds thereof accrue to the United States. Armstrong's Foundry (1867), 6 Wall. 766, 18 L. Ed. 882.

A person who has served out a sentence on conviction of felony may be restored by pardon to competency as a witness, but the jury is the sole judge of the credit to be given his testimony. U. S. v. Jones (C. C. 1824) Fed. Cas. No. 15,493.

Where defendant was sentenced to imprisonment and to pay a fine and costs, a pardon by the President remitting the fine on payment of costs extended only to the remission of the fine, and the President had no authority to order the prisoner discharged from the sentence. U. S. v. Lukins (C. C. 1841), Fed. Cas. No. 15,638.

An Executive pardon would relieve the person pardoned from penalties and disabilities; but could not authorize officers of the Government to pay him moneys which might be due to him, if they were prohibited from so doing by a subsequent statute. Hart's Adm'r v. U. S. (1880), 16 Ct. Cl. 459.

Where a person convicted of a crime against the United States was sentenced to fine and imprisonment and subsequently received an unconditional pardon from the President, but previous thereto had paid the amount of the fine to the marshal, by whom it was deposited in court, where it still remains, held, that the fine was remitted by the pardon, and that the money should now be restored to the person pardoned. (1872) 14 Op. Atty. Gen. 599.

A pardon by the President works a remission of a pecuniary penalty already paid, unless the money has actually passed into the Treasury (overruling the decision in 10 Op. Atty. Gen. 1). Id.

Restoration to rights of citizenship.—An Executive act restoring a convicted criminal to the rights of citizenship is not a pardon and does not remove the legal infamy, and so long as the judgment of guilt remains the disability to testify necessarily continues. People v. Bowen (1872), 43 Cal. 439, 13 Am. Rep. 148.

Restoration of Army or Navy officer to former rank.—A pardon by the President will restore an officer whose rank has been reduced by sentence of a court-martial to his former relative rank according to the date of his commission. (1869) 12 Op. Atty. Gen. 547.

C., a lieutenant commander in the Navy, was sentenced by a court-martial to suspension for one year, and to retain his then present number on the list of lieutenant commanders for that time. The sentence having been executed, he applied to be restored to the number on said list which he thereby lost. Held, that the restoration could not be effected by the President otherwise than by a pardon. (1881) 17 Op. Atty. Gen. 31.

The punishment imposed (loss of numbers) being a continuing one, is still subject to the pardoning power, which, when exercised, would have the effect to restore the officer to his former rank according to the date of his commission. Id.

9. Treaties.— * * * He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; * * * *Art. II, sec. 2, Constitution of the United States.*

Notes of Decisions.

Treaty powers in general.—Although power is given to the Executive, with the consent of the Senate, to make treaties, the power is nowhere conferred to make laws to carry the stipulations of treaties into effect. Prigg v. Pennsylvania (1842), 16 Pet. 539, 619, 10 L. Ed. 1060.

The power of the legislative department of the Government to exclude aliens from the United States can not be surrendered by the treaty-making power. Chinese Exclusion Case (1889), 130 U. S. 581, 600, 9 Sup. Ct. 623, 32 L. Ed. 1068.

The treaty power of the United States extends to the protection to be afforded to the citizens of a foreign country owning property in this country and to the manner in which that property may be transferred, devised, or inherited. Geofroy v. Riggs (1890), 133 U. S. 258, 264, 10 Sup. Ct. 295, 33 L. Ed. 642.

The treaty-making power vested in our Government extends to all proper subjects of negotiation with foreign Governments, and it can make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein. In re Ross (1891), 140 U. S. 453, 480, 11 Sup. Ct. 897, 35 L. Ed. 581.

Where the Senate fails to consent to a proposed treaty, it has no legal force and proceedings taken thereunder are of no avail. In re Sutherland (D. C. 1892), 53 Fed. 551.

No constitutional objection is perceived to a provision in the proposed consular convention between the United States and Great Britain, conferring upon the courts of each country jurisdiction of offenses committed on vessels of the other on the high seas. (1890) 19 Op. Atty. Gen. 644.

The President has no power to make treaties except by and with the advice and consent of the Senate, and with the concurrence of two-thirds of its members present. A treaty, therefore, which has not been thus ratified, is wholly inoperative to affect antecedent laws or the rights acquired under them. United States v. Frelinghuysen (Sup. Ct. D. C. 1883), 2 Mackey, 299.

The general power to make treaties confers authority to negotiate with other Governments, and to form compacts relative to the proper subject-matter of treaty stipulation, such as peace, war, commercial intercourse, alliances, etc. Pierce v. State (1843), 13 N. H. 537.

The police of the several States, regarded as separate governments, is not a subject-matter to which the treaty-making power extends. Id.

The political rights of the people of the several States as such are not subjects of treaty stipulation. Id.

Nature of treaties.—A treaty is, in its nature, a contract, not a legislative act. It is equivalent to an act of the legislature whenever it operates without the aid of any legislative provision. Foster v. Neilson (1829), 2 Pet. 253, 314, 7 L. Ed. 415.

A treaty with a sovereign as such inures to his successors and the Government of the United States. The Sapphire (1870), 11 Wall. 164, 168, 20 L. Ed. 127.

A treaty is primarily a compact between two independent nations and depends for the enforcement of its provisions on the honor and the interest of the Governments which are parties to it. Head Money Cases (1884), 112 U. S. 580, 598, 5 Sup. Ct. 247, 28 L. Ed. 798.

A treaty is primarily a contract between two independent nations, and for the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. Whitney v. Robertson (1888), 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386.

A treaty is in its nature a contract, and if the consideration fail or important provisions be broken by one party, the other may declare it terminated. Hooper v. U. S. (1887), 22 Ct. Cl. 408.

A treaty is a compact of accommodation relating to public affairs. Pierce v. State (1843), 13 N. H. 537.

Though the convention between the United States and Great Britain for the joint military occupancy of San Juan Island, pending the final adjustment of the international boundary dispute, was not a treaty within the meaning of the Federal Constitution, the power to enter into such a convention is a necessary incident to national government. Watts v. U. S. (1870), 1 Wash. T. 286.

When treaties take effect.—Where, by the terms of the treaty, either of the parties engage to perform particular acts, the legislature must execute the contract before it can become a rule for the court. Foster v. Neilson (1829), 2 Pet. 253, 314, 7 L. Ed. 415.

The date when a treaty is to go into effect is to be fixed, not by its provision that

[illegible] to become operative 10 days after exchange of ratifications, but by an act of Congress, where the Senate has added an amendment to the treaty, declaring that it shall not take effect until approved by Congress. U. S. v. American Sugar Refining Co. (1906), 26 Sup. Ct. 717, 719, 202 U. S. 563, 50 L. Ed. 1149, reversing judgment American Sugar Refining Co. v. U. S. (C. C. 1905), 136 Fed. 508.

Where an Indian treaty provided that it should be obligatory as soon as the same should be ratified by the President and Senate, it did not take effect until signed by the President, although it had been previously ratified by the Senate and accepted by the Indians. Shepard v. Northwestern Life Ins. Co. (C. C. 1889), 40 Fed. 341.

A treaty takes effect from its date when ratified, unless a different period is fixed, or must be adopted to fulfill the manifest intent. In re Metzger (D. C. 1847), Fed. Cas. No. 9,511.

Termination of treaties by war.—The termination of a treaty by war does not divest rights of property already vested under it, nor do treaties in general become extinguished ipso facto by war between the two governments. Society, etc., v. New Haven (1823), 8 Wheat. 464, 494, 5 L. Ed. 662.

Invasion or infringement of power by acts of Congress.—Congress is bound to regard public treaties, and has no power to organize a board of revision to nullify titles confirmed thereunder. Reichert v. Felps (1867), 6 Wall. 160, 165, 18 L. Ed. 849.

Sec. 2, act of July 31, 1894 (28 Stat. 205), post, 72, prohibiting officers from holding other lucrative offices, should not be regarded as enacted by Congress to invade the domain of the treaty-making authority and establishing restrictions upon future occasional and temporary commissionerships created by international agreement, the nature and functions of which neither Congress nor the framers of the Constitution could wisely undertake or foresee. (1898), 22 Op. Atty. Gen. 184.

Enforcement, alteration, abrogation, or repeal of treaties by Congress.—The repeal of a treaty can not affect title to real estate acquired by an alien thereunder. Chirac v. Chirac (1817), 2 Wheat. 259, 4 L. Ed. 234.

So far as a treaty made can be made the subject of judicial cognisance, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal. Head Money Cases (1884), 112 U. S. 580, 598; Whitney v. Robertson (1888), 124 U. S. 190, 195.

Abrogation of a treaty may be justified by a change of circumstances. Hooper v. U. S. (1887), 22 Ct. Cl. 408.

Act of Congress as superseding treaty.—An act of Congress may supersede a prior treaty. The Cherokee Tobacco (1870), 11 Wall. 616, 621, 20 L. Ed. 227.

A treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty. Ward v. Race Horse (1896), 163 U. S. 504, 516, 16 Sup. Ct. 1076, 41 L. Ed. 244.

Acquisition of territory and settlement of boundaries.—The United States may acquire territory by treaty. American Ins. Co. v. Canter (1828), 1 Pet. 511, 542, 7 L. Ed. 242. [C. S., p. 13,885.]

Ratification of action of military governor of Cuba.—Ratification by the Executive, Congress, and the treaty-making power of the action of the military governor of Cuba in abolishing a hereditary office, with its emoluments, makes his act that of the United States, and exonerates him from all liability as for a tort in violation of the law of nations, or of a treaty of the United States. O'Reilly De Camara v. Brooke (1908), 28 Sup. Ct. 439, 209 U. S. 45, 52 L. Ed. 676, affirming judgment (D. C. 1906), 142 Fed. 858.

10. Appointment of officers.—The President * * * he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. * * * *Art. II, sec. 2, Constitution of the United States.*

Notes of Decisions.

Public office.—An office is a public station or employment, conferred by the appointment of Government. The term embraces the ideas of tenure, emolument, and duties. * * * The duties are continuing and permanent, not occasional and transitory, and are defined by rules prescribed by Government and not by contract. * * * A Government office is different from a Government contract.

The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other. U. S. *v.* Hartwell, 6 Wall. 385, 394; U. S. *v.* Maurice, 2 Brockenbrough 103.

A public officer is the incumbent of an office "who exercises continuously, and as a part of the regular and permanent administration of the Government, its public powers, trusts, and duties." Sheboygan Co. *v.* Parker, 3 Wall. 93, 96.

Unless a person in the service of the Government holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States. U. S. *v.* Mouat, 124 U. S. 303, 307; U. S. *v.* Germaine, 99 U. S. 508, 510; U. S. *v.* Hendee, 124 U. S. 309; U. S. *v.* Smith, 124 U. S. 525.

Appointment of officers in general.—The general rule deducible from this clause is that the appointment to any office of the United States established by Congress must be made by the President, with the concurrence of the Senate, unless it is otherwise provided in the Constitution or by legislative enactment. Scully *v.* U. S. (C. C. 1910), 193 Fed. 185; (1853) 6 Op. Atty. Gen. 1; (1875) 15 Op. Atty. Gen. 3; (1878) 15 Op. Atty. Gen. 449; (1883) 17 Op. Atty. Gen. 532; (1908) 26 Op. Atty. Gen. 627.

The nomination to an office by the President, confirmation by the Senate, signature of a commission, and affixing to it the seal of the United States were all the acts necessary to render the appointment complete. U. S. *v.* Le Baron (1856), 19 How. 73, 78, 15 L. Ed. 525.

The officers of the United States are divided into two classes: First, those whom the President shall nominate, and by and with the advice and consent of the Senate appoint; and, second, inferior officers established by law whose appointment may be vested in the President alone, in the courts of law or in the heads of departments. Scully *v.* U. S. (C. C. 1910), 193 Fed. 185.

The appointing power, by antedating the appointment or commission of a public officer, can not create a liability on the part of the Government, but the legislative branch of the Government can. Collins *v.* U. S. (1879), 15 Ct. Cl. 22.

An appointment by the President does not take effect until the date of the Senate's confirmation; and though the officer enter immediately upon the duties of his office he can not be regarded as an officer de jure during the interval, and will not be entitled to the salary of the office prior to confirmation. Bennett *v.* U. S. (1884), 19 Ct. Cl. 379.

Neither the President alone nor the President and Senate can give a retroactive effect to an appointment so as to entitle an officer to the emoluments of his office prior to the time of his actual appointment, except where expressly authorized by statute. Id.

The Senate can not originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nominations; and such nominations fail whenever it disagrees with them. (1837) 3 Op. Atty. Gen. 189.

The Senate may suggest conditions and limitations to the President, but can not vary those submitted by him; for no appointment can be made except on his nomination, agreed to by the Senate without qualification or alteration. Id.

The nomination for an office to, and the confirmation thereof by, the Senate, do not of themselves confer the office upon the person nominated, as the President may withhold the commission. (1867) 12 Op. Atty. Gen. 304.

The power of appointment conferred by the Constitution is a substantial and not merely a nominal function, and the judgment and will of the constitutional depositary of that power should alone be exercised or have legal operation in filling offices created by law. (1871) 13 Op. Atty. Gen. 516.

The word "employ" is sometimes used in a sense equivalent to "appoint." (1883) 17 Op. Atty. Gen. 504.

The President can appoint to office only those who are eligible under the Constitution. His appointment of one not eligible is a nullity. (1895) 21 Op. Atty. Gen. 211.

The nomination and confirmation of a person who, at the time, is ineligible for the office by force of Art. I, sec. 6, can not be made the basis of his appointment to such office after his ineligibility ceases. (1883) 17 Op. Atty. Gen. 522.

When Congress, in pursuance of its authority under this clause sees fit to give the sole power of appointment to the President, it does so by language appropriate to that end, such as the unqualified phrase "may appoint" in R. S. 1680; see also post 2642; sec. 19, act May 28, 1896; act Mar. 3, 1897; and, on the other hand, when Congress means the appointment to an office established by law to be made by Senate the intention to that effect is specifically shown by the language used. Act June 11, 1878, sec. 2; act June 4, 1897, 30 Stat. 58; act Apr. 12, 1900, secs. 17, 18,

34, 46; act Apr. 30, 1900, secs. 66, 69, 80, 84 (1900), 23 Op. Atty. Gen. 138.

Establishment of offices by law.—Under this and the following clause it was held that all offices under the Federal Government must be established by law, except where the Constitution itself otherwise provides. U. S. v. Maurice (C. C. 1823), Fed. Cas. No. 15,747.

An agent of fortifications is an officer of the United States, whose office is established by law. Id.

Encroachment on appointive power by Congress or the judiciary.—It was not the purpose of sec. 5 of act July 13, 1866 (12 Stat. 92), post, 2446, to withdraw the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service, by appointing another in his place. Blake v. U. S. (1880), 103 U. S. 227, 236, 26 L. Ed. 462.

The act changing the official designation of persons appointed to the Naval Academy was within the power of Congress and was not an assumption of the power of appointment belonging to the Executive. Crenshaw v. U. S. (1890), 10 Sup. Ct. 431, 434, 134 U. S. 99, 33 L. Ed. 825.

Act Sept. 27, 1890 (26 Stat. 492), authorizing the establishment of a public park in the District of Columbia, provided that the Chief of Engineers of the United States Army, and the engineer commissioner of the District of Columbia, with three citizens appointed by the President, should be a park commission. Held, that the act was constitutional, and not an attempt by Congress to exercise the appointing power, since its effect was merely to lay upon the two engineers, being officers already appointed, new duties germane to their offices. Shoemaker v. U. S. (1893), 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.

The clause vesting the appointing power in the executive branch of the Government precludes an exercise of such power by Congress. Wood v. U. S. (1879), 15 Ct. Cl. 151.

Congress may retire an officer from active service and place him on the retired list upon a rank different from that which attaches to his office by general laws, and may change the mere rank of an officer on the active or retired list at pleasure without coming in conflict with the Constitution. Id.

With some exceptions Congress may at any time reduce the salaries of public officers. The only contract which arises from a statute establishing a salary is to pay the incumbent that salary while that law remains in force. Fisher v. U. S. (1879), 15 Ct. Cl. 322.

The right of Congress to prescribe qualifications for office is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. (1871) 13 Op. Atty. Gen. 516.

The powers of Congress to "declare war," "raise and support armies," "make rules for the government and regulation of the land and naval forces," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" do not include, by implication, a power to designate by law a person to fill a military office, since this would be in direct conflict with the power of appointment expressly given the President. (1884) 18 Op. Atty. Gen. 18, 26, 27.

The appointing power of the President rests in his discretion, and his exercise thereof is not reviewable, so long as it conforms to the limitations imposed by law. U. S. v. Newman (1914), 42 App. D. C. 78.

Power of Congress to require exercise of power.—Congress can not assume the power to require the President and the Senate to exercise their appointing power. (1884) 18 Op. Atty. Gen. 18, 23.

A bill which imposes, or attempts to impose, upon the President, a duty to appoint a person designated therein, is without any support in the Constitution. It is an assumption of an implied power which is not based upon any express power, and clearly invades the constitutional rights of the President. (1884) 18 Op. Atty. Gen. 18, 27.

Appointments by heads of departments in general.—The appointing power provided for by the latter part of this clause is intended to be exercised by the department of the Government to which the officer to be appointed most appropriately belongs. In re Hennen (1839), 13 Pet. 230, 257, 10 L. Ed. 138.

Under this clause all its officers must be appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department, and as there is no statute authorizing the Secretary of the Navy to appoint a paymaster's clerk, nor any act requiring his approval of such appointment, and the regulations of the Navy not requiring any such appointment or approval for the holding of that position, the appointment did not make one so appointed an officer of the United States. U. S. v. Mouat (1888), 8 Sup. Ct. 505, 506, 124 U. S. 303, 31 L. Ed 463.

Appointments to office can be made by the heads of departments of the United States Government in those cases only in which Congress has authorized it by law; and therefore the appointment of an agent of fortifications by the Secretary of War, there being no act of Congress conferring

that power on that officer, is irregular. U. S. *v.* Maurice (C. C. 1823), Fed. Cas. No. 15,747.

The heads of departments have no constitutional prerogative of appointment, and, their power being derived from legislation, must be governed thereby. Perkins *v.* U. S. (1885), 20 Ct. Cl. 438.

A clerk appointed pursuant to an act of Congress by an assistant treasurer with the approbation of the Secretary of the Treasury was appointed by the head of a department within the meaning of this clause. U. S. *v.* Hartwell (1867), 6 Wall. 385, 398, 18 L. Ed. 830.

The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress. Matter of Miller (Sup. Ct. D. C. 1887), 5 Mackey 507.

Distinction between appointment and nomination.—There is no distinction between an appointment and a nomination other than the fact that the President nominates for appointment when the Senate is in session, and appoints when he fills a vacancy temporarily during the recess of the Senate. (1901) 23 Op. Atty. Gen. 599.

Who are "officers of the United States" in general.—A mere clerk in a public office is not an officer of the United States. U. S. *v.* Smith (1888), 8 Sup. Ct. 595, 597, 124 U. S. 525, 31 L. Ed. 534; U. S. *v.* Haas (D. C. 1906), 167 Fed. 211; Melcher *v.* City of Boston (1845), 50 Mass. (9 Metc.) 73.

Where one is appointed under authority of law by the head of a department, and his duties are continuing and permanent, and his emolument fixed, he is an officer of the United States. U. S. *v.* McCrory (1899), 91 Fed. 295, 296, 33 C. C. A. 515.

Under this clause an "officer of the United States," within Pen. Code, sec. 117, post, 439, punishing bribery, is one who is either appointed by the President by and with the advice and consent of the Senate, or by the President alone, the courts of law, or heads of some executive department of the Government. U. S. *v.* Van Wert (D. C. 1912), 195 Fed. 974; Same *v.* Brents, Id. 980.

The word "officer" is frequently used in a broader sense than that indicated by the constitutional method of appointment. Hendee *v.* U. S. (1887), 22 Ct. Cl. 134.

Whether a person is an officer or not depends upon the nature of his employment, and not upon the terms used in conferring it. (1883) 17 Op. Atty. Gen. 504.

If the employment is one that embraces the ideas of tenure, duration, emoluments, and duties, which latter are continuing and permanent, not occasional or temporary, it contains all the essential elements of an office. Id.

Permanent agents.—A permanent agent is one appointed by the President, with the advice and consent of the Senate, in contradistinction to one specially appointed by the head of a department, for some particular service, and on terms agreed on. Armstrong *v.* U. S. (D. C. 1838), Fed. Cas. No. 548.

Army and Navy officers.—The office of a captain in the Army who has placed his blank resignation in the hands of his superior with authority upon certain conditions to fill it out and forward it for acceptance became vacant upon the officer's receipt of notice that his resignation had been accepted by the President. Mimmack *v.* U. S. (1878), 97 U. S. 426, 437, 24 L. Ed. 1067.

Where the President's acceptance of the resignation of an Army captain vacated his office, the President's subsequent revocation of his acceptance did not restore the officer to military service. Id.

An appointment, with the advice of the Senate, to a post chaplaincy in the Army was held to operate, *proprio vigore*, to discharge the incumbent from the service, and invest the appointee with the rights and privileges belonging to the office. Blake *v.* U. S. (1880), 103 U. S. 227, 230, 26 L. Ed. 462.

If an officer's connection with the Army be entirely and legally severed, he can enter the Army again only by the appointment of the President by and with the advice and consent of the Senate. Montgomery *v.* U. S. (1884), 19 Ct. Cl. 370.

Where an order of the Secretary of War directs that an officer in the Army be mustered out, the President has not power to revoke the order and restore the officer. Palen *v.* U. S. (1884), 19 Ct. Cl. 389.

The right of the President to command armies is different from the power to appoint officers. The power of appointing is not incident to the President as commander in chief, but subject to the consent of the Senate. McBlair *v.* U. S. (1884), 19 Ct. Cl. 528.

Lieutenants in the Artillery and Marine Corps may be exchanged, with their own assent, where the ranks of other officers will not be interfered with or prejudiced; but such exchanges can be effected only by the action of the appointing power of the President, by and with the advice and consent of the Senate, and will not be made unless the good of the service requires it. (1830) 2 Op. Atty. Gen. 355.

The President and Senate, by nomination and confirmation, may correct the date of military appointments, even after as great a lapse of time as has occurred in the case

of Capt. Twiggs. (1838) 3 Op. Atty. Gen. 307.

Appointment is the election of persons, not now in the Army, as officers of it, or the designation by selection of an officer already in the Army to a vacancy which is not required by the law or the regulations to be filled by promotion according to seniority. (1881) 17 Op. Atty. Gen. 197.

Regimental officers of such regiments as may be formed by contributions of companies from two or more States are to be appointed by the President of the United States, under the provisions which make him Commander in Chief of the Army and Navy, and which authorizes him to appoint all officers of the United States whose appointment is not otherwise provided by law. (1898) 22 Op. Atty. Gen., 135.

If a battalion is made up of companies contributed by two or more States, the officers of the battalion as such must be appointed by the President. (1898) 22 Op. Atty. Gen. 147.

It being the intention of Congress, as expressed in the sixteenth section of act Feb. 2, 1901 (31 Stat. 751), not to require confirmation of appointments in the grade of captain in the quartermaster's department, the appointment of Capt. A was not a recess appointment, the concurrence of the Senate was not necessary, and the action of the President alone constituted a final and complete appointment. (1901) 23 Op. Atty. Gen. 574.

An officer properly appointed of any grade on the active list may be retired with a rank higher or lower than that which belongs to his office if Congress see fit so to enact. But Congress can not appoint to a new and different office without coming in conflict with the Constitution. Moser v. U. S. (1907), 42 Ct. Cl. 86.

The President, by and with the advice and consent of the Senate, may, by reappointment and commission, restore the lost rank, including seniority, to an officer of the Army or Navy. (1856), 8 Op. Atty. Gen. 223.

The confirmation of an officer nominated for promotion may be made as well by the appointment and promotion of his successor as in any other way, provided it shows the assent of the Senate to such promotion. (1900) 23 Op. Atty. Gen. 31; (1901) 23 Op. Atty. Gen. 413.

Wherever Congress vests in the President alone, in a court of law, or in the head of a department the appointment of any of their respective subordinate officers, other than those named in that clause or whose appointment is otherwise provided for by the Constitution, it must be held that such officers are inferior officers within the meaning of the Constitution, whose appointment in that manner Congress has the power to authorize. Collins v. U. S. (1878), 14 Ct. Cl. 568.

The word "inferior" is not used in the sense of petty or unimportant; it means subordinate or inferior to those officers in whom, respectively, the power of appointment may be vested. Id.

Power of appointment under the United States can not be communicated by act of Congress to persons not named to that end by the Constitution. (1856) 8 Op. Atty. Gen. 41.

Congress may, at its pleasure, distribute the appointment of inferior officers between the President, courts of law, and heads of Departments, or confide the same exclusively to one or more of these depositaries; but it can not constitutionally vest such appointment elsewhere, directly or indirectly. (1871) 13 Op. Atty. Gen. 516.

Accordingly, an act requiring the President, the courts, and heads of departments to appoint to office the persons designated by an examining board as the fittest would be at variance with the Constitution, inasmuch as it would virtually place the power of appointment in that board. Id.

But though the result of an examination before such a board can not be made legally conclusive upon the appointing power, against its own judgment and will, yet it may be resorted to in order to inform the conscience of that power. Id.

And notwithstanding that the appointing power alone can designate an individual for an office, still, either Congress, by direct legislation, or the President, by authority derived from Congress, can prescribe qualifications, and require that the designation shall be out of a class of persons ascertained by proper tests to have those qualifications. Id.

Congress may place any restrictions it pleases upon the employment, by officers of the United States, of any kind of servants to assist them in the discharge of their duties. (1907) 26 Op. Atty. Gen. 363.

Powers of officers.—All the officers of the Government, from the highest to the lowest, are but agents with delegated powers, and if they act beyond the scope of their delegated powers their acts do not bind the principal. U. S. v. Maxwell Land Grant Co. (C. C. 1884), 21 Fed. 19; Id. (C. C. 1888), 28 Fed. 118.

An officer can only bind the Government by acts which come within a just exercise of his official power. Hunter v. U. S. (1831), 5 Pet. 173, 178; The Floyd Acceptances (1850), 7 Wall. 666; State v. Hastings, 12 Wis. 661.

It is a question of law for the court whether an act is a part of the official

duty of a public officer. U. S. *v.* Buchanan (1850), 8 How. 83.

Every public officer is required to perform all duties which are strictly official, although they may be required by laws passed after he comes into office, and may be cumulative upon his original duties, and although his compensation therefor be wholly inadequate. In such case he must look to the bounty of Congress for any additional reward. Andrews *v.* U. S., 2 Story 202.

An officer is bound to use that care and diligence in the discharge of his duties that a conscientious and prudent man, acting under a just sense of his obligations, would exercise under the circumstances of a particular case, and if he fails and neglects to do so he is culpable. U. S. *v.* Baldridge (1882), 11 Fed. 552.

Presumptions as to official acts.—The acts of an officer to whom a public duty is assigned, within the sphere of that duty, are prima facie within his power. U. S. *v.* Arredondo, 6 Pet. 691; U. S. *v.* Clarke, 8 id. 436, 452; Percheman *v.* U. S., 7 id. 51; Delassus *v.* U. S., 9 id. 177, 134; Strother v. Lucas, 12 id. 410, 438; U. S. *v.* Peralta, 19 How. 343, 347.

When a particular functionary is clothed with the duty of deciding a certain question of fact, his decision, in the absence of fraud, is conclusive. Lynde *v.* The County (1872), 16 Wall. 6.

He who alleges that an officer intrusted with important duty has violated his instructions must show it. The courts ought to require very full proof that an officer has transcended his powers before they so determine. U. S. *v.* Peralta, 19 How. 343, 347; Delassus *v.* U. S. (1835), 9 Pet. 117, 134.

When a public officer is to do any act on proof of certain facts, of the competency and sufficiency of which he is to judge, it is to be presumed, from the doing of the act, that the proof was regularly and satisfactorily made, and its sufficiency is not subject to reexamination. Phil. and Tren. R. R. Co. *v.* Stimpson (1840), 14 Pet. 448.

Suspension, removal, or dismissal, and reappointment or reinstatement.—It was not the intention of the Constitution that inferior officers should be held for life. The power of removal is an incident to the power of appointment. In re Hennen (1839), 13 Pet. 230, 257, 10 L. Ed. 138.

An officer of Volunteers in the Army, dismissed from the service during the recent Civil War by order of the President, could not be restored to his position merely by a subsequent revocation of that order. U. S. *v.* Corson (1885), 114 U. S. 619.

A vacancy created by the dismissal of an officer in the Army can only be filled by new appointment by and with the advice and consent of the Senate unless occurring during a recess of that body, in which case the President may grant a commission to expire at the end of its next succeeding session. Id.

The President has power by and with the advice and consent of the Senate to displace an officer in the Army or Navy by the appointment of another officer in his place, and, when that has been done, he can not again become an officer except upon a new appointment. Quackenbush *v.* U. S. (1900), 177 U. S. 20, 25, 20 Sup. Ct. 530, 44 L. Ed. 654.

Where a civil service employee was discharged from the Department of the Interior because of inefficient rating, the courts of the United States could not supervise the action of the head of the department in discharging him. Keim *v.* U. S. (1900), 177 U. S. 290, 293, 20 Sup. Ct. 574, 44 L. Ed. 774, affirming (1898), 33 Ct. Cl. 174.

In the absence of constitutional or statutory provision, the President can, by virtue of his general power of appointment, remove any officer, even though appointed by and with the advice and consent of the Senate, and to take away such power of removal would require very clear and explicit language. Shurtleff *v.* U. S. (1903), 23 Sup. Ct. 535, 536, 189 U. S. 311, 47 L. Ed. 828.

The power to remove an Army officer vests in the power to appoint, and this power is a discretionary one which can not be questioned by the courts. Ex parte Schaumburg (C. C. 1846), Fed. Cas. No. 12,441.

When an appointee has received a commission from the President, takes the oath of office, and gives the requisite bond, the incumbent is superseded, and his removal is complete. U. S. *v.* Bank of Arkansas (C. C. 1846), Fed. Cas. No. 14,515.

Where the appointing power is the President and Senate, acting concurrently, the President alone has not the power of removal, in the absence of legislation and precedent to the contrary. U. S. *v.* Avery (C. C. 1867), Fed. Cas. No. 14,481.

Though the power to regulate removals from office belongs to Congress, that body having for three-fourths of a century practically conceded the authority to the President to make removals without the advice of the Senate, the court will not deny the President such authority. Id.

The power of removal of an officer is incident to the power of appointment where no definite tenure of office is fixed by law. In re Eaves (C. C. 1887), 30 Fed. 21.

The civil service law never contemplated any interference with the President's power of removal from office of an officer. Fleming v. Stahl (C. C. 1897), 83 Fed. 99.

The power of the President to dismiss an officer of the Army is discretionary and not limited to cases arising under certain acts of Congress. His action can not be reviewed here. The tenure of office of all officers, except those in the judicial department is during the pleasure of the President unless Congress shall have given some other duration to their office. Gratiot v. U. S. (1865), 1 Ct. Cl. 258.

The President may dismiss a military or naval officer without the concurrence of the Senate. McElrath v. U. S. (1876), 12 Ct. Cl. 201.

If an order dismissing an officer is not of itself efficient, it will become efficient (i. e., the officer will be removed) by the President's appointment of his successor, with the advice and consent of the Senate. Id.

A statute which provides that the President be, and he is hereby, authorized to reinstate a veteran officer and to retire him in that grade, as of the date he was previously mustered out, confers authority on the President alone to reinstate the officer without the advice and consent of the Senate. Collins v. U. S. (1878), 14 Ct. Cl. 20.

Where the President is authorized by law to reinstate a discharged Army officer he may do so without the advice and consent of the Senate. Collins v. U. S. (1879), 15 Ct. Cl. 22, reaffirming 14 Ct. Cl. 20.

Where the President exercises the discretion vested in him by an act of Congress of reinstating an officer, and expresses his will by an order to that effect, the officer acquires a vested right to the office. Id.

The power to remove is incident to the power to appoint. Twing v. U. S. (1880), 16 Ct. Cl. 13. The tenure of appointment or employment of the members of the Capitol police not being fixed or limited by statute they hold at the will of the officers vested with the power of appointment and may be removed by the authority which is incident to the power of appointment. Id.

If an order dismissing an officer be revoked before the rights of other parties have intervened, the revocation presents only a question of executive authority. Keyes v. U. S. (1881), 17 Ct. Cl. 344.

When the President has once dismissed a military officer, or accepted his resignation, and given notice thereof, he can not again restore him to office except by a new appointment in pursuance of a nomination to and confirmation by the Senate. Id.

The President had the power to dismiss a military officer in 1863 under act July 17, 1862, 12 Stat. 596, sec. 17. Montgomery v. U. S. (1884), 19 Ct. Cl. 370.

An officer summarily dismissed by order of the President can not be reinstated by the President's recalling of the dismissal. Id.

Where in the judgment of the President he has done a wrong by putting an officer out of the Army, the only way provided by law to rectify the error is to reappoint him by and with the advice and consent of the Senate. Palen v. U. S. (1884), 19 Ct. Cl. 389.

The constitutional authority in Congress to vest the appointment of inferior officers in the heads of departments implies authority to limit, restrict, and regulate their removal. Perkins v. U. S. (1885), 20 Ct. Cl. 438.

The power to appoint includes the power to remove or suspend, unless some provision of law interferes with its free exercise. Howard v. U. S. (1887), 22 Ct. Cl. 305.

When an officer is removed before his term expires and the appointment of his successor is confirmed, the action of the Senate is a ratification of the removal. Parsons v. U. S. (1895), 30 Ct. Cl. 222.

The civil service act does not prescribe a tenure of office, nor does it restrict the Executive in his power of removal. Ruggles v. U. S. (1910), 45 Ct. Cl. 86.

The power of the President to dismiss an officer from the public service, without the consent of the Senate, was affirmed by Congress soon after the adoption of the Constitution, and has since received the sanction of every department of the Government. (1847) 4 Op. Atty. Gen. 603.

In case of appointments and removals by the President, where the removal is not by direct discharge, or an express vacating of the office by an independent fact, but merely by the operation of a new commission or appointment, then the virtue of the old commission ceases only when notice of the new commission is given to the outgoing officer, either by the President, or by the new officer exhibiting his commission to the old, or by other sufficient notification. (1853) 6 Op. Atty. Gen. 87.

The President of the United States possesses constitutional power to dismiss officers of the Army or Navy coextensive with his power to dismiss executive or admin-

istrative officers in the civil service of the Government. (1856) 8 Op. Atty. Gen. 223.

Under act Jan. 31, 1823 (3 Stat. 723), the President had power to dismiss a defaulting officer without first giving him notice of the charges reported against him. (1859) 9 Op. Atty. Gen. 313.

Consistently with the spirit and purpose of tenure of office acts Mar. 2, 1867, and Apr. 5, 1869, the President may revoke the suspension of an officer and reinstate him in the functions of his office, after the rejection by the Senate of a nomination to fill his place. (1870) 13 Op. Atty. Gen. 221.

The word "superseded" as used in those acts, imports that the person suspended is still the incumbent of the office, and that the interruption of his performance of its duties is temporary and provisional. Id.

The effect of revoking the suspension is only to restore to his former condition the actual possessor of the office, to whose removal the Senate has given no advice or consent. Id.

Resignation.—That a public office may be vacated by resignation is established by long and familiar practice, and is recognized by express provision of law. Nor can there be any doubt that a resignation may be effected by the concurrence of the officer and the appointing power; its essential elements are an intent to resign on the one side and an acceptance on the other. It may be either in writing or by parole, expressly or by implication. To perfect a resignation nothing more is necessary than that the proper authority manifest in some way its acceptance of the offer to resign. It then becomes effectual, and operates to relieve the incumbent either immediately or on the day specially fixed according to its terms. An offer to resign is revocable prior to acceptance; after acceptance and before it has taken effect it may be modified, or withdrawn by consent of both parties, but this control extends no further. When a resignation once takes effect the official relations of the incumbent are ipso facto dissolved; he has no longer any right to, or hold upon, the office. (1873) 14 Op. Atty. Gen. 259.

An order of the President suspending an officer, under R. S. 1768, takes effect upon due notice thereof to the officer, unless by the terms of the order it is to take effect at a stated time after notice. Receipt of the order by the officer is due notice. (1875) 15 Op. Atty. Gen. 62.

Where an officer is suspended but continues afterwards to perform the duties of the office (there being no one at the time authorized to enter upon the performance of such duties), his acts are those of an officer de facto and are valid so far as they concern the interests of the public. Id.

No duty is devolved upon the President to send in nominations to the Senate in place of suspended officers or to fill vacancies unless that body shall continue in session for 30 days. (1877) 15 Op. Atty. Gen. 376.

Where no nomination in place of a suspended officer has been sent in and the Senate adjourns, or, a nomination having been sent in, the Senate adjourns without confirming it, the officer suspended thereupon becomes reinstated, but he may be again suspended by the President as before. In the case of a vacant office, under like circumstances, the office would be in abeyance upon the adjournment of the Senate. Id.

The President, in nominating a person to the place of a suspended officer, need not give any reasons for the suspension. Id.

Power of the President respecting the suspension of civil officers appointed with the consent of the Senate and his duty in regard to the nomination of persons in the place of suspended officers, and also in regard to the filling of vacancies in civil offices happening during a recess of the Senate, under the provisions of R. S. 1768 and 1769, stated. (1877) 15 Op. Atty. Gen. 376.

Where an officer has been suspended during a recess of the Senate and another person designated to perform his duties, under R. S. 1768, the President may at any time revoke the suspension and thus reinstate the officer. (1877) 15 Op. Atty. Gen. 381.

When Congress vests the appointment of inferior officers in the heads of departments, it may limit the power of removal. Matter of Miller. (Sup. Ct. D. C. 1887), 5 Mackey 507.

It was the purpose of Congress, in the repeal of the tenure-of-office sections of the Revised Statutes 1767–1775, repealed by act of Mar. 3, 1887 (24 Stat. 500), to again concede to the President the power of removal, if taken from him by the original tenure-of-office act, and, by reason of the repeal, to thereby enable him to remove an officer when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office. Parsons *v.* U. S., 167 U. S. 324. (1853) 6 Op. Atty. Gen. 4; (1868) 12 id. 421; (1875) 15 id. 421; (1897) 4 Comp. Dec. 58; (1898) 4 id. 466, 601, and Blake *v.* U. S., 103 U. S. 227.

Tenure of office.—The Executive power is continuous without regard to the governing person, and there is no interruption of the authority or renewal of the cre-

...ments of their public ministers on a ...ange of Presidents. (1855), 7 Op. Atty. ...n. 362.

The power to appoint includes the power ...remove, when the Constitution has not ...therwise provided, and when the laws of ...ongress have not fixed a tenure of office. ...n parte Hennen (1839), 13 Pet. 230; Parsons v. U. S. (1897), 167 U. S. 324; U. S. v. Avery, Deady 204.

When Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interests. U. S. v. Perkins (1886), 116 U. S. 483.

11. Recess appointments.— * * * The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session. * * * *Art. II, sec. 2, Constitution of the United States.*

Notes of Decisions.

Filling vacancies in general.—A vacancy ...ated by a dismissal of an officer in the ...rvice can be filled only by new appointment, by and with the advice and consent ...f the Senate, unless occurring in the recess ...f that body, in which case the President ...ay grant a commission to expire at the ...d of its next succeeding session. U. S. v. ...rsons (1885), 114 U. S. 619, 5 Sup. Ct. ...p. 29 L. Ed. 254.

Where there is no vacancy to which an ...fficer can be appointed, it is not a case ...n the President is authorized "to fill all vacancies." Peck v. U. S. (1904), 30 ...t. 125.

...n the provision in sec. 3 of tenure of ...ce act Mar. 2, 1867 (which, with the ...endment made by sec 3 of act Apr. 5, ...69, is reproduced in sec. 1769, R. S.), ...thorizing the President "to fill all vacan...ies which may happen during the recess ...f the Senate by reason of death, etc., by ...anting commissions which shall expire ...t the end of their next session thereafter," ...ongress must be presumed to have em...loyed the words of the Constitution used ...at is, "which may happen during ...he recess of the Senate," in the same sense ...n which they have been accepted and acted ...n by the executive branch of the Government. (1880), 16 Op. Atty. Gen. 523, ...llowing opinion of Attorney General ...rts in (1868) 12 Op. Atty. Gen. 449. ...ting the intention of Congress, as ex...ressed in the sixteenth section of act Feb. ...1901 (31 Stat. 751), not to require con...irmation of appointments in the grade of ...aptain in the Quartermaster's Depart...ent, the appointment of Captain A. of ...he department, on June 14, 1901, was ...a recess appointment, the concur...ence of the Senate was not necessary, ...nd the action of the President alone ...as final and complete. (1901), 23 Op. ...tty. Gen. 574. The only vacancy which ...the President is authorized to fill under ...ec. 16 and 26 of that act is an original ...acancy. After such vacancy has been filled there is no longer an original vacancy in that particular place, and any subsequent vacancy must be filled by promotion or by detail. Id.

The President has the right under the Constitution, and impliedly under R. S. 181, post 172, to make a temporary appointment, designation, or assignment of one officer to perform the duties of another in the case of a vacancy caused by death, disability, or otherwise during the recess of the Senate. (1904) 25 Op. Atty. Gen. 258.

What constitutes recess of Senate.—The recess of the Senate during which the President shall have power to fill a vacancy that may happen means the period after the final adjournment of Congress for the session and before the next session begins—while an adjournment during a session of Congress means a merely temporary suspension of business from day to day, or for such brief periods of time as are agreed upon by the joint action of the two Houses. (1901) 23 Op. Atty. Gen. 597; (1901) 23 Op. Atty. Gen. 599.

Holiday adjournment.—The President is not authorized to appoint an appraiser at the port of New York during the current holiday adjournment of the Senate, which will have the effect of an appointment made in the recess occurring between two sessions of the Senate. (1901) 23 Op. Atty. Gen. 599.

Meaning of the words "may happen."— The phrase "vacancies which may happen during the recess of the Senate," found in this clause of the Constitution, and R. S. sec. 1769, authorizing the President to fill vacancies in office, means "vacancies that may happen to exist during the recess of the Senate." In re Farrow (C. C. 1880), 3 Fed. 112.

The President has power to fill, during a recess of the Senate, by temporary commission, a vacancy that occurred by expiration of commission during a previous session of that body, the term in the Con-

stitution "may happen during the recess," being equivalent to "may happen to exist during the recess," without which interpretation it could not be executed in its spirit, reason, and purpose. (1823) 1 Op. Atty. Gen. 631.

The words "may happen," in this clause, mean "may happen to exist." Therefore the President has power whenever and however a vacancy first occurred, whether by death, resignation, etc., or by the creation of a new office by act of Congress, which is an "original vacancy," to fill the place during the recess of the Senate by a temporary appointment under a commission which shall expire at the end of the next session of the Senate. (1907) 26 Op. Atty. Gen. 234.

Time when vacancy occurs in general.—The exercise of the power of the President to fill vacancies during a recess of the Senate is not limited to those which occur during a recess. (1832) 2 Op. Atty. Gen. 525.

The President may fill vacancies that may happen during the recess of the Senate, even though the vacancy shall occur after a session of the Senate shall have intervened. (1841) 3 Op. Atty. Gen. 673.

The President has full and independent power to fill vacancies in the recess of the Senate, without any limitation as to the time when they first occurred. (1806) 12 Op. Atty. Gen. 32; (1875) 14 Op. Atty. Gen. 563; (1884) 18 Op. Atty. Gen. 29.

The predicament of a vacancy, which may be filled by a temporary appointment by the President, under the Constitution, is not confined by it to vacancies originating or beginning to exist during the recess of the Senate, but embraces all vacancies that from any casualty happen to exist at a time when the Senate can not be consulted as to filling them. (1868) 12 Op. Atty. Gen. 449.

The President has power to fill, by temporary appointment, in a recess of the Senate, a vacancy then existing which occurred during the next preceding session of that body. (1877) 15 Op. Atty. Gen. 207.

Vacancy happening when Senate is in session.—An appointment by the President to an office, during a recess of the Senate, to fill a vacancy happening by the expiration of a term when the Senate was in session, can not constitutionally take effect. In re District Attorney of United States (D. C. 1868), Fed. Cas., No. 3,924.

If vacancies are known to exist during the session of the Senate, and nominations are not then made to fill them, they can not be filled by the Executive during the subsequent recess. (1845), 4 Op. Atty. Gen. 361.

The construction of this provision in the Constitution, by which this provision is construed to comprehend all vacancies that may happen to exist in a recess of the Senate, and according to which the President has authority thereunder to fill, during a recess of the Senate, not only vacancies that have originated in the recess, but also such as originated whilst the Senate was in session, reaffirmed, upon full review of the opinions of former Attorneys General on the same subject, all of which are shown to concur in that construction. (1880) 16 Op. Atty. Gen. 523.

The provision in sec. 3 of tenure of office act Mar. 2, 1867 (14 Stat. 430; also in R. S. 1769), putting "in abeyance" an office "so vacant," etc., if no appointment thereto with the consent of the Senate is made "during such next session of the Senate," does not assume to act upon the power of appointment given to the President by the Constitution. It acts upon the office itself, but does not thus act until the expiration of the next session of the Senate. Hence, in the case of a vacancy which has originated during a session of the Senate, the office can not be affected by that provision until the end of the succeeding session of the Senate; and during the intervening recess of the Senate the President may fill the vacancy by a temporary appointment. Id.

An office which has become vacant during a session of the Senate may be filled during the next ensuing recess of the Senate by a temporary appointment during the President. (1883) 17 Op. Atty. Gen. 521.

A vacancy in an office which happens during a session of the Senate, but remains unfilled until a recess of the Senate occurs, may be filled by the President during such recess by a temporary appointment. (1889) 19 Op. Atty. Gen. 261.

Offices created and taking effect during session.—Where a session of Congress passes without the filling of an office which was created and took effect during a previous session of the Senate, the President can not make a valid appointment during a recess of the Senate. Schenck *v.* Peay (C. C. 1869), Fed. Cas. No. 12,451.

When an office is created by a law taking effect during a session of the Senate, and no nominations are made thereto, the office may be filled by Executive appointment during the recess of the Senate. (1868) 12 Op. Atty. Gen 455; (1884) 18 Op. Atty. Gen. 28; (1889) 19 Op. Atty. Gen. 261.

Failure of Senate to act on nomination.—Where, under the operation of act of Mar. 2, 1875, and the joint resolution of Mar. 3, 1875 (No. 7), two vacancies existed in the office of paymaster in the Army, with the rank of major, and nominations therefor were sent to the Senate by the President, but which that body failed to confirm before adjourning, held, that it is competent

for the President to fill the two vacancies, during the recess of the Senate, by temporary appointments, and that he is not subject to any restrictions as to the person whom he may thus appoint. (1875) 14 Op. Atty. Gen. 563.

Legality of appointment of person whose nomination is afterward rejected. One appointed to office when the Senate was not in session, who entered upon the duties of the office and continued to serve until notified that his nomination had been rejected, must be deemed to have been legally appointed and entitled to the office. Gould v. U. S. (1884), 19 Ct. Cl. 593.

Second temporary appointment.—Where the President made a temporary appointment of a collector of internal revenue during a recess of the Senate, and no nomination was made during the next regular session, or during an extra session called thereafter, held, that the President, after the adjournment of the extra session, might fill the vacancy by a second temporary appointment. (1863) 11 Op. Atty. Gen. 179.

Expiration of commission.—The commission of an officer appointed during a recess, who is afterwards nominated and rejected, is not thereby determined. (1842) 4 Op. Atty. Gen. 30.

The President has the right under the Constitution, and impliedly under R. S. 161, to make a temporary appointment, designation, or assignment of one officer to perform the duties of another in the case of a vacancy caused by death, disability, or otherwise, during the recess of the Senate, and such temporary appointment, designation, or assignment is not limited by law to any particular period. (1904) 25 Op. Atty. Gen. 258.

Salary and compensation of appointee.—See also post, 16, and notes thereunder.

An office which has become vacant during a session of the Senate may be filled during the next ensuing recess of the Senate by a temporary appointment by the President; but by R. S. 1761, post, 16, payment of the salary of the appointee, in such cases, is postponed until he has been confirmed by the Senate. (1883) 17 Op. Atty. Gen. 521.

The President may send to the Senate for approval of his action the names of officers on the retired list of the Army nominated by him for advancement under act Apr. 23, 1904 (33 Stat. 264), after the adjournment of the last session of Congress, but who died before the convening of the present session; and upon approval by the Senate, the personal representatives of the deceased officers will be entitled to receive the advanced pay due such officers without further action by Congress. (1905) 25 Op. Atty. Gen. 312.

The salary or compensation of a person so appointed can not be paid, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. R. S. 1761, post, 16; (1907) 26 Op. Atty. Gen. 234.

12. Commissions.—The President is authorized to make out and deliver, after the adjournment of the Senate, commissions for all officers whose appointments have been advised and consented to by the Senate. *R. S. 1773.*

For statutory requirements in respect to commissions to military officers see chapter 26 post, entitled "Commissioned Officers."

The affixing to commissions of officers, appointed by the President, of the seal of the United States was provided for by R. S. 1794, post, 2781.

The commissions of officers under direction and control of the secretaries or other heads of several executive departments were to be made out and recorded in the respective departments under which they were to serve, and the department seal affixed thereto, by provisions of act Mar. 28, 1896; act Mar. 3, 1875, sec. 14; act Aug. 8, 1888; and act Mar. 3, 1905, post, 2259.

Notes of Decisions.

Necessity of commission as evidence.—Proof that an individual has acted notoriously as a public officer is prima facie evidence of his character, without producing his commission or appointment. Jacob v. U. S. (C. C. 1821), Fed. Cas. No. 7,157.

Tenure under commission. A commission issued by the President of the United States to fill a vacancy in an office during a recess of the Senate continues until the end of the next session of Congress, unless sooner determined by the President, even though the person commissioned shall have been in the meantime nominated to the office, and his nomination rejected by the Senate; and this rule applies where the vacancy occurs through the suspension of an officer. In re Marshalship for Southern and Middle Dists. of Alabama (D. C. 1884), 20 Fed. 379.

A commission for a term of years gives to the officer no greater legal right to the office than though it ran "during the pleasure of the President." Howard v. U. S. (1887), 22 Ct. Cl. 305.

Where an act of Congress gives the President power to appoint an officer, without defining the tenure by which the office is to be held, a commission may legally issue to the officer to hold the office during the pleasure of the President. (1818) 1 Op. Atty. Gen. 212.

New commission.—Where a new commission is accepted it supersedes the old one; and the four years, prescribed by law as the official term of the appointee, must commence to run from its date. The bonds taken under the first commission cease to have effect when the commission terminates. (1830) 2 Op. Atty. Gen. 333.

13. Threats against the President.—That any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding one thousand dollars or imprisoned not exceeding five years, or both. *Act of Feb. 14, 1917 (39 Stat. 919).*

Notes of Decisions.

Words constituting.—U. S. v. Stickrath (D. C. 1917), 242 Fed. 151; Clark v. U. S. (C. C. A. 1918), 250 Fed. 449; U. S. v. Jasick (D. C. 1918), 252 Fed. 931.

Words not constituting.—U. S. v. French (D. C. 1917), 243 Fed. 785; U. S. v. Metzdorf (D. C. 1918), 252 Fed. 933.

Question for jury.—U. S. v. Stobo (D. C. 1918), 251 Fed. 689.

Intent.—It is no defense to a prosecution under this act that the language used was intended as a joke, it not being claimed that it was so understood or intended so to be understood. Ragansky v. U. S. (C. C. A. 1918), 253 Fed. 643.

A threat under this act is "knowingly" made if the maker comprehends the meaning of the words used and "willfully" made if, knowing their meaning, he voluntarily and consciously utters them as the declaration of an apparent intention. Id.

Other offenses.—Joinder of count under this act with counts under the espionage act, post 2857, in same indictment, held improper by court below. Hall v. U. S. (C. C. A. 1919), 256 Fed. 748, 749.

Nature of threat.—An oral threat to take the life of the President violates this act. Nor need the threat be communicated to the President, to complete the offense. U. S. v. Stobo (D. C. 1919), 251 Fed. 689; U. S. v. Metzdorf (D. C. 1918), 252 Fed. 933. The indictment should aver that the threat was against the President in his public character. U. S. v. Metzdorf (D. C. 1918), 252 Fed. 933. The mere fact that the threat was made conditional upon an opportunity to fulfill it makes it none the less an offense. U. S. v. Jasick (D. C. 1918), 252 Fed. 931.

CHAPTER 2.

PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS AND EMPLOYEES.

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14. Notification of appointments when made without consent of the Senate.—Whenever the President, without the advice and consent of the Senate, designates, authorizes, or employs any person to perform the duties of any office, he shall forthwith notify the Secretary of the Treasury thereof, and the Secretary of the Treasury shall thereupon communicate such notice to all the proper accounting and disbursing officers of his Department. *R. S. 1774.*

See notes to 91, post.

15. Notification of rejections and confirmations by the Senate.—The Secretary of the Senate shall, at the close of each session thereof, deliver to the Secretary

of the Treasury, and to each of the Assistant Secretaries of the Treasury, and to each of the Auditors, and to each of the Comptrollers in the Treasury and to the Treasurer, and to the Register of the Treasury, a full and complete list, duly certified, of all the persons who have been nominated to and rejected by the Senate during such session, and a like list of all the offices to which nominations have been made and not confirmed and filled at such session. *R. S. 1775.*

Of the two Comptrollers in the Treasury, mentioned in this section, who were authorized by R. S. 268, the designation of the First Comptroller was changed to Comptroller of the Treasury, and the office of Second Comptroller was abolished and its duties, powers, etc., were transferred to the Comptroller, by sec. 4 of the Dockery Act of July 31, 1894 (28 Stat. 162).

16. Recess appointments.—No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. *R. S. 1761.*

Notes of Decisions.

"Vacancy" defined.—The general rule is that, where Congress has not authorized the officer to hold over, his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then be made. (1882) 17 Op. Atty. Gen. 448.

A vacancy caused by death or resignation or by the creation of a new office is within this section. (1907) 26 Op. Atty. Gen. 234.

17. Civil service regulations.—The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of the service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service. *R. S. 1753.*

The authority conferred upon the President by this section was not taken away by the civil service act of Jan. 16, 1883 (22 Stat. 403), except in so far as it was inconsistent with the provisions of that act, by a provision of sec. 7 thereof, post, 18.

Notes of Decisions.

"Civil service" defined.—Persons in the employment of the Government, whose services are special, being rendered to it as a government, and whose salary or pay is directly fixed or indirectly limited by law, constitute the civil service. Persons in the employment of the Government, whose service are such as might be rendered to any employer, whose wages come under the restriction of no statute, and who receive for their services whatever they may be worth in the place where they happen to be rendered, are not in the civil service. Baker v. U. S. (1868), 4 Ct. Cl. 227.

Who are officers. See notes to 91, post.

Regulations for appointment.—The President may by his regulations restrict original entry into the civil service to one or more of the classes that may exist, or permit such entry to all of them, as in his judgment will best promote the efficiency of the service. (1883) 17 Op. Atty. Gen. 621.

Determination of qualifications.—An employee's fitness, capacity, and attention to his duties are questions of discretion and judgment, to be determined by his superior officers, and such questions are beyond the jurisdiction of any court. (1907) 26 Op. Atty. Gen. 364.

A statute which empowers an officer or tribunal to appoint a person having certain

qualifications confers upon that officer or tribunal the power to determine the qualifications and eligibility of the appointee. (1910) 28 Op. Atty. Gen. 180.

Removal.—Neither this section nor the civil service act of Jan. 16, 1883, puts any restrictions on the power of removal from appointive offices, except for refusal to contribute to political funds or neglect to render political service. Page *v.* Moffett (C. C. 1898), 85 Fed. 38, 39, 40. See, also, as to the equitable jurisdiction of the Federal courts, In re Sawyer, 124 U. S. 200, and World's Columbian Exp. *v.* U. S., 18 U. S. App. 159, 6 Circ. Ct. App. 71, 56 Fed. 667; Butler *v.* White, 83 id. 578; Carr *v.* Gordon, 82 id. 373.

Officers in classified service.—See post, 52, and notes.

Restoration to office.—An officer who has resigned or been dismissed can not be restored to the office formerly held by him except by reappointment. (1906) 25 Op. Atty. Gen. 579.

18. Examination for the civil service.—That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination. *Sec. 7, act of Jan. 16, 1883 (22 Stat. 406).*

Provisions of R. S. 164, for examination for appointment of clerks in the executive departments, were superseded by those of this act.

Notes of Decisions.

Determination of eligibility.—Jurisdiction to determine the eligibility of an applicant for appointment in the classified service lies with the Civil Service Commission; and, the Attorney General can not properly render an opinion to the head of an executive department regarding the eligibility of a temporary clerk to permanent appointment under the civil service. (1910) 28 Op. Atty. Gen. 393.

Certification of eligibles.—The head of a department has no authority to withdraw his notice to the Civil Service Commission of his revocation of a selection for appointment and appoint the same party previously certified without a further certification from the Commission, though, through a misunderstanding, a wrong has been done the party originally selected. (1891) 20 Op. Atty. Gen. 64.

An irregularity in the certification of the name of an eligible for appointment under the civil service is cured by the probational and absolute appointment of such a person. (1896) 21 Op. Atty. Gen 289.

The certificate of eligibles delivered to the appointing officer by the subordinates of the Civil Service Commission is a complete authority to such officer to make any selection he may desire therefrom, and is a complete protection to the appointee. (1896) 21 Op. Atty. Gen. 335.

Nothing in this act prevents the certification by the Commission of eligibles for a vacancy from registers not designating functions of the nature suggested by the title of the position given in the specific appropriation providing for the compensation of the employees. (1908) 26 Op. Atty. Gen. 522.

An appointment by the Secretary of State, without reference to or conformity with the regulations prescribed for appointments in the classified service, made pursuant to the act of July 1, 1898 (30 Stat. 645), authorizing the temporary employment of stenographers and typewriters in his department, is lawful. (1899) 22 Op. Atty. Gen. 556.

Under an act making an appropriation for an engineer and assistant engineer of

United States Military Academy, to appointed by the superintendent, the tion is limited to those who have qualified under the civil service law and rules. (1907) 25 Op. Atty. Gen. 341. But where appropriation act for the next year used words "to be selected and appointed by superintendent of the United States Military Academy," the appointments could made without reference to the civil service law (1905) 25 Op. Atty. Gen. 413. Congress undoubtedly intended that the provisions of the civil service law, so far as has provided for the organization of a united service, should be extended to all persons engaged in the legitimate civil work the executive branch of the Government, ether such persons were or were not ordinarily in the employ of the United ates. (1907) 26 Op. Atty. Gen. 363.

Under the existing civil service rules, places in the executive civil service, cept those mentioned in Schedule A, and cept persons employed merely as laborers and persons whose appointments are bject to confirmation by the Senate, must appointed as a result of open competitive aminations, held under the provisions of (1908) 26 Op. Atty. Gen. 502.

The words "persons employed merely as rers," in section 1 of rule 2 of the service rules, must be understood as aking all those covered by the exception "any person merely employed as a rer or workman," in this section. (1908) 27 Op. Atty. Gen. 184, 215.

Persons employed in navy yards as skilled rers or mechanics are not within the rision of this section that no "person ey employed as a laborer or workman" l be required to be classified. (1909) Op. Atty. Gen. 446.

Transfers.—Employees transferred to the sus Office from other branches of the departmental classified service, under sec. 7 the census act of July 2, 1909 (36 Stat. are eligible to appointment in any of the partments to positions of the same class grade as those held by them at the date their transfer to the Census Office, but to higher positions. (1912) 29 Op. Gen. 213.

Preference to ex-soldiers and sailors.—charge of ex-soldiers and sailors, see 21, and notes.

This section does not prohibit the discharge of a clerk for inefficiency, though he had been honorably discharged from the Army, nor give the courts power to review the act of the head of a department in making such discharge. Keim v. U. S. (1900), 20 Sup. Ct. 574, 576, 177 U. S. 290, 44 L. Ed. 774.

Executive order of July 5, 1906, which directs the certification, next after the eligibles entitled to preference, of persons honorably discharged from the United States Navy as water tenders, oilers, and firemen, for the position of fireman in the State, War, and Navy Building, of persons honorably discharged as warrant machinists in the Navy for the position of chief engineer or assistant engineer, and of persons honorably discharged as noncommissioned officers in the United States Army for the position of watchman in that building, is inconsistent with the provisions of the civil service act, and therefore without sanction of law. (1909) 28 Op. Atty. Gen. 112.

Preference in the matter of appointment to civil office accorded by 22, post, to persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, is not subject to the laws of apportionment. (1910) 28 Op. Atty. Gen. 298, overruling (1909) 27 Op. Atty. Gen. 546.

Informality in appointment.—The formalities of a pilot's entry into the service were immaterial, if his services were accepted. Stilling v. U. S. (1908), 41 Ct. Cls. 61.

Waiver of requirements.—Where Congress in an appropriation act makes use of the very term employed in the civil service act in describing appointments to be made in accordance with its provisions, it is manifest that there was no intention to waive the requirements of the civil service law. (1908) 26 Op. Atty. Gen. 502.

Impersonating another at examination.—Agreement whereby one person impersonated another at a civil service examination, to enable the latter to get credit for examinations passed by the former was a conspiracy to defraud the United States. Curley v. U. S. (1904), 130 Fed. 1, 64 C. C. A. 369; writ of certiorari denied (1904), 25 Sup. Ct. 787, 195 U. S. 628, 49 L. Ed. 351, affirming judgment U. S. v. Curley (C. C. 1903), 122 Fed. 738.

9. Civil service examinations held in the State of an applicant.—* * * ovided, That hereafter all examinations of applicants for positions in the vernment service, from any State or Territory, shall be had in the State or ritory in which such applicant resides, and no person shall be eligible for examination or appointment unless he or she shall have been actually

domiciled in such State or Territory for at least one year previous to such examination: * * * *Sec. 7, act of July 2, 1909 (36 Stat. 3).*

This section was suspended, by act of Mar. 27, 1918 (40 Stat. 459) during the World War, to the extent of permitting the Civil Service Commission to hold any examination in the District of Columbia.

Notes of Decisions.

Applicants affected by provision.—The phrase "from any State or Territory" refers to applications where it is requisite that the applicant should be of a particular State or Territory and charged to it under the law of apportionment, which is the case only with respect to appointments in the classified service in the departments at Washington and in the Census Bureau. (1909) 28 Op. Atty. Gen. 78, modifying in this respect (1909) 27 Op. Atty. Gen. 546, and (1909) 27 Op. Atty. Gen. 567.

The proviso of sec. 7 of the census act of July 2, 1909 (36 Stat. 3), which requires that all examinations for positions in the Government service shall be had in the State or Territory in which the applicant resides, does not apply to the so-called nonassembled examinations. (1913) 30 Op. Atty. Gen. 194.

Determination of residence.—Questions of "actual bona fide residence" and "domicile" are mixed questions of law and fact, to be determined in each instance by the civil service commission upon the facts presented. (1909) 27 Op. Atty. Gen. 766.

Period of residence.—The words "for at least one year previous," as used in the first proviso of sec. 7 (36 Stat. 3), mean for at least one year next preceding. (1909) 27 Op. Atty. Gen. 546.

Change of residence.—If a domicile be once established, it is presumed to continue until there has been a change of residence, with the intention of establishing a new residence. (1909) 27 Op. Atty. Gen. 546.

20. Employees of detective agencies ineligible for Federal employment.—That hereafter no employee of the Pinkerton Detective Agency, or similar agency, shall be employed in any Government service or by any officer of the District of Columbia. *Act of Mar. 3, 1893 (27 Stat. 591), making appropriations for sundry civil expenses.*

21. Employment of publicity experts restricted.—No money appropriated by this or any other Act shall be used for the compensation of any publicity expert unless specifically appropriated for that purpose. *Act of Oct. 22, 1913 (38 Stat. 212), making appropriations for urgent deficiencies.*

22. Preference given to discharged soldiers, their wives and widows.—Persons honorably discharged from military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices. *R. S. 1754.*

That hereafter in making appointments to clerical and other positions in the Executive branch of the Government in the District of Columbia or elsewhere preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such and to the wives of injured soldiers, sailors and marines who themselves are not qualified, but whose wives are qualified to hold such positions. *Act of July 11, 1919 (41 Stat. 37), amending act of Mar. 3, 1919 (40 Stat. 1293).*

The preference conferred by this section was not taken away by the civil service act of Jan. 16, 1883, by a provision of sec. 7 thereof, ante, 18.

The heads of the executive departments, in making any reduction of their clerical force, were required to retain persons equally qualified, who had been honorably discharged from the military or naval service, and the widows and orphans of deceased soldiers and sailors, by a provision of sec. 3, act Aug. 15, 1876, 51, post.

The amended portion of act of Mar. 3, 1919, supra, as originally enacted read as follows:

"That hereafter in making appointments to clerical and other positions in the executive departments and in independent governmental establishments preference shall be

given to honorably discharged soldiers, sailors, and marines, and widows of such, if they are qualified to hold such positions."

Notes of Decisions.

Scope.—R. S. 1754 is more restricted than the act of Mar. 3, 1919, as to the persons in whose favor a preference is given, but there is no conflict in so far as these provisions apply to the same appointments, and the one does not give preference over the other. (1919) 31 Op. Atty. Gen. 406.

The provision of the act of Mar. 3, 1919, above given, does not relate to the examination of a candidate, which is a preliminary step to his qualification for a civil service appointment. (1919) 31 Op. Atty. Gen. 489.

The Civil Service Commission, in the exercise of its general power of control over examinations and in the interests of good administration, may reopen an examination to veterans only. Id.

Regulations.—Regulations promulgated to give effect to this section should provide that persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, if fitted physically, mentally, and morally to discharge, with reasonable skill and efficiency, the duties of the position to be filled, are entitled to be selected in preference to others, although the latter may possess greater skill and efficiency. (1909) 27 Op. Atty. Gen. 184.

Determination of qualifications.—To entitle an ex-soldier to retention in the service in preference to a civilian, he must be "equally qualified," and such qualification must be determined by the head of the department. Keim v. U. S. (1898), 33 Ct. Cl. 175.

The matter of capacity and personal fitness for the place is for the determination of the appointing power. (1889) 19 Op. Atty. Gen. 318.

The head of the department may direct by what reasonable and appropriate tests such fitness or comparative fitness may be ascertained, and, in the absence of any law rule, or order on the subject, that matter would be left to the discretion of the appointing officer. (1909) 27 Op. Atty. Gen. 184.

Selection from classes.—As between persons within the privileged class, relative skill and efficiency should be decisive as to the right of employment, and all other considerations should be subordinated thereto. With respect to all other persons, including those honorably discharged on account of expiration of enlistment, or reasons other than disability incurred in the line of duty, superior fitness for the employment should be the decisive consideration; but where there is no appreciable difference in this respect between two applicants, then an honorably discharged soldier, sailor, or marine would be entitled to preference, in conformity with the intendment of R. S. 1755. (1909) 27 Op. Atty. Gen. 184.

Civil service examinations.—Honorably discharged soldiers and sailors are not exempt from liability to examination for admission into the civil service, but are entitled to a preference for appointment as against other persons of equal qualifications for the place. (1881) 17 Op. Atty. Gen. 194; (1909) 27 Op. Atty. Gen. 546.

Apportionment among States.—The preference in the matter of appointment to civil office accorded by this section is not subject to the law of apportionment, and extends over all others on the eligible list, irrespective of their rating. (1910) 28 Op. Atty. Gen. 298, overruling (1909) 27 Op. Atty. Gen. 546.

Reductions in salary.—Ex-soldiers, or ex-sailors, or the widows and orphans of deceased soldiers and sailors, are not entitled to preference over other persons, when reductions in salary and rank are to be made, even though their qualifications are equal. (1909) 27 Op. Atty. Gen. 490.

Removal.—This section does not entitle one who was preferred for an appointment to be continued in service after he is found inefficient. Keim v. U. S. (1900), 20 Sup. Ct. 574, 575, 177 U. S. 290, 44 L. Ed. 774.

23. Employment of discharged soldiers in constructing public roads. * * * *Provided further*, That in the expenditure of this fund for labor preference shall be given, other conditions being equal, to honorably discharged soldiers, sailors, and marines, but any other preference or discrimination among citizens of the United States in connection with the expenditure of this appropriation is hereby declared to be unlawful. *Sec. 6, act of Feb. 28, 1919 (40 Stat. 1204).*

* * * In the expenditure of this fund for labor preference shall be given, other conditions being equal, to honorably discharged soldiers, sailors, and marines. *Sec. 8, act of Feb. 28, 1919 (40 Stat. 1202), making appropriations for the service of the Post Office Department.*

Section 6, above, pertains to funds for the aid of the States in the construction of rural post roads, and other purposes, allotted to States having constitutional prohibition against internal improvements, etc., available when changes in a constitution are made.

Section 8, above, pertains to appropriation for roads and trails in national forests.

24. Reinstatement of discharged soldiers.—* * * That all former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany shall be reinstated on application to their former positions, if they have received an honorable discharge and are qualified to perform the duties of the position. *Act of Feb. 25, 1919 (40 Stat., 1164), making appropriations to supply deficiencies.*

* * * That the period of time during which soldiers, sailors, and marines, both enlisted and drafted men, who, prior to entering the service of their country, had a civil service status, and whose names appear upon the eligible list of the Civil Service Commission, shall not be counted against them in the determination of their eligibility for appointment under the law, rules and regulations of the Civil Service Commission now in effect, and at the time of demobilization their civil service status shall be the same as when they entered the service. *Act of Mar. 1, 1919 (40 Stat. 1224), making appropriations for legislative, executive, and judicial expenses.*

Notes of Decisions.

Scope.—The provision of the act of Feb. 25, 1919, above quoted, is not limited to former employees of the War Department, but applies alike to former employees in any department of the Government. (1919) 31 Op. Atty. Gen. 452.

It applies to former employees who entered the naval service or Marine Corps as well as to those who entered the Army. Id.

It includes all who were either drafted or enlisted as privates, although subsequently commissioned, and those who enlisted for the purposes of entering officers' training camps and were subsequently commissioned, but does not include those commissioned from civil life who had not previously enlisted for any purpose. Id. 452, 454.

The provision applies only to those who were drafted while in the employ of the Government or who left Government employment for the purpose of enlisting. Id. 452.

The provision requires the restoration of every former Government employee to the civil service status he occupied before he entered the military service, but if the position the employee left was only a temporary one and has actually ceased to exist, his right to reinstatement is lost. (1919) 31 Op. Atty. Gen. 454. Nor does it require his reinstatement if the services he was rendering are no longer required, but if such services are required, he must be reinstated, although the said services are being satisfactorily performed by another employee. Id.

The provision requires that the former employee be reinstated in his position if it exists, and this requirement is not satisfied by reinstating an employee who vacated a statutory position in a nonstatutory one, even though the rate of pay and civil service designation are the same in both. Id.

An employee who had a temporary appointment and no civil service status is entitled to be reinstated in his former position. (1919) 31 Op. Atty. Gen. 449. Nor is he disqualified by the fact that two members of his family are already in the classified civil service. Id.

25. Reinstatement of discharged soldiers as postal employees.—* * * any postal employé who has entered the military service of the United States or who shall hereafter enter it shall, upon being honorably discharged therefrom, be permitted to resume the position in the postal department which he left

to enter such military service. *Act of July 28, 1916 (39 Stat. 413), making appropriations for the service of the Post Office Department.*

Employees, including substitute employees, of the Postal Service who have entered the military or naval service of the United States or who shall hereafter enter it during the existence of the present war, shall, when honorably discharged from such service, be reassigned to their duties in the Postal Service at the salary to which they would have been automatically promoted had they remained in the Postal Service, provided they are physically and mentally qualified to perform the duties of such positions. *Sec. 9, act of July 2, 1918 (40 Stat. 735), making appropriations for the service of the Post Office Department.*

26. Reinstatement of National Guardsmen mustered out of Federal service.—* * * *Provided*, That all officers and enlisted men of the National Guard and of the Medical Reserve Corps of the Army who are Government employees and who respond to the call of the President for service shall, at the expiration of the military service to which they are called, be restored to the positions occupied by them at the time of the call: * * * *Act of Aug. 29, 1916 (39 Stat. 62)*.

Members of the National Guard, employed by the Government or District of Columbia, are entitled to leave of absence, without loss of pay or time, for certain parade and encampment occasions, post, 2577.

27. Wife of a soldier or sailor not disqualified by marriage for Government service.—That the wife of a soldier or sailor serving in the present war shall not be disqualified for any position or appointment under the Government because she is a married woman. *Sec. 5, act of Aug. 31, 1918 (40 Stat. 956).*

The title of the act of Aug. 31, 1918, declares it to be generally amendatory of the act of May 18, 1917 (40 Stat. 76).

28. Additional employees in the War Department.—For additional employees in the Office of the Secretary of War, $75,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding $1,800 per annum, except the following: Two at $2,500 each, two at $2,200 each, and one at $2,000: *Act of Mar. 3, 1921 (41 Stat. 1277), making appropriations for legislative, executive, and judicial expenses: War Department.*

To provide for the temporary employment of civilians additional to the statutory rolls of the executive departments, successive acts making appropriations for legislative, executive, and judicial expenses and for deficiencies placed lump-sum funds at the disposal of the Secretary of War to be allotted among bureaus and offices of the War Department.

Provided, That not to exceed $250,000 of the money herein appropriated shall be expended for the payment of salaries of civilian employees connected with the sale of war supplies and the adjustment of war contracts and claims: * * * *Act of June 5, 1920 (41 Stat. 949), making appropriations for the support of the Army: Contingencies of the Army.*

The temporary force of employees was established in the urgent deficiency act of June 15, 1917. Varying provisions as to maximum salaries appear in succeeding executive, legislative, and judicial acts and deficiencies acts.

29. Officers and employees on the statutory rolls of executive departments determined by appropriation.—The officers and employees of the United States whose salaries are herein appropriated for are established and shall continue from year to year to the extent they shall be appropriated for by Congress.

Sec. 6, act of Mar. 4, 1915 (38 Stat. 1049), making appropriations for legislative, executive, and judicial expenses.

The statutory roll for each bureau, etc., is fixed annually by the terms of the legislative, executive and judicial act in providing appropriations for respective departments, etc.

30. Authority to employ.—Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognised by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employés, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year. *R. S. 169.*

The clerks and other employees in the several departments at the time of the enactment of the Revised Statutes were enumerated in the sections relating to each: In the War Department, R. S. 215, post, 487. But the officers, clerks, etc., actually appointed or employed are those for whom specific provision is made in the appropriation acts from year to year; the employment or payment of others being forbidden by act of August 5, 1882, post, 33.

Notes of Decisions.

Authority to appoint and remove.—The word "employ," in this section, is regarded as the equivalent of "appoint." (1896) 21 Op. Atty. Gen. 355, 363.

Departmental clerks, messengers, and laborers are to be appointed and removed by the head of the department, when not otherwise provided by statute. This power, being discretionary in character, can not be delegated, but must be exercised by the Secretary or Acting Secretary. (1897) 21 Op. Atty. Gen. 535.

The power of suspension is an incident of the power of removal. Burnap *v.* U. S. (1920), 252 U. S. 512.

The fact that a landscape architect in the Office of Public Buildings and Grounds was, by inadvertence, appointed by the Secretary of War and not by the Chief of Engineers, which latter officer was the proper appointing authority, does not preclude the Chief of Engineers from removing him from office, under the power conferred by implication in R. S. 1799, which gives the Chief of Engineers the power of appointment. Id.

Clerks, etc., who are to be appointed.—The words "clerks of the several classes recognized by law" did not include the new offices created by act Mar. 3, 1875, sec. 2, in bureaus of the Treasury Department, with the designations "deputy comptroller," "deputy commissioner," etc., who were to perform the duties theretofore performed by the chief clerks of the several bureaus, the office of chief clerk therein being omitted in the reorganization of the department by that act; and this section gave no authority to the head of the department to appoint said new officers. But this section included the officers described in this section as "heads of divisions." (1875) 15 Op. Atty. Gen. 3, 5.

The words of this section, "clerks of the several classes recognized by law," are not to be confined in their effect to the four main classes of clerks mentioned in R. S. secs. 163, 167, post, 62, 63. Those sections were reenactments of provisions of sec. 3, act Mar. 3, 1853, which statute also provided separately for chief clerks, and disbursing clerks of the various departments, who, by the uniform practice of the departments, have always been treated as clerks within the meaning of this section. (1896) 21 Op. Atty. Gen. 363.

Employment and compensation of agents and special officers.—The department charged with the execution of a particular authority, business, or duty, which, for its due execution requires services and duties to be performed, not strictly appertaining to or devolved upon any particular officers, or which require agencies of a special discretionary nature, possesses the right to employ proper persons to perform the same, and also the right, when the service or duty is an extra service or duty, to allow the persons so employed a suitable compensation. U. S. *v.* Ripley (1833), 7 Pet. 18, 24, 8 L. Ed. 593; U. S. *v.* Fillebrown (1833), 7 Pet. 28, 44, 8 L. Ed. 596; Gratiot *v.* U. S. (1841), 15 Pet. 336, 370, 10 L. Ed. 759. See U. S. *v.* Macdaniel (1833), 7 Pet. 1, 11, 8 L. Ed. 587.

The head of a department is authorized, in the administration of the duties of his office, to employ agents, and to determine when an exigency arises demanding their employment. U. S. *v.* Potter (C. C. 1879), Fed. Cas. No. 16,076.

The compensation of special officers employed by the head of a department may be fixed by special agreement. U. S. *v.* Cadwalader (D. C. 1835), Fed. Cas. No. 14,706.

Where the accounts of a public officer employed by the head of a department under a special contract are settled, and a

certain rate of compensation allowed, he continues to be entitled to the same rate of compensation until a new agreement is made. Id.

Liability of head of department for act in reliance on subordinate.—The head of a department incurs no personal liability by executing an instrument which should not have been executed if he acts in reliance upon properly chosen subordinates whose ability and good faith he has no reason to question. (1893) 20 Op. Atty. Gen. 573.

Discharge of unnecessary employees.—Neither the statutes nor the rules promulgated cast upon the Government the obligation of employing men on probation or in the permanent service whose services are not needed. Brown *v.* U. S. (1904), 39 Ct. Cl. 255.

The Government does not contract to keep its employees in its service if their services are not needed. Stilling *v.* U. S. (1906), 41 Ct. Cl. 61.

31. Appointment of women.—Women may, in the discretion of the head of any Department, be appointed to any of the clerkships therein authorized by law, upon the same requisites and conditions, and with the same compensations, as are prescribed for men. *R. S. 165.*

32. Secretaries for retired officials.—Hereafter no allowance or compensation for clerks or secretaries of officials of the United States retired from active service shall be authorized. *Act of July 1, 1898 (30 Stat. 644), making appropriations for sundry civil expenses.*

33. Employment according to specific appropriations.—That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall after the first day of October next be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall hereafter be employed at the seat of government in any executive department or subordinate bureau or office thereof or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services. * * * *Sec. 4, act of Aug. 5, 1882 (22 Stat. 255), making appropriations for legislative, executive and judicial expenses.*

Previous provisions similar, to some extent, to those of this section, but relating to the War Department only, contained in sec. 1, act June 20, 1874 (18 Stat. 101), may be regarded as superseded by these provisions.

Violation of this section was made punishable by sec. 5, act of Aug. 23, 1912, post, 37.

Money appropriated for services in any executive department is not to be used in the distribution of any publication, except maps, weather reports, and weather cards issued by an executive department, but such work is required to be done at the Government Printing Office, by sec. 8, act Aug. 23, 1912, post, 192.

Payments for official or clerical compensation, from appropriations for contingent, incidental, or miscellaneous purposes, were also forbidden by R. S. 3682, post, 271.

The detail of employees of the executive departments and other Government establishments to the office of the President for temporary assistance, from time to time, was authorized by act of Mar. 1, 1919, post, 45.

See notes to 36, post.

34. Employment restricted to statutes.—That the executive officers of the Government are hereby prohibited from employing any clerk, agent, engineer,

draughtsman messenger watchman, laborer, or other employee, in any of the executive departments in the city of Washington, or elsewhere beyond provision made by law. *Sec. 5, act of Aug. 15, 1876 (19 Stat. 169).*

35. Voluntary service.—* * * Nor shall any Department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. * * * *R. S. 3679 as amended by sec. 3, act of Feb. 27, 1906 (34 Stat. 49).*

A similar provision is found in the urgent deficiency appropriation act of May 1, 1884 (23 Stat. 17).

Notes of Decisions.

Purpose.—The language here used (referring to the similar provision of the act of May 1, 1884) indicates that the Government shall not, except in the emergencies mentioned, place itself under obligations to anyone. The principle condemned is the same, whether the party rendering the service does so without any charge or because paid by other parties. The Government is forbidden to accept the service in either case. U. S. *v.* San Jacinto Tin Co. (1888), 125 U. S. 273, 305.

Retired officer.—A retired Army officer, even though receiving upwards of $2,500 per annum, may be employed as superintendent of an Indian school or agency, where no additional compensation is allowed, without contravening the provisions of this act. (1913) 30 Op. Atty. Gen. 51.

The words "voluntary service," as employed in the above act, were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. Id.

36. Details for duty in the District of Columbia.—* * * and after the first day of October next section one hundred and seventy-two of the Revised Statutes, and all other laws and parts of laws inconsistent with the provisions of this act, and all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, or other employees at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be, and they are hereby, repealed; and thereafter all details of civil officers, clerks, or other subordinate employees from places outside of the District of Columbia for duty within the District of Columbia, except temporary details for duty connected with their respective offices, be, and are hereby, prohibited; and thereafter all moneys accruing from lapsed salaries, or from unused appropriations for salaries, shall be covered into the Treasury: * * * *Sec. 4, act of Aug. 5, 1882 (22 Stat. 255).*

The transfer of clerks or other employees in the classified service from one department to another was restricted by sec. 5, act of June 22, 1906 (34 Stat. 449) post 48.

A prohibition of the detail of clerks or other employees from the executive departments, etc., to the Civil Service Commission, for the performance of duty in the District of Columbia, accompanies the appropriations for the commission in recent legislative, executive, and judicial appropriation acts, limited, in each such act, to the particular fiscal year.

Notes of Decisions.

Purpose of section.—The purpose of Congress in these provisions was to deprive the officers of the Government of all authority to employ at the "seat of government" "civil officers, clerks, and other employees," except such as might be specifically appropriated for. Plummer *v.* U. S. (1889) 24 Ct. Cl. 517.

The purpose of this section was to prevent the expenditure of public money in the employment of subordinate persons at the seat of government out of appropriations made for general purposes, so as to insure the efficient control by Congress, not only over the amounts of money expended but also over the number and char-

...ent of subordinate officers and employees in the service of the United States employed at the seat of government. (1908) 26 Op. Atty. Gen. 522.

The section in no wise limits the discretion of the heads of the several executive departments as to the character of the work which shall be required of their several employees, but is intended to prevent the employment of subordinate officers or employees at the seat of government without specific appropriations for their payment. (1908) 26 Op. Atty. Gen. 522.

Approval of promotions and certifications by vacancies by Civil Service Commission.—There is nothing in the civil service act of January 16, 1883, secs. 2, 6, 7 (sec. 7 infra, 181), nor in this section, which prohibits the Civil Service Commission from approving a promotion, otherwise unobjectionable, where it is informed that the appointing officer expects or intends to assign to the appointee duties not included within the designation given to his position in the specific appropriation providing for his compensation. (1908) 26 Op. Atty. Gen. 522.

Neither is there anything in either of those acts preventing the certification by the commission of eligibles for a vacancy from registers not designating functions of the nature suggested by the title of the position given in the specific appropriation providing for the compensation of the employee. Id.

Employment of substitutes for clerks, etc.—The employment of substitutes for clerks, etc., in the departments, who are temporarily absent, from sickness or other unavoidable cause, would be unauthorized where an additional expenditure would be requisite for their employment, and there is no specific appropriation therefor. (1890) 19 Op. Atty. Gen. 507, 508.

Rights of persons employed without specific appropriation.—These prohibitions against the employment of persons in Washington beyond specific appropriations therefor are binding on the heads of departments and persons employed therein alike. An innocent employee is not bound to know that his superior is properly disbursing a fund committed to his discretion, but is bound to know that his own employment is authorized by law and within the discretion of his superior. Plummer *v.* U. S. (1889), 24 Ct. Cl. 517.

A deputy auditor of the Treasury detailed to disburse a fund under the administration of the Navy Department, and performing that service in Washington, is prohibited by this act, as well as by R. S. sec. 1765, post, 69, from receiving compensation additional to his salary. Whitaker *v.* U. S. (1892), 27 Ct. Cl. 524.

37. Penalty for employment or detail contrary to law.—That any person violating section four of the legislative, executive, and judicial appropriation Act approved August fifth, eighteen hundred and eighty-two (Statutes at Large, volume twenty-two, page two hundred and fifty-five), shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year. *Sec. 5, act of Aug. 23, 1912 (37 Stat. 414), making appropriations for legislative, executive, and judicial expenses.*

38. Details to the District of Columbia provided by law.—Hereafter it shall be unlawful to detail civil officers, clerks, or other subordinate employees who are authorized or employed under or paid from appropriations made for the military or naval establishments, or any other branch of the public service outside of the District of Columbia, except those officers and employees whose details are now especially provided by law, for duty in any bureau, office, or other division of any Executive Department in the District of Columbia, except temporary details for duty connected with their respective offices. *Sec. 6, act of June 22, 1906 (34 Stat. 449), making appropriations for legislative, executive, and judicial expenses.*

39. Details to the Civil Service Commission.—No detail of clerks or other employees from the executive departments or other Government establishments in the District of Columbia, to the Civil Service Commission or its field force, excepting the fourth district, for the performance of duty in the District of Columbia, shall be made for or during the fiscal year 1922. * * * *Act of Mar. 3, 1911 (41 Stat. 1362), making appropriations for legislative, executive, and judicial expenses.*

40. Clerks and messengers and laborers at military headquarters.—* * * *Provided*, That said clerks, messengers, and laborers shall be employed and assigned by the Secretary of War to the offices and positions in which they are to serve: *Provided further*, That no clerk, messenger, or laborer at headquarters of tactical divisions, military departments, brigades, service schools, and office of the Chief of Staff shall be assigned to duty in any bureau of the War Department. *Act of June 5 1920 (41 Stat. 955), making appropriations for the support of the Army.*

Similar provision appears in previous appropriation acts.

40½. Civilian employees for tank units.—For payment of the necessary civilian employees to assist in handling the clerical work in the office of the Chief of Tank Corps, the various Tank Corps organization headquarters, and Tank Corps schools; and for the payment of the necessary mechanics to assist in repairing and preserving tanks in the hands of Tank Corps units, $79,000. *Act of June 5, 1920 (41 Stat. 974), making appropriations for the support of the Army: Tank Service.*

41. Clerks, etc., of the office of the General Staff.—It shall not hereafter be lawful to detail clerks or other civilian employees authorized for the Office of the General Staff for duty, temporary or otherwise, in any office or bureau of the War Department at Washington, District of Columbia, or to detail clerks or other employees from the War Department for service in the Office of the General Staff. *Act of June 22, 1906 (34 Stat. 418), making appropriations for legislative, executive and judicial expenses.*

The clerks and messengers above referred to and provided for were first authorized by the act of Aug. 6, 1894 (28 Stat. 236); they replace the force of "General service clerks and messengers" created by the act of July 29, 1886 (24 Stat. 167), but discontinued by the act of Aug. 6, 1894 (28 Stat. 236). Their numbers and compensation are determined in the annual acts of appropriation for the support of the Army.

42. Details for service outside the District of Columbia.—That in expending appropriations made in this Act persons in the classified service in the District of Columbia shall not be detailed for service outside of the District of Columbia except for or in connection with work pertaining directly to the service at the seat of government of the department or other Government establishment from which the detail is made: *Provided*, That nothing in this section shall be deemed to apply to the investigation of any matter or the preparation, prosecution, or defense of any suit by the Department of Justice. *Sec. 5, act of Mar. 3, 1921, (41 Stat. 1308), making appropriations for legislative, executive, and judicial expenses.*

Similar provision appears in previous appropriation acts.

43. Details within a department.—Each head of a Department may, from time to time, alter the distribution among the various bureaus and offices of his Department, of the clerks and other employees allowed by law, except such clerks or employees as may be required by law to be exclusively engaged upon some specific work, as he may find it necessary and proper to do, but all details hereunder shall be made by written order of the head of the Department, and in no case be for a period of time exceeding one hundred and twenty days: *Provided*, That details so made may, on expiration, be renewed from time to time by written order of the head of the Department, in each particular case, for periods of not exceeding one hundred and twenty days. All details hereto-

fore made are hereby revoked, but may be renewed as provided herein. *Sec. 166, R. S., as amended by sec. 3, act of May 28, 1896 (29 Stat. 179).*

This section, as enacted in the Revised Statutes, authorized each head of a department to alter the distribution, among the bureaus and offices of his department, of the clerks allowed by law, "as he may find it necessary and proper to do."

Notes of Decisions.

Power of head of department as dependent on appropriations.—It is competent for a head of a department to alter the disposition among the various bureaus and offices of his department of the clerks allowed by law, as he may find it necessary and proper to do, taking care that in no case shall any such clerk be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such payment is specifically provided for in the law granting the appropriation. (1894) 20 Op. Atty. Gen. 750.

44. Details from the Government Printing Office.—* * * Hereafter no employee of the Government Printing Office shall be detailed to duties not pertaining to the work of public printing and binding in any executive department or other government establishment unless expressly authorized by law. *Sec. 1, act of June 25, 1910 (36 Stat. 770), making appropriations for sundry civil expenses.*

45. Detail of civilian employees to the executive office.—* * * *Provided,* That employees of the executive departments and other establishments of the executive branch of the Government may be detailed from time to time to the office of the President of the United States for such temporary assistance as may be necessary. *Act of May 29, 1920 (41 Stat. 640), making appropriations for legislative, executive and judicial expenses.*

Similar provision appears in previous appropriation acts.

46. Detail of employees to administer oaths.—The Secretary of War is authorized to detail one or more of the employees of the War Department for the purpose of administering the oaths required by law in the settlement of officers' accounts for clothing, camp and garrison equipage, quartermaster's stores, and ordnance, which oaths shall be administered without expense to the parties taking them. *R. S. 225.*

Provisions applicable to all the departments, as to administration of oaths by officers and clerks, were made by R. S. 183, and the statutes referred to under that section, post, 97.

47. Distribution of employees who care for buildings.—The Superintendent of the State, War, and Navy Department Building may from time to time alter the distribution among the various office buildings under his direction and control of the employees allowed by law as he may find it necessary and proper to do. *Act of July 8, 1918 (40 Stat. 831).*

48. Transfers between departments.—It shall not be lawful hereafter for any clerk or other employee in the classified service in any of the Executive Departments to be transferred from one Department to another Department until such clerk or other employee shall have served for a term of three years in the Department from which he desires to be transferred. *Sec. 5, act of June 22, 1906 (34 Stat. 449), making appropriations for legislative, executive, and judicial expenses.*

Notes of Decisions.

Departments, offices, clerks, etc., within provision.—This provision was not intended to apply to the entire classified service, for, if it were, the words "in any of the executive departments" would be altogether superfluous. Only the subordinates of the several departments enumerated in R. S. 158, were to be included. (1907) 26 Op. Atty. Gen. 209.

It is lawful therefore for the Civil Service Commission to consent to the transfer of a classified employee from an inde-

pendent office of the Government to a department or another independent office or bureau, although such employee may not have served three years in the office or bureau from which he seeks transfer, as is required by this section, of clerks and employees of the executive departments. Id.

The "field force" of an executive department—that is, its classified employees under its immediate control, as inspectors, examiners, and agents, though employed usually or invariably away from the seat of Government—are governed by this provision with regard to transfers. Id.

The provision is not applicable to the Philippine Commission or to the Isthmian Canal Commission. Id.

The three-year limitation as to transfers in the executive departments, prescribed by this section, does not apply to employees and subordinates in post offices, pension agencies, customhouses, ordnance establishments, subtreasuries, navy yards, and quartermaster's establishments. (1907) 26 Op. Atty. Gen. 254.

The language of that provision imports that the persons to which it applies are actually "in" the departments at the seat of Government, or that the performance of duties away from such departments is by direct orders from and under supervision by those departments. Id.

Where a branch of the civil service of the Government under the supervision of an executive department may properly be regarded as a distinct and independent office, it is not in the department within the meaning of this statute; but clerks and employees not in any such independent offices, and under the immediate control of the several departments, are covered by the statute, although usually or invariably away from the seat of Government. (1909) 27 Op. Atty. Gen. 421, 425.

The rule laid down by Attorney General Devens in (1877) 15 Op. Atty. Gen. 262, 267, as to what bureaus and offices may be deemed bureaus and offices in any of the executive departments, approved and held applicable. (1907) 26 Op. Atty. Gen. 254.

Classified employees on the rolls of the Forest Service, Department of Agriculture, in Washington, are required by this section to serve three years before their transfer to other departments is permissible. (1909) 27 Op. Atty. Gen. 421. And see (1908) 27 Op. Atty. Gen. 100.

Extension of requirement to remainder of classified services.—The requirement of three years' service before transfer from one department to another was extended by the President, by Civil Service Rule X, sec. 8, clause (*a*), to transfers within the remainder of the classified service, with the proviso that in the case of a transfer not between one executive department and another at Washington, the Civil Service Commission may waive the three-year limit of time, under certain given conditions. (1908) 27 Op. Atty. Gen. 100.

Time when transfer becomes effective.—The transfer of a clerk's name from the roll of the Department of Agriculture, Forest Service, in Washington, to that of the field force of the same service, is effective from the date of the transfer, notwithstanding such employee may not actually have entered upon the discharge of her duties as a member of that force. (1908) 27 Op. Atty. Gen. 100.

49. Transfer of employees between executive departments and independent establishments.—That section five of the Act of June twenty-second, nineteen hundred and six, prohibiting the transfer of employees from one executive department to another, shall apply with equal force and effect to the transfer of employees from executive departments to independent establishments and vice versa and to the transfer of employees from one independent establishment to another: *Provided*, That the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the purposes of this section. *Sec. 6, act of Oct. 6, 1917 (40 Stat. 383).*

50. Promotions, reductions, or removals, according to efficiency ratings.—The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions,

demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided*, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

Any person knowingly violating the provisions of this section shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year. *Sec. 4, act of Aug. 23, 1912 (37 Stat. 413), making appropriations for legislative, executive and judicial expenses.*

Reports as to the establishment and maintenance of the system were required to be made by the Commission by provisions of sec. 1, act Mar. 4, 1913.

The operation of the executive order of Mar. 28, 1912, for the annual submission to the Civil Service Commission of an outline of the organization of the Government, was suspended until otherwise provided by law, by a provision of sec. 1, act July 16, 1914.

A Division of Efficiency, with a chief therefor, was created by a provision of act Mar. 4, 1915, sec. 1; and said Division of Efficiency was made an independent establishment, to be known as the Bureau of Efficiency, by a provision of act Feb. 28, 1916, sec. 1, and the duties imposed upon the Civil Service Commission by this section were transferred to said Bureau of Efficiency by a further provision of said act, post, 53, 54.

Appropriations are not to be used to pay accountants or other experts for inaugurating new methods of transacting public business, unless specific provisions are made therefor, by sec. 5, act Apr. 6, 1914, post, 176.

See R. S. 158; and par. 3, sec. 6, act of Jan. 16, 1883 (22 Stat. 405).

Notes of Decisions.

Scope.—The above section does not prohibit the head of a department from conforming the salary of honorably discharged soldiers and sailors to the grade or character of work they may be called upon to perform. (1913) 30 Op. Atty. Gen. 167.

51. Retention of former soldiers, etc.—* * * *Provided*, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors. *Sec. 3, act of Aug. 15, 1876 (19 Stat. 169), making appropriations for sundry civil expenses.*

Notes of Decisions.

Preference of honorably discharged soldiers, sailors, etc.—The preference of honorably discharged soldiers and sailors for appointments to civil offices under this section and the civil service act of Jan. 16, 1883, sec. 7, ante, 18, is limited to cases in which such persons are "equally qualified" and does not authorize the appointment of incompetent clerks. Keim v. U. S. (1900), 20 Sup. Ct. 574, 575, 177 U. S. 290, 44 L. Ed. 744; Id. (1898), 33 Ct. Cl. 174; Medkirk v. U. S. (1909), 44 Ct. Cl. 469.

The preference of ex-soldiers or ex-sailors, or the widows and orphans of deceased soldiers and sailors, given by R. S. sec. 1754, ante, 22, and extended by this section and by the civil service act of Jan. 16, 1883, sec. 7, ante, 18, does not entitle them to preference over other persons, when reductions in salary and rank are to be made, even though their qualifications are equal. (1909) 27 Op. Atty. Gen. 490.

52. Removal on charges.—That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the

person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: * * * The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with. *Sec. 6, act of Aug. 24, 1912 (37 Stat. 555).*

Notes of Decisions.

Regulation restricting removal.—The order of the President of July 27, 1897, prohibiting removals from positions subject to competitive examination except upon written charges and notice, is an administrative order, regulating the conduct of the President's subordinates; but it has not the force of law, and confers upon an incumbent no right to hold office indefinitely, and no right of which a court of equity can take cognizance. Carr *v.* Gordon (C. C. 1897), 82 Fed. 373.

Civil-service rules promulgated by the Executive, so far as they deal with the executive right of removal, are but the expression of the will of the President, and are regulations imposed by him on his own action, or that of heads of departments appointed by him. They do not give employees within the classified service such tenure as to confer on them a property right in the office or place. Morgan *v.* Nunn (C. C. 1898), 84 Fed. 551.

Amendment or repeal.—The rules regulating the power of removal may be repealed, altered, or amended at the pleasure of the President. (1907) 26 Op. Atty. Gen. 363.

Suspension.—A regular and duly qualified employee in the classified civil service of the United States is entitled to the compensation attached by law to his position during the period of his wrongful suspension by a subordinate officer. U. S. *v.* Wickersham (1906), 26 Sup. Ct. 469, 472, 201 U. S. 390, 50 L. Ed. 798.

Suspension without pay is to give the officer an opportunity to make a defense to the charge, instead of being subjected to immediate dismissal. Ruggles *v.* U. S. (1910), 45 Ct. Cl. 86.

An officer wrongfully suspended by one having no authority to do so is entitled to the compensation provided by law during the period of suspension, but where he was removed by one authorized to do so he can not claim his pay, though he was thereafter reinstated by the Civil Service Commission. Miller *v.* U. S. (1910), 45 Ct. Cl. 509.

Power of removal.—A person in the classified civil service can not be deprived of his status in the service except by removal as provided in the above section, and it is for the head of a department, and not the Civil Service Commission, to determine when there exists proper cause for removal. (1913) 30 Op. Atty. Gen. 70.

53. Bureau of Efficiency established.—* * * *Provided*, That hereafter the Division of Efficiency of the Civil Service Commission shall be an independent establishment and shall be known as the Bureau of Efficiency; * * *. *Act of Feb. 28, 1916 (39 Stat. 15).*

The Division of Efficiency, mentioned in this section was established by a provision of act Mar 4, 1915, sec. 1. See notes to 50, ante.

54. Duties of the Bureau of Efficiency.—* * * *And provided further*, That the duties relating to efficiency ratings imposed upon the Civil Service Commission by section four of the legislative, executive, and judicial appropriation

Act approved August twenty-third, nineteen hundred and twelve, and the duty of investigating the administrative needs of the service relating to personnel in the several executive departments and independent establishments, imposed on the Civil Service Commission by the legislative, executive, and judicial appropriation Act approved March fourth, nineteen hundred and thirteen, are transferred to the Bureau of Efficiency. *Act of Feb. 28, 1916 (39 Stat. 15).*

To enable the Bureau of Efficiency, authorized by the Urgent Deficiency Appropriation Act approved February 28, 1916, to establish and maintain a system of efficiency ratings, to investigate administrative needs of the service relating to personnel in the several executive departments and independent establishments, required by the Legislative, Executive, and Judicial Appropriation Acts for the fiscal years 1913 and 1914, respectively, and to investigate duplication of statistical and other work and methods of business in the various branches of the Government service; * * *. *Act of Mar. 1, 1919 (40 Stat. 1223).*

Not later than June 30, 1919, all books, records, and papers relating to the investigations of duplication of statistical and other work and to the work of the statistical clearing house of the Central Bureau of Planning and Statistics shall be transferred to the Bureau of Efficiency. *Act of July 11, 1919 (41 Stat. 36), making appropriations to supply deficiencies.*

The Bureau of Efficiency has been required by the act of Mar. 3, 1917 (39 Stat. 1080–1081), making appropriations for legislative, executive, and judicial expenses, to investigate (1) methods of auditing claims and accounting for receipts and disbursements, (2) methods of the Civil Service Commission, (3) rates of pay of employees of State and municipal governments and commercial institutions, (4) classification, salary, and efficiency of employees of the Government in the District of Columbia.

By sec. 3, act of Nov. 4, 1919 (41 Stat. 343), "the Bureau of Efficiency is directed to investigate the scope and character of statistics needed by the Government, and the methods of collecting, compiling, and presenting statistical information by the several executive departments and independent Government establishments and submit to Congress a report of its findings together with such recommendations as it deems proper."

55. **Investigation of duplication of work.**—The Bureau of Efficiency shall investigate duplication of service in the various executive departments and establishments of the Government, including bureaus and divisions, and make a report to the President thereon, and the President is hereby authorized, after such report shall have been made to him, wherever he finds such duplications to exist to abolish the same. Report of the action taken hereunder shall be made to Congress at its next regular session. *Sec. 8, act of Mar. 3, 1917 (39 Stat. 1122).*

56. **Access to records of departments by the Bureau of Efficiency.**—Officers and employees of the executive departments and other establishments shall furnish authorized representatives of the Bureau of Efficiency with all information that the bureau may require for the performance of the duties imposed on it by law, and shall give such representatives access to all records and papers that may be needed for that purpose. *Act of Mar. 3, 1917 (39 Stat. 1081), making appropriations for legislative, executive and judicial expenses.*

57. **Time study.**—That no part of the appropriations made in this bill shall be available for the salary or pay of any officer, manager, superintendent, foreman, or other person having charge of the work of any employee of the United States Government while making or causing to be made with a stop watch, or other time-measuring device, a time study of any job of any such employee between the starting and completion thereof, or of the movements of any such

employee while engaged upon such work; * * * *Act of June 5, 1920 (41 Stat. 975), making appropriations for the support of the Army.*

* * * *Provided*, That no part of the appropriations made in this Act shall be available for the salary or pay of any officer, manager, superintendent, foreman, or other person having charge of the work of any employee of the United States Government while making or causing to be made with a stop watch or other time-measuring device a time study of any such employee between the starting and completion thereof, or of the movements of any such employee while engaged upon such work. *Sec. 4, act of Mar. 3, 1921 (41 Stat. 1352), making appropriations for fortifications, etc.*

For restriction upon the use of recording clocks, see post, 183.

58. Redistribution of functions as an emergency measure.—That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record: *Provided*, That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace, or at such earlier time as the President may designate: *Provided further*, That the termination of this Act shall not affect any act done or any right or obligation accruing or accrued pursuant to this Act and during the time that this Act is in force: *Provided further*, That the authority by this Act granted shall be exercised only in matters relating to the conduct of the present war. *Sec. 1, act of May 20, 1918 (40 Stat. 556).*

That should the President, in redistributing the functions among the executive agencies as provided in this Act, conclude that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper. *Sec. 5, act of May 20, 1918 (40 Stat. 557).*

That all laws or parts of laws conflicting with the provisions of this Act are to the extent of such conflict suspended while this Act is in force.

Upon the termination of this Act all executive or administrative agencies, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this Act to the contrary notwithstanding. *Sec. 6, act of May 20, 1918 (40 Stat. 557).*

59. Transfer of personnel.—That in carrying out the purposes of this Act the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, office, or officer to another, to transfer the personnel

thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto. *Sec. 2, act of May 20, 1918 (40 Stat. 556).*

60. **Expenditure of appropriations.**—That for the purpose of carrying out the provisions of this Act, any moneys heretofore and hereafter appropriated for the use of any executive department, commission, bureau, agency, office, or officer shall be expended only for the purposes for which it was appropriated under the direction of such other agency as may be directed by the President hereunder to perform and execute said function. *Sec. 4, act of May 20, 1918 (40 Stat. 557).*

61. **Salaries sanctioned by law.**—No money shall be paid from the Treasury to any person acting or assuming to act as an officer, civil, military, or naval, as salary, in any office when the office is not authorized by some previously existing law, unless such office is subsequently sanctioned by law. *R. S. 1760.*

Payments for official or clerical compensation from appropriations for contingent, incidental, or miscellaneous purposes were also forbidden by R. S. 3682, post, 271.

The employment by the executive officers of the Government of any clerk, etc., in the executive departments at Washington or elsewhere, beyond provision made by law, was forbidden by sec. 5, act of Aug. 15, 1876, ante, 34.

The officers, clerks, etc., to be employed in the executive departments, were limited to the compensation and number for which specific provision is made by appropriations each year, by sec. 4, act of Aug. 5, 1882, ante, 34.

Notes of Decisions.

Right to salary.—Where the words of a statute fixing the compensation of a public officer are loose and obscure and admit of two meanings, they should be construed in favor of the officer. Moore v. U. S. (1868), 4 Ct. Cl. 139.

If an appointment be contrary to law, the party can not recover for services rendered. Weeks v. U. S. (1886), 21 Ct. Cl. 124.

It is immaterial, so far as compensation is concerned, whether an employment constitutes an office as defined in the Constitution, provided the appointment was made lawfully. Saunders v. U. S. (1886), 21 Ct. Cl. 408.

De facto officer.—The legal right of an officer to the salary of an office depends upon his being de jure an officer holding or entitled to hold the office. Belcher v. U. S. (1899), 34 Ct. Cl. 400; Morey v. U. S. (1900), 35 Ct. Cl. 603; Jackson v. U. S. (1906), 42 Ct. Cl. 39.

De facto office.—There may be a de facto officer, but never a de facto office. (1889) 19 Op. Atty. Gen. 443, 449.

Increase or reduction of salary.—A salary established by statute can neither be increased nor diminished by executive officers. Dyer v. U. S. (1885), 20 Ct. Cl. 166; Andrews v. U. S. (1911), 47 Ct. Cl. 51.

Recovery of money paid as salary.—Where one claiming to be an officer rendered no service and held no official relation with the Government, money paid him for salary may be recovered back. Miller v. U. S. (1884), 19 Ct. Cl. 338.

62. **Four classes of clerks.**—The clerks in the Departments shall be arranged in four classes, distinguished as the first, second, third, and fourth classes. *R. S. 163.*

Provisions for classification of other clerks and employees in the civil service were made by sec. 6 of the civil service act of Jan. 16, 1883.

Notes of Decisions.

Effect of section on previous provisions.—The limitation of the proviso annexed to said act Mar. 3, 1853, sec. 3, that the clerks, when distributed and arranged according to that section, should constitute the whole of the clerical force of the departments named, was confined to such clerks as are arranged and distributed into the four classes. (1853) 6 Op. Atty. Gen. 42, 47.

Repeal of provisions of R. S. sec. 164, for appointments to classes on examinations.—R. S. sec. 164, which provided for appointments to the classes designated in this section upon examination, was repealed by

implication by the civil service act of Jan. 16, 1883. (1885), 18 Op. Atty. Gen. 245.

Clerks included in classified service.—A soldier enlisted in the "general service" of the Army, for clerical duty at headquarters, and transferred to the Adjutant General's Office, was not in the classified service of the War Department, within a rule of that department allowing a person separated from the "classified service" thereof, through no delinquency or misconduct, to be certified for reinstatement. (1890) 19 Op. Atty. Gen. 552.

63. Salaries of various employes.—The annual salaries of clerks and employees in the Departments, whose compensation is not otherwise prescribed, shall be as follows:

First. To clerks of the fourth class, eighteen hundred dollars.

Second. To clerks of the third class, sixteen hundred dollars.

Third. To clerks of the second class, fourteen hundred dollars.

Fourth. To clerks of the first class, twelve hundred dollars.

Fifth. To the women employed in duties of a clerical character, subordinate to those assigned to clerks of the first class, including copyists and counters, or temporarily employed to perform the duties of a clerk, nine hundred dollars.

Sixth. To messengers, eight hundred and forty dollars.

Seventh. To assistant messengers, seven hundred and twenty dollars.

Eighth. To laborers, seven hundred and twenty dollars.

Ninth. To watchmen, seven hundred and twenty dollars. *R. S. 167.*

* * * *Provided further,* That none of the funds appropriated or made available under this Act shall be used for the payment of any salary in excess of $12,000 per annum to any civilian employee in the War Department: * * * *Act of June 5, 1920 (41 Stat. 949), making appropriations for the support of the Army: Contingencies of the Army.*

That the pay of telephone-switchboard operators, assistant messengers, firemen, watchmen, laborers, and charwomen provided for in this Act, except those employed in mints and assay offices, unless otherwise specially stated, shall be as follows: For telephone-switchboard operators, assistant messengers, firemen, and watchmen, at the rate of $720 per annum each; for laborers, at the rate of $660 per annum each; assistant telephone-switchboard operators, at the rate of $600 each, and for charwomen, at the rate of $240 per annum each. *Sec. 2, act of Mar. 3, 1921 (41 Stat. 1307), making appropriations for legislative, executive, and judicial expenses.*

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employees appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employees, respectively, until otherwise fixed by an annual rate of appropriation or other law, by sec. 6, act of July 16, 1914 (38 Stat. 809).

By sec. 9, act of Mar. 1, 1919 (40 Stat. 1269), a Joint Commission on Reclassification of Salaries was authorized, which made a thorough study of the work and pay of each employee and rendered its report in March, 1920.

Notes of Decisions.

Effect of appropriation of less amount.—A laborer in an executive department held entitled to the increased compensation fixed by Pub. Res. 18, Aug. 15, 1856 (11 Stat. 145), and not limited to a less amount provided by the current appropriation. Graham *v.* U. S. (1865), 1 Ct. Cl. 380.

Effect of suspension.—A clerk illegally suspended is entitled to the salary of his office during the period of his suspension. Lellmann *v.* U. S. (1902), 37 Ct. Cl. 128.

A dismissal on charges preferred can not be reviewed by the judiciary. Id.

An employee of the Government can not recover compensation, where the head of a department, having power to discharge, furloughed him without pay. Small *v.* U. S. (1909), 45 Ct. Cl. 13.

64. Translators at the Army Service Schools.—Not exceeding $400 per month may be used for the payment of $100 per month each to a translator at the Army Service Schools, Fort Leavenworth, Kansas, Feld Artillery School, Fort Sill, Oklahoma, the Infantry School, Camp Benning, Georgia, and the Cavalry School, Fort Riley, Kansas, to be appointed by the commandants of the schools named, with the approval of the Secretary of War, $100,000. *Act of June 5, 1920 (41 Stat. 950), making appropriations for the support of the Army: United States Service Schools.*

65. Computation of annual and monthly salaries.—Hereafter, where the compensation of any person in the service of the United States is annual or monthly the following rules for division of time and computation of pay for services rendered are hereby established: Annual compensation shall be divided into twelve equal installments, one of which shall be the pay for each calendar month; and in making payments for a fractional part of a month one-thirtieth of one of such installments, or of a monthly compensation, shall be the daily rate of pay. For the purpose of computing such compensation and for computing time for services rendered during a fractional part of a month in connection with annual or monthly compensation, each and every month shall be held to consist of thirty days, without regard to the actual number of days in any calendar month, thus excluding the thirty-first of any calendar month from the computation and treating February as if it actually had thirty days. Any person entering the service of the United States during a thirty-one day month and serving until the end thereof shall be entitled to pay for that month from the date of entry to the thirtieth day of said month, both days inclusive; and any person entering said service during the month of February and serving until the end thereof shall be entitled to one month's pay, less as many thirtieths thereof as there were days elapsed prior to date of entry: *Provided*, That for one day's unauthorized absence on the thirty-first day of any calendar month one day's pay shall be forfeited. *Sec. 6, act of June 30, 1906 (34 Stat., 763), making appropriations for sundry civil expenses.*

A previous similar but less specific provision relating to the same subject, made by sec. 4, act of Apr. 28, 1904 (33 Stat. 513), may be regarded as superseded by this section.

Similar rules for computation of the compensation of any person in the military service of the United States were prescribed by a provision of act June 12, 1906, post, 1599.

Notes of Decisions.

Computation of increased pay.—Where an officer's salary is increased on the 14th of February, he is entitled to be paid for the balance of February as if the month contained 30 days, to wit, for 17 days. Jacobs v. U. S. (1906), 41 Ct. Cl. 452.

Performance of part of duties.—There can be no implied contract by which an appointee undertakes to perform less than the whole duty, and to receive less than the full pay enacted by Congress. Stocksdale v. U. S. (D. C. 1889), 39 Fed. 62.

66. Bonus of $240.—That all civilian employees of the Governments of the United States and the District of Columbia who receive a total of compensation at the rate of $2,500 per annum or less, except as otherwise provided in this section, shall receive, during the fiscal year ending June 30, 1922, additional compensation at the rate of $240 per annum: *Provided*, That such employees as receive a total of annual compensation at a rate more than $2,500 and less than $2,740 shall receive additional compensation at such rate per annum as may be necessary to make their salaries, plus their additional compensation, at the rate of $2,740 per annum, and no employee shall receive additional

compensation under this section at a rate which is more than 60 per centum of the rate of the total annual compensation received by such employee: *Provided further*, That the increased compensation at the rate of $240 per annum for the fiscal year ending June 30, 1921, shall not be computed as salary in construing this section: *Provided further*, That where an employee in the service on June 30, 1920, has received during the fiscal year 1921, or shall receive during the fiscal year 1922 an increase of salary at a rate in excess of $200 per annum, or where an employee, whether previously in the service or not, has entered the service since June 30, 1920, whether such employee has received an increase in salary or not, such employees shall be granted the increased compensation provided herein only when and upon the certification of the person in the legislative branch or the head of the department or establishment employing such persons of the ability and qualifications personal to such employees as would justify such increased compensation.

The provisions of this section shall not apply to the following: * * * employees whose pay is adjustable from time to time through wage boards or similar authority to accord with the commercial rates paid locally for the same class of service; employees of the Panama Canal on the Canal Zone; employees of the Alaskan Engineering Commission in Alaska; employees paid from lump-sum appropriations in bureaus, divisions, commissions, or any other governmental agencies or employments created by law since January 1, 1916, except employees of * * * the Bureau of War Risk Insurance, who shall be included, * * * The provisions of this section shall not apply to employees whose duties require only a portion of their time, except charwomen, who shall be included; employees whose services are utilized for brief periods at intervals; persons employed by or through corporations, firms, or individuals acting for or on behalf of or as agents of the United States or any department or independent establishment of the Government of the United States in connection with construction work or the operation of plants; employees who receive a part of their pay from any outside sources under cooperative arrangements with the Government of the United States or the District of Columbia; employees who serve voluntarily or receive only a nominal compensation, and employees who may be provided with special allowances because of their service in foreign countries. The provisions of this section shall not apply to employees of the railroads, express companies, telegraph, telephone, marine cable, or radio system or systems taken over by the United States, and nothing contained herein shall be deemed a recognition of the employees of such railroads, express companies, telegraph, telephone, marine cable, or radio system or systems as employees of the United States.

Section 6 of the Legislative, Executive, and Judicial Appropriation Act approved May 10, 1916, as amended by the Naval Appropriation Act approved August 29, 1916, shall not operate to prevent anyone from receiving the additional compensation provided in this section who otherwise is entitled to receive the same.

Such employees as are engaged on piecework, by the hour, or at per diem rates, if otherwise entitled to receive the additional compensation, shall receive the same at the rate to which they are entitled in this section when their fixed rate of pay for the regular working hours and on the basis of three hundred and thirteen days in the said fiscal year would amount to $2,500 or less: *Provided*, That this method of computation shall not apply to any per diem employees regularly paid a per diem for every day in the year.

So much as may be necessary to pay the additional compensation provided in this section to employees of the Government of the United States is appropriated out of any money in the Treasury not otherwise appropriated.

* * * * * * *

Reports shall be submitted to Congress on the first day of the next regular session showing for the first four months of the fiscal year the average number of employees in each department, bureau, office, or establishment receiving the increased compensation at the rate of $240 per annum and the average number by grades receiving the same at each other rate. *Sec. 6, act of Mar. 3, 1921 (41 Stat. 1308–1310), making appropriations for legislative, executive, and judicial expenses.*

* * * *Provided further*, That no employee of the Federal Government shall, for services in the Philippine Islands, receive additional compensation under this section at a rate which is more than 20 per centum of the rate of the total annual compensation received by such employee. *Sec. 2, act of Nov. 4, 1919 (41 Stat. 348), making appropriations to supply deficiencies, amending sec. 7, act of Mar. 1, 1919 (40 Stat. 1267).*

Similar provisions appear in previous appropriation acts.

Bonuses of 10 per cent and 5 per cent were provided by sec. 7, act of Mar. 3, 1917 (39 Stat. 1121). Sec. 6, act of July 9, 1918 (40 Stat. 814), and the Joint Resolution of July 8, 1918 (40 Stat. 844), authorized a bonus of $120. This bonus was increased to $240 by sec. 7, act of March 1, 1919 (40 Stat. 1267). §66½ Sup. CML 2

67. Salaries of temporary clerks.—Except when a different compensation is expressly prescribed by law, any clerk temporarily employed to perform the same or similar duties with those belonging to clerks of either class, is entitled to the same salary as is allowed to clerks of that class. *R. S. 168.*

68. Extra service without extra pay.—No money shall be paid to any clerk employed in either Department at an annual salary, as compensation for extra services, unless expressly authorized by law. *R. S. 170.*

General prohibitions were contained in R. S. secs. 1763-1765.

No officer or employee is to charge or receive any compensation for administering oaths of office, post, 95.

Notes of Decisions.

No extra compensation for acts within general duties.—The separate duties of the several clerks in the departments, except where they are specifically designated in particular cases by statute, are assigned to such clerks by the head of the department; and no posterior claim to extra compensation can be founded on the official acts done by a clerk, provided those acts constituted any part of the lawful general duties of the department. (1854) 6 Op. Atty. Gen. 593.

69. No extra pay for disbursing money.—No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation. *R. S. 1765.*

A provision similar to that of this section was made by act June 20, 1874, sec. 3.

Notes of Decisions.

Decisions as to extra compensation in general.—See notes, ante, 68.

Permanence of statute.—This section was not repealed by the preceding section. Stansbury v. U. S. (1868), 8 Wall. 33, 37, 19 L. Ed. 315.

This act was not repealed by the repeal of the proviso of act Mar. 3, 1849 (9 Stat.

367), that no part of the appropriation for superintendents' commissions on disbursements should be paid to one who received a salary as customs officer. U. S. *v.* Converse (C. C. 1858), Fed. Cas. No. 14,848, reversed on another ground in Converse *v.* U. S. (1858), 21 How. 463, 16 L. Ed. 192.

This section is a perpetual law applying to all branches of the public service. (1842) 4 Op. Atty. Gen. 128.

What is "additional pay."—A clerk from the office of the Chief of Engineers designated to take charge and superintend the construction of a public building can be compensated from the fund appropriated therefor, his salary and service as clerk having been suspended during the period, so that there is no "additional pay, extra allowance, or compensation" received by said clerk. (1882) 17 Op. Atty. Gen. 321.

Persons included within prohibition.—This section applies to all public officers, or quasi public officers, who have a fixed compensation. Hoyt *v.* U. S. (1850), 10 How. 109, 141, 13 L. Ed. 348.

Right to hold different offices.—This section does not prevent a person from holding two distinct offices, appointments, or positions, not otherwise forbidden, and not incompatible with each other, and drawing the salary attached to each. U. S. *v.* Saunders (1887), 120 U. S. 126, 30 L. Ed. 594.

But see 72, post.

Services for which additional pay or extra compensation is prohibited.—A civil officer, whose salary is fixed by law, can not hold another office or receive additional compensation for other and distinct service, even though the services were valuable, were additional to the duties of his office, and were rendered upon the assurance of the officers who employed him that he would be justly remunerated for them. Wilson *v.* U. S. (1865), 1 Ct. Cl. 206; Stansbury *v.* U. S. (1864), 1 Ct. Cl. 123; affirmed Stansbury *v.* U. S. (1868), 8 Wall. 33, 37, 19 L. Ed. 315; Harvey *v.* U. S. (1867), 3 Ct. Cl. 38.

Compensation for special services of disbursing clerk of Interior Department under appointment of Secretary of Interior as special disbursing agent of appropriations for the Government hospital, is prohibited by this section, where appropriation acts did not provide for such compensation. Evans *v.* U. S. (1913), 33 Sup. Ct. 133, 226 U. S. 567, 57 L. Ed. 353, affirming judgments (1909) 44 Ct. Cl. 549, and (1910) 45 Ct. Cl. 169.

This section only prohibits extra compensation for service incompatible with that for which the compensation is fixed. U. S. *v.* Evans (1885), 4 Mackey (Sup. Ct., D. C.) 281.

A statute requiring the surveyor general of Louisiana to collect, but not undertaking to dispose of, certain fees does not authorize him to retain the same, in view of this section. Lewis *v.* U. S. (1917), 244 U. S. 134.

70. Pay of officers detailed to the Lighthouse Service.—No additional salary shall be allowed to any civil, military, or naval officer on account of his being employed on the Light-House Board, or being in any manner attached to the light-house service. *R. S. 4679.*

Traveling expenses allowed, see post, 1792.

71. Performing the duty of another.—No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law. *R. S. 1764.*

Notes of Decisions

Public policy of extra compensation.—Where the words of a statute prescribing compensation admit of two interpretations, they will not be construed to require the officer to perform the duties of an office without receiving compensation. U. S. *v.* Morse (C. C. 1844), Fed. Cas. No. 15,820.

Where an act is required to be performed or services to be rendered, and the officer required to perform it necessarily holds two positions intimately and indispensably connected, and provision is made by law for the payment of services rendered in each capacity, it is more consonant with the principles of justice and equity that compensation for that service should be made according to the provisions of the statute that applies to it, rather than to deny such remuneration on mere technical grounds. In re Conrad (C. C. 1883), 15 Fed. 641.

To diminish or take away extra pay given by a statute is contrary to public policy. Bush *v.* U. S. (1900), 35 Ct. Cl. 223.

Extra compensation in general.—A public officer is required to perform duties imposed by law passed after coming into office without extra compensation, though his compensation is inadequate. Andrews *v.* U. S. (C. C. 1842), Fed. Cas. No. 381.

An officer can not be allowed extra compensation for services performed properly pertaining by law to his office. U. S. *v.* Smith (D. C. 1856), Fed. Cas. No. 16,321.

A retired naval officer, serving in time of war upon the active list and appointed meteorologist, held entitled to his salary as meteorologist, and to the pay of an officer on the retired list, but not to the pay of an officer on the active list. Hayden *v.* U. S. (1903), 38 Ct. Cl. 30.

Where an officer does not hold two distinct offices or places of employment, each with its own duties and compensation, he comes within the prohibitions of the statutes. Bartlett *v.* U. S. (1904), 39 Ct. Cl. 338.

The statutes apply to extra services in another department. Woodwell *v.* U. S. (1906), 41 Ct. Cl. 357.

Extra compensation to persons entitled to salaries may be allowed only where money shall have been appropriated for the particular services for the performance of which it is claimed as a compensation. (1829) 3 Op. Atty. Gen. 439. It can not be allowed an officer whose salary is fixed by law for the discharge of a public service, but traveling expenses may be. (1845) 4 Op. Atty. Gen. 372.

The executive department has no authority to give extra pay to the officers of the United States exploring expedition. (1842) 4 Op. Atty. Gen. 126.

If the duties of an office belong to an incumbent who receives the salary affixed to it, another officer performing those duties is prohibited from receiving therefor any compensation whatever. (1849) 3 Op. Atty. Gen. 74.

The separate duties of the several clerks in the departments, except where they are specifically designated in particular cases by statute, are assigned to such clerks by the head of the department; and no posterior claim to extra compensation can be founded on the official acts done by a clerk, provided those acts constituted any part of the lawful general duties of the department. (1854) 6 Op. Atty. Gen. 583.

The several acts of Congress relative to extra pay and double compensation for public service manifest a determination on the part of Congress to prevent the payment of double compensation in any form or under any pretext whatsoever. (1857) 9 Op. Atty. Gen. 123.

A compensation for extra services, where no certain allowance is fixed by law, can not be paid by the head of a department to any officer of the Government who has by law a certain compensation in the office he holds. (1861) 10 Op. Atty. Gen. 31.

No discretion is left to the head of a department to allow any officer who has a fixed compensation any credit beyond his salary, unless the service he has performed is required by existing laws, and the remuneration therefor is fixed by law. (1863) 10 Op. Atty. Gen. 436.

Where the service is one required by law, but not of any particular official, and compensation therefor is fixed by competent authority, and is appropriated, any officer who under due authorization performs the service is entitled to the compensation. (1877) 15 Op. Atty. Gen. 608.

The elements necessary to justify the payment of compensation to an officer of the Government for additional services are: That they shall be performed by virtue of a separate and distinct appointment authorized by law, that such services shall not be services added to or connected with the regular duties of the place he holds, and that a compensation whose amount is fixed by law or regulation shall be provided for their payment. (1888) 19 Op. Atty. Gen. 121.

Officers to whom extra compensation for particular services is forbidden.—Watchmen, for labor performed in the offices during the day. (1839) 3 Op. Atty. Gen. 473.

A disbursing clerk in the Treasury Department, for disbursing money for a public building in the city of Washington. Bartlett *v.* U. S. (1904), 39 Ct. Cl. 338, affirmed in (1905) 25 Sup. Ct. 433, 434, 197 U. S. 230, 49 L. Ed. 735.

The chief messenger in the Treasury Department, for carrying the mails of the several offices occupying the southeast executive building to and from the post office. (1839) 3 Op. Atty. Gen. 473.

Services outside of scope of duty.—Where a service which can not be legally required of an officer is rendered with the consent of his superior for another department having no official control of him, and is a service within the lawful discretion of the department employing him, he may receive additional pay therefor. Collier *v.* U. S. (1887), 22 Ct. Cl. 125; Meigs *v.* U. S. (1884), 19 Ct. Cl. 497.

A retired Army officer may be employed by the War Department to supervise work, where he could not have been assigned to that duty, notwithstanding the statutes relating to double pay. Yates *v.* U. S. (1890), 25 Ct. Cl. 296.

Compensation for overtime.—Where a Government employee renders two distinct, entire statutory days' services, though in one calendar day of 24 hours, he is as much entitled to compensation for the one statutory day as for the other. Garlinger *v.* U. S. (1895), 30 Ct. Cl. 473.

Computation of overtime compensation.—The computation of extra time will follow the general usage of the Treasury, and be reckoned by taking a day as the three hundred and sixty-fifth part of a year. In re the Letter-Carriers' Cases (1892), 27 Ct. Cl. 244.

Holding separate offices.—The statutes prohibiting extra compensation do not prevent a person from holding two distinct offices, appointments, or positions, not otherwise forbidden, and not incompatible with each other, and drawing the salary attached to each. U. S. *v.* Saunders (1887), 7 Sup. Ct. 467, 120 U. S. 126, 30 L. Ed. 594.

The purpose of this section and the two following sections, considered in pari materia, was to prevent a person holding an office or appointment for which the law provides a definite compensation from receiving extra compensation for other services which may be required of him by act of Congress, or by the head of his department, or in any other mode; but the sections have no application in the case of two distinct offices or employments, each of which has its own duties and its own compensation, which offices may be held by one person at the same time. Woodwell *v.* U. S. (1909), 29 Sup. Ct. 576, 579, 214 U. S. 82, 87, 53 L. Ed. 919.

The statutes prohibit additional compensation to public officers, but do not apply to the salaries of two offices properly held by the same person. Collins *v.* U. S. (1879), 15 Ct. Cl. 22.

A person may hold two offices and receive the salaries of both; each having its own duties and compensation, and they not being incompatible. Crosthwaite *v.* U. S. (1895), 30 Ct. Cl. 300.

These provisions do not prohibit the holding by the same person of two distinct offices, each with its own compensation and duties. Pack *v.* U. S. (1906), 41 Ct. Cl. 414; [C. S. p. 4440].

But this rule has been changed as to officers having a salary of $2,500 by post, 68. Pack *v.* U. S. (1906), 41 Ct. Cl. 414.

The Secretary of the Treasury can not by means of regulations, divide a day's service into parts, and attach to each part the pay for a full day's work. U. S. *v.* Garlinger (1897), 18 Sup. Ct. 364, 169 U. S. 316, 42 L. Ed. 762.

Where two incompatible offices are held by the same person, to which are attached different salaries, he is entitled to the larger. Winchell *v.* U. S. (1892), 28 Ct. Cl. 30.

Compatible offices.—A retired Army major of Engineers and agent in charge of river and harbor work at Wilmington, Del. (1889) 19 Op. Atty. Gen. 283.

Incompatible offices.—Two offices are incompatible when a performance of the duties of the one will prevent or conflict with the performance of the duties of the other, or when the holding of the two is contrary to the policy of the law. Crosthwaite *v.* U. S. (1895), 30 Ct. Cl. 300; (1898) 22 Op. Atty. Gen. 237.

The duties of the following offices have been held to be incompatible: Chief of the Record and Pension Office of the War Department, with the rank and pay and allowance of a colonel, and a surgeon of the Army. (1892) 20 Op. Atty. Gen. 427. A retired Army officer and a consular or diplomatic post. Radeau *v.* U. S. (1889), 9 Sup. Ct. 579, 582, 583, 130 U. S. 439, 32 L. Ed. 997.

72. Dual salary not allowed to a person drawing $2,500 yearly.—* * * No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office, by and with the advice and consent of the Senate. *Sec. 2, act of July 31, 1894 (28 Stat. 205), making appropriations for legislative, executive, and judicial expenses.*

Other provisions relating to retired officers of the Army or Navy serving in other capacities were made by R. S. secs. 1223, 1260, and subsequent statutes set forth post, 2375, 2428, and by sec. 7, act June 3, 1896, post, 2443.

Notes of Decisions.

Dual salary. Where the compensation of an officer is fixed by statute it may not be diminished by regulation of a department or order of the President unless empowered thereto by Congress, but where appointment to two certain offices is claimed and so to hold would involve a construction that the appointment was invalid under the act of July 31, 1894 (28 Stat. 205), the court must adopt the view that a legal appointment was contemplated, and hence that the claimant was not appointed to two offices. McMath v. U. S. (1916), 51 Ct. Cl. 356.

A retired officer of the Navy, whose retired pay amounts to $2,500 per annum, is ineligible to hold office as a clerk of class 3 under the United States Civil Service Commission, as such clerkship is an office within this section (1912), 29 Op. Atty. Gen. 505.

See, also, notes to post, 91.

Term to commence in future.—Accepting an appointment to an office, the term of which is to commence in future, does not, until such term actually commences, affect an office previously held by the appointee. (1893), 20 Op. Atty. Gen. 593.

Appointment of retired Army or Navy officer. A retired Army Officer may be employed by the War Department to supervise work, where he could not have been assigned to that duty, notwithstanding the statutes relating to double pay. Yates v. U. S. (1899), 25 Ct. Cl. 296.

A retired Army officer is not prohibited by law from holding an office in an executive department, the salary of which is less than $2,500, nor from receiving the salary thereof in addition to his retired pay, though his retired pay amounts to more than $2,500 per annum. Collins v. U. S. (1879), 15 Ct. Cl. 22.

A retired naval officer whose compensation as such amounts to $2,500 per annum is ineligible to appointment as a commercial attaché under the act of July 16, 1914 (38 Stat. 500). (1914) 30 Op. Atty. Gen. 298.

"Office" construed.—An act of Congress authorizing the expenditure of money for the employment of a competent mathematician to supervise the completion of certain tables of planets, providing no permanency to the term, no requirement that the person employed shall either take an official oath or receive a commission, and no formalities in the selection of such an employee, does not create an office. (1897) 21 Op. Atty. Gen. 567.

Special assistant to the United States attorney for New Mexico held not within the term "any other office," of this section; but otherwise if a regular assistant district attorney. (1895) 2 Comp. Dec. 271.

For difference between an office and employment, see U. S. v. Hartwell (1867) 6 Wall. 385, 393; Hall v. Wisconsin (1880) 103 U. S. 5.

73. Dual salary not to exceed $2,000.—That unless otherwise specially authorized by law, no money appropriated by this or any other Act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of $2,000 per annum, but this shall not apply to retired officers or enlisted men of the Army, Navy, Marine Corps, or Coast Guard, or to officers and enlisted men of the Organized Militia and Naval Militia in the several States, Territories, and the District of Columbia: *Provided*, That no such retired officer, officer, or enlisted man shall be denied or deprived of any of his pay, salary, or compensation as such, or of any other salary or compensation for services heretofore rendered by reason of any decision or construction of said section six. *Sec. 6, act of May 10, 1916 (39 Stat. 120), as amended by act of Aug. 29, 1916 (39 Stat. 582), making appropriations for the naval service.*

74. Salary not to be supplemented from a private source.—* * * *Provided*, That on and after July first, nineteen hundred and nineteen, no Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States. Any person violating any of the terms of this proviso shall

be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $1,000 or imprisonment for not less than six months, or by both such fine and imprisonment as the court may determine. *Act of Mar. 3, 1917 (39 Stat. 1106).*

75. Bonus for suggestion for improvements.—* * * nor shall any part of the appropriations made in this act be available to pay any premium or bonus or cash reward to any employee in addition to his regular wages, except for suggestions resulting in improvements or economy in the operation of any Government plant. *Act of June 5, 1920 (41 Stat. 975), making appropriations for the support of the Army.*

76. Incapacitated persons not entitled to salaries.—That the appropriations herein made for the officers, clerks, and persons employed in the public service shall not be available for the compensation of any persons incapacitated otherwise than temporarily for performing such service. *Sec. 3, act of Mar. 3, 1921 (41 Stat. 1307), making appropriations for legislative, executive, and judicial expenses.*

Similar provisions appear in previous appropriation acts.

77. Salaries provided by lump-sum appropriations.—That no part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the preceding fiscal year; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced: *Provided,* That this section shall not apply to mechanics, artisans, their helpers and assistants, laborers, or any other employees whose duties are of similar character and required in carrying on the various manufacturing or constructing operations of the Government. *Sec. 4, act of Mar. 4, 1913 (37 Stat. 790), amending sec. 7, act of Aug. 26, 1912 (37 Stat. 626).*

That it shall not be lawful hereafter to pay to any person, employed in the service of the United States under any general or lump sum appropriation, any sum additional to the regular compensation received for or attached to any employment held prior to an appointment or designation as acting for or instead of an occupant of any other office or employment. This provision shall not be construed as prohibiting regular and permanent appointments by promotion from lower to higher grades of employments. *Sec. 12, act of Aug. 1, 1914 (38 Stat. 680), making appropriations for sundry civil expenses.*

That no civil employee in any of the executive departments or other Government establishments, or who has been employed therein within the period of one year next preceding his proposed employment in any other executive department or other Government establishment, shall be employed hereafter and paid from a lump-sum appropriation in any other executive department or other Government establishment at an increased rate of compensation. * * * *Sec. 7, act of Oct. 6, 1917 (40 Stat. 383), making appropriations to supply urgent deficiencies.*

78. Increase in salary delayed for one year after transfer.—* * * And no civil employee in any of the executive departments or other Government establishments or who has been employed therein within the period of one year next preceding his proposed employment in any other executive department or other Government establishment and who may be employed in another executive de-

partment or other Government establishment shall be granted an increase in compensation within the period of one year following such reemployment: *Provided*, That the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the purposes of this section: *Provided further*, That this section shall not be construed to repeal section five of the Act of June twenty-second, nineteen hundred and six, which prohibits the transfer of employees from one department to another. *Sec. 7, act of Oct. 6, 1917 (40 Stat. 384).*

79. **Subsistence allowance.**—On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $5 per day; nor shall any allowance or reimbursement for subsistence be paid to any officer or employee in any branch of the public service of the United States in the District of Columbia unless absent from his designated post of duty outside of the District of Columbia, and then only for the period of time actually engaged in the discharge of official duties. *Act of Apr. 6, 1914 (38 Stat. 318), making appropriations for urgent deficiencies.*

That the heads of executive departments and other Government establishments are authorized to prescribe per diem rates of allowance not exceeding $4 in lieu of subsistence to persons engaged in field work or traveling on official business outside of the District of Columbia and away from their designated posts of duty when not otherwise fixed by law. For the fiscal year nineteen hundred and sixteen and annually thereafter estimates of appropriations from which per diem allowances are to be paid shall specifically state the rates of such allowances. • • • *Sec. 13, act of Aug. 1, 1914 (38 Stat. 680), making appropriations for sundry civil expenses.*

• • • including the payment of a per diem allowance not to exceed $4, in lieu of subsistence, to employees of the War Department traveling on official business outside of the District of Columbia and away from their designated posts, $300,000: • • • *Act of June 5, 1920 (41 Stat. 949), making appropriations for the support of the Army: Contingencies of the Army.*

• • • for travel allowance • • • of the necessary agents and other employees, including per diem allowances in lieu of subsistence not exceeding $4 for those authorized to receive the per diem allowance; • • • *Act of June 5, 1920 (41 Stat. 959), making appropriations for the support of the Army: Transportation.*

• • • *Provided further*, That $683,000 of the appropriation hereby made shall be available for additional pay for employees on harbor boats, quartermaster service, in lieu of subsistence: • • • *Act of June 5, 1920 (41 Stat. 961), making appropriations for the support of the Army: Transportation.*

80. **Exemption from existing laws.**—• • • The establishment of a civil pension roll or an honorable service roll, or the exemption of any of the officers, clerks, and persons in the public service from the existing laws respecting employment in such service is hereby prohibited: • • • *Sec. 4, act of Feb. 24, 1899 (30 Stat. 890).*

For provisions for retirement and compensation for disability see post, 110 and 112-143.

81. Minimum day of seven hours.—Hereafter it shall be the duty of the heads of the several Executive Departments, in the interest of the public service, to require of all clerks and other employees, of whatever grade or class, in their respective Departments, not less than seven hours of labor each day, except Sundays and days declared public holidays by law or Executive order: * * *. *Sec. 5, act of Mar. 3, 1893 (27 Stat. 715), as amended by sec. 7, act of Mar. 15, 1898 (30 Stat. 316), making appropriations for legislative, executive, and judicial expenses.*

Notes of Decisions.

Clerks and employees at seat of Government or elsewhere.—The extension of hours act of Mar. 15, 1898, sec. 7, amending this section, applies only to employees in the departments at the seat of Government. It does not apply to laborers employed at the various customs ports who are actually engaged in manual labor, and it did not repeal, as to such laborers, the provisions of the eight-hour law, act Aug. 1, 1892, sec. 1, post 782. (1912) 29 Op. Atty. Gen. 481.

Hours of labor.—There is no limit to the right of the head of a department to demand service of his subordinates. (1894) 20 Op. Atty. Gen. 728.

This section does not permit an allowance of half an hour for luncheon within the seven hours of labor required. (1898) 22 Op. Atty. Gen. 62.

"Every Saturday after 12 o'clock noon" is a holiday for all purposes within the District of Columbia, by Code D. C. sec. 1389, and is, therefore, one of the "days declared public holidays by law," within the meaning of this section, and consequently heads of departments are not obliged to require labor of such clerks, etc., after the hour of noon on Saturdays. (1903) 25 Op. Atty. Gen. 40. See post, 84.

Heads of departments must require at least seven hours' labor of all their clerks and other employees every day in the year except Sundays and days declared to be holidays by sec. 1389 of the Code of the District of Columbia, and during authorized leave; and, if the public service requires it, the hours of labor may be extended by special order and may include holidays as well as ordinary days. Id.

82. Extension of hours of service without extra pay.—* * * *Provided*, That the heads of the Departments may, by special order, stating the reason, further extend the hours of any clerk or employee in their Departments, respectively; but in case of an extension it shall be without additional compensation: * * * *Sec. 5, act of Mar. 3, 1893 (27 Stat. 715), as amended by sec. 7, act of Mar. 15, 1898 (30 Stat. 316), making appropriations for legislative, executive, and judicial expenses.*

Notes of Decisions.

Application.—This requirement does not apply to laborers and mechanics whose compensation is not fixed by law or regulations. 4 Comp. Dec., 578; see also Hurlburt *v.* U. S., 30 Ct. Cls. 16; 29 Op. Atty. Gen. 481.

83. Extension of hours of service if work is in arrears.—* * * Hereafter it shall be the duty of the head of each Executive Department to require monthly reports to be made to him as to the condition of the public business in the several bureaus or offices of his Department at Washington; and in each case where such reports disclose that the public business is in arrears, the head of the Department in which such arrears exist shall require, as provided herein, an extension of the hours of service to such clerks or employees as may be necessary to bring up such arrears of public business. * * * *Sec. 5, act of Mar. 3, 1893 (27 Stat. 715), as amended by sec. 7, act of Mar. 15, 1898 (30 Stat. 317), making appropriations for legislative, executive, and judicial expenses.*

84. Holidays in the District of Columbia.— * * * The following days in each year, namely, the first day of January, commonly called New Year's Day;

the twenty-second day of February, known as Washington's Birthday; the Fourth of July; the thirtieth day of May, commonly called Decoration Day; the first Monday in September, known as Labor's Holiday; the twenty-fifth day of December, commonly called Christmas Day; every Saturday, after twelve o'clock noon; any day appointed or recommended by the President of the United States as a day of public fasting or thanksgiving, and the day of the inauguration of the President, in every fourth year, shall be holidays in the District within the meaning of this section. Whenever any day set apart as a legal holiday shall fall on Sunday, then and in such case the next succeeding day shall be a holiday; * * * *Sec. 1389, Code of Law for the District of Columbia, act of March 3, 1901 (31 Stat. 1404).*

Amend section 1389 by striking out * * * the words "within the meaning of this section" and inserting in lieu thereof the words "for all purposes." *Act of June 30, 1902 (32 Stat. 543), amending R. S. 1389.*

By Executive order of May 22, 1909, all Government establishments are to be closed and employees excused on the following Monday when the above legal holidays fall on Sunday, and outside the District of Columbia upon the following or upon another day according to State law. See notes to 81, ante.

85. Labor Day.—That the first Monday of September in each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by law public holidays. *Act of June 28, 1894 (28 Stat. 96).*

86. Holidays with pay for per diem employees.—That the employees of the navy-yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days. *Joint Res. 5, Jan. 6, 1885 (23 Stat. 516).*

That all per diem employees of the Government, on duty at Washington or elsewhere in the United States, shall be allowed the day of each year which is celebrated as "Memorial" or "Decoration Day" and the fourth of July of each year, as holiday, and shall receive the same pay as on other days. *Joint Res. 6, Feb. 23, 1887 (24 Stat. 644).*

Notes of Decisions.

Executive order.—Per diem employees at the Washington Navy Yard, on duty Apr. 6, 1899, should be allowed and paid for that day, without reduction of compensation for the portion of the day that the Navy Yard was closed by Executive order of the President. (1899) 22 Op. Atty. Gen. 472.

Continuously employed.—In the act of Jan 6, 1885, which provides that "the employees of the navy yard, Government Printing Office, Bureau of Engraving and Printing, and all other per diem employees" shall be allowed pay for legal holidays, the provision "all other per diem employees" is to be restricted to employees whose employment is similarly permanent or continuous. 4 Comp. Dec. 499.

87. Annual leave of absence.—* * * *Provided further*, That the head of any Department may grant thirty days' annual leave with pay in any one year to each clerk or employee; * * *. *Sec. 5, act of Mar. 3, 1893 (27 Stat. 715).*

as amended by sec. 7, act of Mar. 15, 1898 (30 Stat. 316), making appropriations for legislative, executive, and judicial expenses.

See, also, post, 2577. For leave to arsenal employees, see 622–624, post.

Notes of Decisions.

Employees entitled.—A clerk or other employee of an executive department of the Government whose duties are performed at a place other than the seat of Government is as much entitled to the benefits of act of Mar. 15, 1898, sec. 7, amending this section, with reference to leaves of absence, as one whose duties are performed in the city of Washington. (1898) 22 Op. Atty. Gen. 77.

88. Annual leave exclusive of Sundays and legal holidays.—* * * *Provided,* That the thirty days' annual leave of absence with pay in any one year to clerks and employees in the several Executive Departments authorized by existing law shall be exclusive of Sundays and legal holidays. *Sec. 4, act of Feb. 24, 1899 (30 Stat. 890), making appropriations for legislative, executive, and judicial expenses.*

89. Annual leave additional to sick leave.—Nothing contained in section seven of the Act making appropriations for legislative, executive, and judicial expenses of the Government for the fiscal year eighteen hundred and ninety-nine, approved March fifteenth, eighteen hundred and ninety-eight, shall be construed to prevent the head of any Executive Department from granting thirty days' annual leave with pay in any one year to a clerk or employee, notwithstanding such clerk or employee may have had during such year not exceeding thirty days' leave with pay on account of sickness as provided in said section seven. *Act of July 7, 1898 (30 Stat. 653), making appropriations for urgent deficiencies.*

Notes of Decisions.

Effect of provision on previous law.—This provision nullified so much of act Mar. 15, 1898, sec. 7, as provided that the 30 days sick leave should only be granted with pay in exceptionally meritorious cases, and reestablished the law authorizing 30 days annual leave with pay without any cause being given, and 30 days additional leave on account of sickness. (1898) 22 Op. Atty. Gen. 255.

Under this provision, 60 days leave of absence, with pay, may be granted employees in the executive departments, provided that as much as 30 days of it was made necessary by personal illness. Id.

90. Sick leave.—* * * *And provided further,* That where some member of the immediate family of a clerk or employee is afflicted with a contagious disease and requires the care and attendance of such employee, or where his or her presence in the Department would jeopardize the health of fellow-clerks, and in exceptional and meritorious cases, where a clerk or employee is personally ill, and where to limit the annual leave to thirty days in any one calendar year would work peculiar hardship, it may be extended, in the discretion of the head of the Department, with pay, not exceeding thirty days in any one case or in any one calendar year.

This section shall not be construed to mean that so long as a clerk or employee is borne upon the rolls of the Department in excess of the time herein provided for or granted that he or she shall be entitled to pay during the period of such excessive absence, but that the pay shall stop upon the expiration of the granted leave. * * * *Sec. 5, act of Mar. 3, 1893 (27 Stat. 715), as amended by sec. 7, act of Mar. 15, 1898 (30 Stat. 317), making appropriations for legislative, executive, and judicial expenses.*

Notes of Decisions.

Construction.—In the phrase of the proviso to this section, "in exceptional and meritorious cases," the word "meritorious" is surplusage, and the phrase must be read as equivalent to "exceptional as well as meritorious"; and the word "exceptional," is not susceptible of precise definition as matter of law. (1894) 20 Op. Atty. Gen. 716.

But so much of this section as authorized sick leave, with pay, only in "exceptional and meritorious cases," etc., was nullified by act July 7, 1898, sec. 1, ante, 89. (1898) 22 Op. Atty. Gen. 255.

The President is without authority to grant an extension of leave of absence with pay to members of the Grand Army of the Republic employed in the Government service who attend the annual encampment of that order. (1907) 26 Op. Atty. Gen. 336.

Where an employee in an executive department is, in consideration of sickness of her husband, excused from attendance, and is to have her work sent to her residence, if it be not sent she is bound to report to the department. If she neglects to report, her tenure can not be deemed to extend beyond the current month. Palmer v. U. S. (1881), 17 Ct. Cl. 230.

Evidence.—The nature of the evidence required from applicants for leave and sufficiency of reasons for extending or limiting hours of labor are matters within the discretion of the Secretary, as to which the Attorney General can not advise. Id.

Military service.—Leaves of absence of employees of the government in the discharge of military duties are not to be charged to the 30 days allowed them annually for rest and recreation. (1896) 21 Op. Atty. Gen. 353.

Computation.—In computing the annual leave and sick leave under this section, Sundays and holidays occurring during such absence should be charged against the absentee. (1894) 20 Op. Atty. Gen. 716; (1898) 22 Op. Atty. Gen. 77.

An employee connected with the department only during part of the calendar year is not entitled to full annual or sick leave, but it should be prorated. (1894) 20 Op. Atty. Gen. 728.

91. Oaths of office.—That section seventeen hundred and fifty-six of the Revised Statutes be, and the same is hereby, repealed; and hereafter the oath to be taken by any person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States, shall be as prescribed in section seventeen hundred and fifty-seven of the Revised Statutes. But this repeal shall not affect the oaths prescribed by existing statutes in relation to the performance of duties in special or particular subordinate offices and employments. *Sec. 2, act of May 13, 1884 (23 Stat. 22).*

Whenever any person * * * is elected or appointed to any office of honor or trust under the Government of the United States, * * * he shall, before entering upon the duties of his office, take and subscribe * * * the following oath: "I, A. B., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." *R. S. 1757.*

Notes of Decisions.

Who are officers.—Clerks in the executive departments. (1868) 12 Op. Atty. Gen. 321.

A disbursing agent for a public building Bartlett v. U. S. (1904), 39 Ct. Cl. 338.

An office is a public station conferred by appointment; and the term embraces the ideas of tenure, duration, emolument, and duties. Drury v. U. S. (1908), 43 Ct. Cl. 237.

The recognition in a Federal statute of a person in the public employ as an officer of the United States constitutes such person an officer. (1907) 26 Op. Atty. Gen. 364.

For definition of office see U. S. v. Germaine, 99 U. S. 508, and Mouat v. U. S., 124 U. S. 303. Clerks appointed by the head of an executive department are officers, and are required by the Constitution to take the oath of office. 1 Comp. Dec. 4.

Who are not officers.—An act of Congress making appropriation for the employment of a competent mathematician to supervise the completion of certain tables of planets, providing no permanency to the term, with no requirement that the person employed shall either take an official oath or receive a commission, and no formalities in the selection of such an employee, does not create an office. (1897) 21 Op. Atty. Gen. 507.

An employee whose compensation is fixed by the head of an executive department is not required to take a new oath of office when his compensation is increased. 1 Comp. Dec. 267.

When by law a change is made in the compensation of an office, and in the manner in which such compensation shall be ascertained, the incumbent thereof is entitled from the date of the act to the compensation so fixed and is not required to take a new oath of office. 1 Comp. Dec. 313.

Oath prerequisite to salary.—A public officer is usually entitled to the emoluments of the office only after qualification. Poore v. U. S. (1914), 49 Ct. Cl. 192.

Oath on transfer or reappointment.—This section contemplates that the oath shall be taken at every new appointment before entering upon the duty. (1889) 19 Op. Atty. Gen. 221.

Under the act of Feb. 14, 1889 (25 Stat. 670), S. was appointed from civil life to the position of major of Engineers in the Army, and thereupon was placed on the retired list of the Army as of that grade; advised, that he must take the oath required by section 1756 of the Revised Statutes, and that this act would be in law a legal acceptance of the office, and, as such, a sufficient formal acceptance. 19 Op. Atty. Gen. 283.

92. Oaths of office administered by authorized officers.—The oath of office required by either of the two preceding sections may be taken before any officer who is authorized either by the laws of the United States, or by the local municipal law, to administer oaths, in the State, Territory, or District where such oath may be administered. *R. S. 1758.*

Notes of Decisions.

Construction.—The territorial limitation prescribed by this section includes the District of Columbia. All the oaths, then, that are thus required to be taken may be taken in the United States. This would seem to operate, as many other provisions do operate, to limit the otherwise universal application of sec. 2, act of May 13, 1884, above, so that the requirement may be no broader than the permitted performance, and so that no oaths are intended except such as may be taken in the only mode prescribed. (1902) 23 Op. Atty. Gen. 511.

Power of foreign consul.—The act is not complied with unless the oath be taken before an officer authorized to administer oaths by the laws of the United States. A foreign consul residing in Mexico has no such authority. Otterbourg v. U. S. (1869), 5 Ct. Cl. 430.

93. Oaths of office administered by chief clerk.—And the Chief Clerks of the several Executive Departments and of the various bureaus and offices thereof in Washington, District of Columbia, are hereby authorized and directed, on application and without compensation therefor, to administer oaths of office to employees required to be taken on their appointment or promotion. *Act of Aug. 29, 1890 (26 Stat. 371).*

94. Oaths administered by a notary public or commissioner.—In all cases in which under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any State, district, or Territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace. *R. S. 1778.*

The office of commissioners of the circuit courts, mentioned in this section, was abolished, and the appointment of United States commissioners, to have the same powers and perform the same duties as were theretofore imposed on the commissioners of the circuit courts, was authorized, by act May 28, 1896, sec. 19.

95. Oaths of office administered without fee.—* * * And no officer, clerk, or employee of any Executive Department who is also a notary public or other officer authorized to administer oaths, shall charge or receive any fee or compensation for administering oaths of office to employees of such department required to be taken on appointment or promotion therein. *Act of Aug. 29, 1890 (26 Stat. 371).*

96. Filing oaths of office.—The oath of office taken by any person pursuant to the requirements of section seventeen hundred and fifty-six, or of section seventeen hundred and fifty-seven, shall be delivered in by him to be preserved among the files of the House of Congress, Department, or court to which the office in respect to which the oath is made may appertain. *R. S. 1759.*

Notes of Decisions.

Venue.—The venue in affidavits taken before a United States commissioner should be "United States of America, District of ———," and not "State of ———, County of ———." Sterrick v. Pugsley (C. C. 1874), Fed. Cas. No. 13,379.

Powers of notaries.—So far as notaries are concerned, this section embodies the substance of similar provisions in act Sept. 16, 1850 (9 Stat. 458), act July 29, 1854, sec. 1 (10 Stat. 315), and act June 22, 1874, sec. 20 (18 Stat. 186), and was intended to give notaries in their respective States the same authority, in the administration of oaths, as are given under the laws of the United States to justices of the peace in the same States, and to notaries in a Federal judicial district the same authority in administering oaths which, under the laws of the United States, might be exercised by justices of the peace in such district. U. S. v. Curtis (1882), 2 Sup. Ct. 507, 509, 510, 107 U. S. 671, 27 L. Ed. 534.

Notarial seal.—A seal of a notary may be an impression made by the seal on paper, without wax or any other tenacious substance. Orr v. Lacy (C. C. 1847), Fed. Cas. No. 10,589.

The requisites of a notarial seal are determined by the law of the locality from which the official derives his authority, although it does not contain any device or words indicating any particular official. In re Phillips (D. C. 1876), Fed. Cas. No. 11,098, disapproving In re Nebe (D. C. 1875), Fed. Cas. No. 10,073, which held that the seal of a notary must bear his name and show his official character.

97. Oaths in investigations.—Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps or Revenue-Cutter Service, detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Revenue-Cutter Service board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation. *R. S. 183, as amended by the act of Feb. 13, 1911 (36 Stat. 898).*

This section as enacted in the Revised Statutes, was amended by act Mar. 2, 1901, sec. 3, the amendment consisting principally in the insertion of a clause adding to the officers or clerks authorized to administer oaths to witnesses, "and any officer of the Army detailed to conduct an investigation, and the recorder, and, if there be none, the presiding officer of any military board appointed for such purpose." The further amendment by act Feb. 13, 1911, cited above, inserted in the clause so added, after the word "Army," the words "Navy, Marine Corps, or Revenue-Cutter Service," and between the words "military" and "board," the words "naval or Revenue-Cutter Service," making the section read as set forth here. See also A. W. 114, ch. 52, post.

Authority to administer an oath to any witness, on investigation of a shipwreck attended with loss of life, was conferred on the officer or clerk of the Treasury Department detailed to conduct such investigation, by sec. 9, act June 18, 1878 (20 Stat. 164).

98. Oaths to expense accounts.—After June thirtieth, nineteen hundred and twelve, postmasters, assistant postmasters, collectors of customs, collectors of

internal revenue, chief clerks of the various executive departments and bureaus, or clerks designated by them for the purpose, the superintendent, the acting superintendent, custodian, and principal clerks of the various national parks and other Government reservations, superintendent, acting superintendents, and principal clerks of the different Indian superintendencies or Indian agencies, and chiefs of field parties, are required, empowered, and authorized, when requested, to administer oaths, required by law or otherwise, to accounts for travel or other expenses against the United States, with like force and effect as officers having a seal; for such services when so rendered, or when rendered on demand after said date by notaries public, who at the time are also salaried officers or employees of the United States, no charge shall be made; and on and after July first, nineteen hundred and twelve, no fee or money paid for the services herein described shall be paid or reimbursed by the United States. *Sec. 8, act of Aug. 24, 1912 (37 Stat. 487), making appropriations for sundry civil expenses.*

The provisions of this section were extended to chief clerks, etc., in the offices of lighthouse inspectors, by a provision of sec. 7, act March 3, 1915 (38 Stat. 928).

Notes of Decisions.

Fee for administering oath as charge against United States.—The fee paid by an officer or employee to a notary or other officer for administering an oath does not constitute a proper charge against the United States, and if charged in his account should not be allowed in the settlement thereof. (1889) 19 Op. Atty. Gen. 401.

99. Officer etc., not to solicit or receive political contributions.—No Senator or Representative in, or Delegate or Resident Commissioner to Congress, or Senator, Representative, Delegate, or Resident Commissioner elect, or officer or employee of either House of Congress, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch, or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States. *Sec. 118, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1110).*

Notes of Decisions.

Constitutionality.—An act of Congress prohibiting executive officers or employees from requesting or receiving from other officers or employees any money or thing of value for political purposes, does not prohibit an act of a nature pertaining so exclusively to the sphere of private conduct as not to be within the power of Congress to prescribe regulations for the discipline of Government officials; it is only when Congress has palpably transgressed the limits of its discretion that the judicial department will intervene. U. S. v. Curtis (C. C. 1882), 12 Fed. 824.

Voluntary contributions.—The statute does not forbid voluntary contributions for political purposes by persons in the employ of the Government, but protects such persons from solicitation or coercion with respect to such contributions. (1896) 21 Op. Atty. Gen. 298.

Circular letters.—The sending of a circular letter by a political committee to Federal officers and employees, soliciting financial aid in congressional or State elections, upon or attached to which appear the names of Federal officers or employees, is a violation of section 11 of the Civil Service act of Jan. 16, 1883 (22 Stat. 406), which declares that no officer or employee of the Government shall be in any manner concerned in soliciting or receiving any assessment or contribution for any political purpose whatever from any officer or employee

of the United States. (1902) 24 Op. Atty. Gen. 133.

The statute unquestionably condemns all such circulars notwithstanding the particular form of words adopted in order to show a request rather than a demand and to give the responses a quasi voluntary character. Id.

Receiving money to pay secret agents.—An agent of the Government, who receives money to pay secret agents, is not guilty of either receiving or being concerned in receiving a contribution for a political purpose, within the meaning of act Jan. 16, 1883, 22 Stat. 403, where he received and honored an order from one of said secret agents to pay money out of the next remittance to a person not in the Government service as a contribution in aid of a political campaign, it appearing that said agent had nothing whatever to do with soliciting, inducing, or causing said secret agent to give the order, and had no relation or connection with the person to whom he paid the money, and had no concern in or control over the money after it was so paid, although he knew for what purpose it was paid. (1896) 21 Op. Atty. Gen. 298.

100. **Solicitation of political contributions on Government premises.**—No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in the preceding section, or in any navy-yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever. *Sec. 119, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1110).*

Notes of Decisions.

Solicitation by letter.—Solicitation by letter to a post office employee in a post-office building, received and read in such building, held within the statute. U. S. v. Thayer (1908), 28 Sup. Ct. 426, 209 U. S. 39, 52 L. Ed. 673, reversing judgment (D. C. 1907) 154 Fed. 508.

The personal delivery to a postmaster in his office of a sealed letter containing a request for a contribution for a political campaign constitutes a criminal offense, under this section. U. S. v. Smith (D. C. 1908), 163 Fed. 926.

101. **Refusal to make political contributions.**—No officer or employee of the United States mentioned in section one hundred and eighteen, shall discharge, or promote, or degrade, or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purposes. *Sec. 120, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1110).*

Sec. 118 is set forth, 99, ante.

102. **Political contributions by Government employees.**—No officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress, or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever. *Sec. 121, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1110).*

103. **Penalty as to political contributions.**—Whoever shall violate any provision of the four preceding sections shall be fined not more than five thousand dollars, or imprisoned not more than three years, or both. *Sec 122, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1110).*

104. **Gifts to superiors.**—No officer, clerk, or employee in the United States Government employ shall at any time solicit contributions from other officers, clerks, or employees in the Government service for a gift or present to those in a superior official position; nor shall any such officials or clerical superiors

receive any gift or present offered or presented to them as a contribution from persons in Government employ receiving a less salary than themselves; nor shall any officer or clerk make any donation as a gift or present to any official superior. Every person who violates this section shall be summarily discharged from the Government employ. *R. S. 1784.*

By act Aug. 24, 1912, sec. 6, post, 52, employees in the classified civil service can be removed only after notice.

Notes of Decisions.

Constitutionality.—This section was held to be constitutional by the Supreme Court in Ex parte Curtis (1882) 106 U. S. 371.

Gifts to President.—The President can not properly accept presents from persons in the public service. (1903) 25 Op. Atty. Gen. 46.

105. Duties of chief clerks.—Each chief clerk in the several Departments, and Bureaus, and other offices connected with the Departments, shall supervise, under the direction of his immediate superior, the duties of the other clerks therein, and see that they are faithfully performed. *R. S. 173.*

106. Monthly reports of chief clerks.—Each chief clerk shall take care, from time to time, that the duties of the other clerks are distributed with equality and uniformity, according to the nature of the case. He shall revise such distribution from time to time, for the purpose of correcting any tendency to undue accumulation or reduction of duties, whether arising from individual negligence or incapacity, or from increase or diminution of particular kinds of business. And he shall report monthly to his superior officer any existing defect that he may be aware of in the arrangement or dispatch of business. *R. S. 174.*

107. Action on report of chief clerk.—Each head of a Department, chief of a Bureau, or other superior officer, shall, upon receiving each monthly report of his chief clerk, rendered pursuant to the preceding section, examine the facts stated therein, and take such measures, in the exercise of the powers conferred upon him by law, as may be necessary and proper to amend any existing defects in the arrangement or dispatch of business disclosed by such report. *R. S. 175.*

108. Disbursing clerks.—The disbursing clerks authorized by law in the several Departments shall be appointed by the heads of the respective Departments, from clerks of the fourth class; and shall each give a bond to the United States for the faithful discharge of the duties of his office according to law in such amount as shall be directed by the Secretary of the Treasury, and with sureties to the satisfaction of the Solicitor of the Treasury; and shall from time to time renew, strengthen, and increase his official bond, as the Secretary of the Treasury may direct. Each disbursing clerk, except the disbursing clerk of the Treasury Department, must, when directed so to do by the head of the Department, superintend the building occupied by his Department. Each disbursing clerk is entitled to receive, in compensation for his services in disbursing, such sum in addition to his salary as a clerk of the fourth class as shall make his whole annual compensation two thousand dollars a year. *R. S. 176.*

Notes of Decisions.

Compensation of disbursing clerks.—Under the provision of act July 1, 1879, sec. 5, (21 Stat. 46), that the chief clerk of the National Board of Health should act as disbursing agent for the board, and should "give bond, conformably to" this section,

and for such service should receive $300 per annum in addition to his salary, the Secretary of the Treasury had no authority, by reason of such reference to this section, to change the salary so allowed. Dunwoody v. U. S. (1887), 22 Ct. Cl. 269, 279.

Under the provisions of act Mar. 3, 1853, sec. 3, 10 Stat. 211, and of act Mar. 3, 1855, sec. 4, 10 Stat. 669, which were incorporated into this section, a clerk of the State Department, appointed disbursing officer of that department, was not entitled to commissions in addition to his salary for receiving, keeping, and disbursing to claimants the indemnity fund paid by Great Britain under the Convention of Feb. 8, 1853, which was not required by law to be paid into the Treasury. (1861), 10 Op. Atty. Gen. 31.

109. Acting disbursing clerks.—In case of the sickness or unavoidable absence of any disbursing clerk or disbursing agent of any executive department, independent bureau, or office, in Washington, District of Columbia, he may, with the approval of the head of the department, independent bureau, or office, in which said disbursing clerk or agent is employed, authorize the clerk of highest grade employed therein to act in his place, and to discharge all the duties by law or regulations of such disbursing clerk or agent. The official bond given by the principal of the office shall be held to cover and apply to the acts of the person appointed to act in his place in such cases. Such acting officer shall, moreover, for the time being, be subject to all the liabilities and penalties prescribed by law for the official misconduct in like cases, of the disbursing clerk or disbursing agent, respectively, for whom he acts, and such acting officer shall be required by the head of the department, independent bureau, or office, to give bond to and in such sum as the disbursing clerk or disbursing agent may require. *Sec. 8, act of Mar. 4, 1909 (35 Stat. 1027), making appropriations for sundry civil expenses.*

Notes of Decisions.

Bond.—The premium to be paid on bond of an acting or deputy disbursing clerk is not governed by act of Aug. 5, 1909 (36 Stat. 125), 240, post, relating to bonds running to the United States, and the rate may therefore be whatever the principal and surety agree upon; but the surety on such a bond should be one authorized by 244–246, post, or such personal surety as may be acceptable to the proper authorities. (1909) 27 Op. Atty. Gen. 624.

110. Retirement of civilian employees.—That beginning at the expiration of ninety days next following the passage of this Act, all employees in the classified civil service of the United States who have on that date, or shall have on any date thereafter, reached the age of seventy years and rendered at least fifteen years of service computed as prescribed in section 3 of this Act, shall be eligible for retirement on an annuity as provided in section 2 hereof: *Provided*, That mechanics, city and rural letter carriers, and post-office clerks shall be eligible for retirement at sixty-five years of age, and railway postal clerks at sixty-two years of age, if said mechanics, city and rural letter carriers, post-office clerks, and railway postal clerks shall have rendered at least fifteen years of service computed as described in section 3 of this Act.

The provisions of this Act shall include superintendents of United States national cemeteries, employees of the Superintendent of the United States Capitol Buildings and Grounds, the Library of Congress, and the Botanic Gardens, excepting persons appointed by the President and confirmed by the Senate, and may be extended by Executive order, upon recommendation of the Civil Service Commission, to include any employee or group of employees in the civil service of the United States not classified at the time of the passage of this Act. The President shall have power, in his discretion, to exclude from the operation of

this Act any employee or group of employees in the classified civil service whose tenure of office or employment is intermittent or of uncertain duration.

All regular annual employees of the municipal government of the District of Columbia, appointed directly by the commissioners, or by other competent authority including those receiving per diem compensation paid out of general appropriations, but whose services are continuous, and including public-school employees, excepting school officers and teachers, shall be included in the provisions of this Act, but members of the police and fire departments shall be excluded therefrom.

Postmasters, and such employees of the Lighthouse Service as come within the provisions of section 6 of the Act of June 20, 1918, entitled, "An Act to authorize aids to navigation and for other works in the Lighthouse Service, and for other purposes," shall not be included in the provisions of this Act. *Sec. 1, act of May 22, 1920 (41 Stat. 614).*

The above act provides for pensions varying from $180 to $720, according to length of service and salary received at the time of retirement, to be paid monthly during life, and 2½ per cent of the basic salary, pay, or compensation of each employee is to be deducted for this purpose, to which each employee is deemed to consent. Upon transfer to an unclassified position or if absolutely separated from the service, such deposits may be refunded with interest at 4 per cent. Application for retirement must be filed by the employee with the Commissioner of Pensions, who administers under this act. All service under the Government, of whatever kind, is to be considered, including service in the Army, Navy, Marine Corps, or Coast Guard.

111. Retirement of disabled civilian employees.—That any employee to whom this Act applies who shall have served for a total period of not less than fifteen years, and who, before reaching the retirement age as fixed in section 1 hereof, becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on the part of the employee, shall upon his or her own application or upon the request or order of the head of the department, branch, or independent office concerned, be retired on an annuity under the provisions of section 2 hereof: *Provided, however,* That no employee shall be retired under the provisions of this section until examined by a medical officer of the United States or a duly qualified physician or surgeon or board of physicians or surgeons designated by the Commissioner of Pensions for that purpose and found to be disabled in the degree and in the manner specified herein.

Every annuitant retired under the provisions of this section, unless the disability for which retired is permanent in character, shall, at the expiration of one year from the date of such retirement and annually thereafter until reaching the retirement age as defined in section 1 hereof, be examined under direction of the Commissioner of Pensions by a medical officer of the United States, or a duly qualified physician or surgeon or board of physicians or surgeons designated by the Commissioner of Pensions for that purpose, in order to ascertain the nature and degree of the annuitant's disability, if any; if the annuitant recovers and is restored to his or her former earning capacity before reaching the retirement age, payment of the annuity shall be discontinued from the date of the medical examination showing such recovery; if the annuitant fails to appear for examination as required under this section, payment of the annuity shall be suspended until continuance of the disability has been satisfactorily established. The Commissioner of Pensions is hereby authorized to order or direct at any time such medical or other examination as he shall deem necessary to determine the facts relative to the nature and degree of disability of any employee retired on an annuity under this section.

Fees for examinations made under the provisions of this section by physicians or surgeons who are not medical officers of the United States shall be fixed by the Commissioner of Pensions, and such fees, together with the employee's reasonable traveling and other expenses incurred in order to submit to such examinations, shall be paid out of the appropriations for the cost of administering this act.

In all cases where the annuity is discontinued under the provisions of this section before the annuitant has received a sum equal to the total amount of his or her contributions with accrued interest, the difference shall be paid to the retired employee, or to his or her estate, upon application therefor in such form and manner as the Commissioner of Pensions may direct. * * *

No person shall be entitled to receive an annuity under the provisions of this Act, and compensation under the provisions of the Act of September 7, 1916, entitled "An act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," covering the same period of time; but this provision shall not be so construed as to bar the right of any claimant to the greater benefit conferred by either Act for any part of the same period of time. *Sec. 5, act of May 22, 1920 (41 Stat. 616).*

112. Compensation for injury.—That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death. *Sec. 1, act of Sept. 7, 1916 (39 Stat. 742).*

That all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided, however,* That for injuries occurring prior to the passage of this Act compensation shall be paid under the law in force at the time of the passage of this Act: * * * *Sec. 41, act of Sept. 7, 1916 (39 Stat. 750).*

Act of May 30, 1908 (35 Stat. 556), and subsequent legislation provided that employees in arsenals and others engaged in hazardous employment if injured were entitled to compensation proportioned to pay for one year.

Notes of Decisions.

"Injury."—A plate printer in the Bureau of Engraving and Printing whose right wrist was sprained in the course of his employment and without misconduct or negligence on his part, which injury was complicated by a rupture of the synovial sac surrounding the ligaments leading from the back part of the forearm to the fingers, the injury continuing for more than 15 days, suffered "an injury" within the meaning of the act. (1909) 27 Op. Atty. Gen. 346. An employee may be injured in the course of his employment within the language of that statute without having suffered a definite accident. Id.

An artisan or laborer employed by the United States in the construction of river and harbor work who contracted a severe cold in the course of his employment resulting in pneumonia and which incapacitated him for duty for a period lasting more than 15 days is not entitled to compensation under the act. (1910) 28 Op Atty Gen. 254.

The word "injury" as used in the act is in no sense suggestive of disease, nor has it ordinarily any such significance. (1911) 29 Op Atty. Gen. 254.

"Accident."—The word "injury" in the section is employed comprehensively to embrace all the cases of incapacity to continue work or employment unless the injury is due to the negligence or misconduct of the employee injured, and includes all cases where as a result of the employee's

occupation and without any negligence or misconduct, he becomes unable to carry on his work, and the condition continues for more than 15 days. (1909) 27 Op. Atty. Gen. 346.

The word "accident" is employed to denote the happening of some unusual event producing death or injury, which injury results in incapacity for work, lasting more than 15 days. Id.

"Course of employment."—An employee has no legal claim if he might with ordinary care have avoided the disaster, except where the rule of comparative negligence prevails. Hayes v. U. S. (1911), 46 Ct. Cl. 282.

Contributory negligence.—Where a laborer employed by the United States in the construction of river and harbor work, while off duty, went upon a bin to talk with the man emptying gravel about going home the following Sunday, and in the act of leaving voluntarily and with no emergency for immediate action attempted to empty a box of gravel, and in so doing fell overboard and was drowned, the accident is deemed not to have arisen within the course of his employment, and compensation therefor is unauthorized under the act. (1912) 29 Op. Atty. Gen. 415.

Remedy.—This act does not provide an exclusive remedy, so as to preclude a railway mail clerk from maintaining a personal injury negligence action. Dahn v. McAdoo (D. C. 1919), 258 Fed. 549.

113. No compensation during first three days of disability.—That during the first three days of disability the employee shall not be entitled to compensation except as provided in section nine. No compensation shall at any time be paid for such period. *Sec. 2, act of Sept. 7, 1916 (39 Stat. 743).*

114. Compensation may begin four days after expiration of annual or sick leave.—That if at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the fourth day of disability after the annual or sick leave has ceased. *Sec. 8, act of Sept. 7, 1916 (39 Stat. 743).*

115. Written notice of injury given to immediate superior of an employee.—That every employee injured in the performance of his duty, or some one on his behalf, shall, within forty-eight hours after the injury, give written notice thereof to the immediate superior of the employee. Such notice shall be given by delivering it personally or by depositing it properly stamped and addressed in the mail. *Sec. 15, act of Sept. 7, 1916 (39 Stat. 746).*

That the notice shall state the name and address of the employee, the year, month, day, and hour when and the particular locality where the injury occurred, and the cause and nature of the injury, and shall be signed by and contain the address of the person giving the notice. *Sec. 16, act of Sept. 7, 1916 (39 Stat. 746).*

116. Failure to give notice of injury within time limit may be waived for cause.—That unless notice is given within the time specified or unless the immediate superior has actual knowledge of the injury, no compensation shall be allowed, but for any reasonable cause shown, the commission may allow compensation if the notice is filed within one year after the injury. *Sec. 17, act of Sept. 7, 1916 (39 Stat. 746).*

117. Report of injury to be made to commission by employee's superior.—That immediately after an injury to an employee resulting in his death or in his probable disability, his immediate superior shall make a report to the commission containing such information as the commission may require, and shall thereafter make such supplementary reports as the commssion may require. *Sec. 24, act of Sept. 7, 1916 (39 Stat. 747).*

116. Claim for compensation.—That no compensation under this Act shall be allowed to any person, except as provided in section thirty-eight, unless he

or some one on his behalf shall, within the time specified in section twenty, make a written claim therefor. Such claim shall be made by delivering it at the office of the commission or to any commissioner or to any person whom the commission may by regulation designate, or by depositing it in the mail properly stamped and addressed to the commission or to any person whom the commission may by regulation designate. *Sec. 18, act of Sept. 7, 1916 (39 Stat. 746).*

119. **Method of entering a claim for compensation.**—That every claim shall be made on forms to be furnished by the commission and shall contain all the information required by the commission. Each claim shall be sworn to by the person entitled to compensation or by the person acting on his behalf, and, except in case of death, shall be accompanied by a certificate of the employee's physician stating the nature of the injury and the nature and probable extent of the disability. For any reasonable cause shown the commission may waive the provisions of this section. *Sec. 19, act of Sept. 7, 1916 (39 Stat. 746).*

120. **Time limit for entering a claim for compensation.**—That all original claims for compensation for disability shall be made within sixty days after the injury. All original claims for compensation for death shall be made within one year after the death. For any reasonable cause shown the commission may allow original claims for compensation for disability to be made at any time within one year. *Sec. 20, act of Sept. 7, 1916 (39 Stat. 747).*

121. **Medical examination of claimant for compensation.**—That after the injury the employee shall, as frequently and at such times and places as may be reasonably required, submit himself to examination by a medical officer of the United States or by a duly qualified physician designated or approved by the commission. The employee may have a duly qualified physician designated and paid by him present to participate in such examination. For all examinations after the first the employee shall, in the discretion of the commission, be paid his reasonable traveling and other expenses and loss of wages incurred in order to submit to such examination. If the employee refuses to submit himself for or in any way obstructs any examination, his right to claim compensation under this Act shall be suspended until such refusal or obstruction ceases. No compensation shall be payable while such refusal or obstruction continues, and the period of such refusal or obstruction shall be deducted from the period for which compensation is payable to him. *Sec. 21, act of Sept. 7, 1916 (39 Stat. 747).*

122. **Appointment of third physician to examine an injured employee.**—That in case of any disagreement between the physician making an examination on the part of the United States and the employee's physician the commission shall appoint a third physician, duly qualified, who shall make an examination. *Sec. 22, act of Sept. 7, 1916 (39 Stat. 747).*

123. **Fees for medical examination.**—That fees for examinations made on the part of the United States under sections twenty-one and twenty-two by physicians who are not already in the service of the United States shall be fixed by the commission. Such fees, and any sum payable to the employee under section twenty-one, shall be paid out of the appropriation for the work of the commission. *Sec. 23, act of Sept. 7, 1916 (39 Stat. 747).*

124. **Finding of facts and award of compensation.**—The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may

deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided for in this Act. Compensation when awarded shall be paid from the employees' compensation fund. *Sec. 36, act of Sept. 7, 1916 (39 Stat. 749).*

125. Review of award of compensation.—That if the original claim for compensation has been made within the time specified in section twenty, the commission may, at any time, on its own motion or on application, review the award, and, in accordance with the facts found on such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, award compensation. *Sec. 37, act of Sept. 17, 1916 (39 Stat. 749).*

126. Cancellation and recovery of award of compensation.—That if any compensation is paid under a mistake of law or of fact, the commission shall immediately cancel any award under which such compensation has been paid and shall recover, as far as practicable, any amount which has been so paid. Any amount so recovered shall be placed to the credit of the employees' compensation fund. *Sec. 38, act of Sept. 7, 1916 (39 Stat. 749).*

127. Perjury in claiming compensation.—That whoever makes, in any affidavit required under section four or in any claim for compensation, any statement, knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $2,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. *Sec. 39, act of Sept. 7, 1916 (39 Stat. 749).*

128. Compensation for total disability.—That if the disability is total the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of his monthly pay, except as hereinafter provided. *Sec. 3, act of Sept. 7, 1916 (39 Stat. 743).*

129. Maximum and minimum compensation for total disability.—That the monthly compensation for total disability shall not be more than $66.67 nor less than $33.33, unless the employee's monthly pay is less than $33.33, in which case his monthly compensation shall be the full amount of his monthly pay. * * * *Sec. 6, act of Sept. 7, 1916 (39 Stat. 743).*

130. Compensation for partial disability.—That if the disability is partial the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of such partial disability. The commission may, from time to time, require a partially disabled employee to make an affidavit as to the wages which he is then receiving. In such affidavit the employee shall include a statement of the value of housing, board, lodging, and other advantages which are received from the employer as a part of his remuneration and which can be estimated in money. If the employee, when required, fails to make such affidavit, he shall not be entitled to any compensation while such failure continues, and the period of such failure shall be deducted from the period during which compensation is payable to him. *Sec. 4, act of Sept. 7, 1916 (39 Stat. 743).*

131. Maximum compensation for partial disability.— * * * The monthly compensation for partial disability shall not be more than $66.67. * * * *Sec. 6, act of Sept. 7, 1916 (39 Stat. 743).*

132. **Compensation ceases on refusal to work.**—That if a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him, he shall not be entitled to any compensation. *Sec. 5, act of Sept. 7, 1916 (39 Stat. 743).*

133. **Compensation of injured minors.**— * * * In the case of persons who at the time of the injury were minors or employed in a learner's capacity and who were not physically or mentally defective, the commission shall, on any review after the time when the monthly wage-earning capacity of such persons would probably, but for the injury, have increased, award compensation based on such probable monthly wage-earning capacity. * * * *Sec. 6, act of Sept. 7, 1916 (39 Stat. 743).*

134. **Compensation reduced as age increases.**— * * * The commission may, on any review after the time when the monthly wage-earning capacity of the disabled employee would probably, irrespective of the injury, have decreased on account of old age, award compensation based on such probable monthly wage-earning capacity. *Sec. 6, act of Sept. 7, 1916 (39 Stat. 743).*

135. **Computation of wage-earning capacity.**—That in computing the monthly pay the usual practice of the service in which the employee was employed shall be followed. Subsistence and the value of quarters furnished an employee shall be included as part of the pay, but overtime pay shall not be taken into account. *Sec. 12, act of Sept. 7, 1916 (39 Stat. 746).*

136. **Wage-earning capacity of partially disabled.**—That in the determination of the employee's monthly wage-earning capacity after the beginning of partial disability, the value of housing, board, lodging, and other advantages which are received from his employer as a part of his remuneration and which can be estimated in money shall be taken into account. *Sec. 13, act of Sept. 7, 1916 (39 Stat. 746).*

137. **Receipt of salary, pension and compensation by the same person.**—That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States. *Sec. 7, act of Sept. 7, 1916 (39 Stat. 743).*

138. **Lump-sum payment of compensation.**—That in cases of death or of permanent total or permanent partial disability, if the monthly payment to the beneficiary is less than $5 a month, or if the beneficiary is or is about to become a nonresident of the United States, or if the commission determines that it is for the best interests of the beneficiary, the liability of the United States for compensation to such beneficiary may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at four per centum true discount compounded annually. The probability of the beneficiary's death before the expiration of the period during which he is entitled to compensation shall be determined according to the American Experience Table of Mortality; but in case of compensation to the widow or widower of the deceased employee, such lump sum shall not exceed sixty months' compensation. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded. *Sec. 14, act of Sept. 7, 1916 (39 Stat. 746).*

139. Assignment of claim prohibited.—That any assignment of a claim for compensation under this Act shall be void * * *. *Sec. 25, act of Sept. 7, 1916 (39 Stat. 747).*

140. Compensation exempt from claims of creditors.— * * * all compensation and claims therefor shall be exempt from all claims of creditors. *Sec. 25, act of Sept. 7, 1916 (39 Stat. 747).*

141. Release of claims against the Panama Railroad Co.— * * * *And provided further*, That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in the Panama Railroad Company to pay damages therefor under the laws of any State, Territory, or possession of the United States or of the District of Columbia or any foreign country, no compensation shall be payable until the person entitled to compensation releases to the Panama Railroad Company any right of action which he may have to enforce such liability of the Panama Railroad Company, or until he assigns to the United States any right which he may have to share in any money or other property received in satisfaction of such liability of the Panama Railroad Company. *Sec. 41, act of Sept. 7, 1916 (39 Stat. 750).*

142. Medical, surgical, and hospital treatment provided.—That immediately after an injury sustained by an employee while in the performance of his duty, whether or not disability has arisen, and for a reasonable time thereafter, the United States shall furnish to such employee reasonable medical, surgical, and hospital services and supplies unless he refuses to accept them. Such services and supplies shall be furnished by United States medical officers and hospitals, but where this is not practicable shall be furnished by private physicians and hospitals designated or approved by the commission and paid for from the employees' compensation fund. If necessary for the securing of proper medical, surgical, and hospital treatment, the employee, in the discretion of the commission, may be furnished transportation at the expense of the employees' compensation fund. *Sec. 9, act of Sept. 7, 1916 (39 Stat. 743).*

143. Burial expenses.—That if death results from the injury within six years the United States shall pay to the personal representative of the deceased employee burial expenses not to exceed $100, in the discretion of the commission. In the case of an employee whose home is within the United States, if his death occurs away from his home office or outside of the United States, and if so desired by his relatives, the body shall, in the discretion of the commission, be embalmed and transported in a hermetically sealed casket to the home of the employee. Such burial expenses shall not be paid and such transportation shall not be furnished where the death takes place more than one year after the cessation of disability resulting from such injury, or, if there has been no disability preceding death, more than one year after the injury. *Sec. 11, act of Sept. 7, 1916 (39 Stat. 745).*

Provided, That hereafter the heads of Departments shall not authorize any expenditure in connection with transportation of remains of deceased employees, except when otherwise specifically provided by law. *Act of June 7, 1897 (30 Stat. 86).*

144. Compensation to dependents if death results from injury.—That if death results from the injury within six years, the United States shall pay to the following persons for the following periods a monthly compensation equal to the following percentages of the deceased employee's monthly pay, subject to

the modification that no compensation shall be paid where the death takes place more than one year after the cessation of disability resulting from such injury, or, if there has been no disability preceding death, more than one year after the injury: * * *. *Sec. 10, act of Sept. 7, 1916 (39 Stat. 744).*

146. **Total monthly compensation to dependents.**—In computing compensation under this section, the monthly pay shall be considered not to be more than $50 nor less than $50, but the total monthly compensation shall not exceed the monthly pay computed as provided in section twelve. *Sec. 10 (K), act of Sept. 7, 1916 (39 Stat. 745).*

147. **Compensation to a widow without children.**—To the widow, if there is no child, thirty-five per centum. This compensation shall be paid until her death or marriage. *Sec. 10 (A), act of Sept. 7, 1916 (39 Stat. 744).*

148. **Compensation to a widower without children.**—To the widower, if there is no child, thirty-five per centum if wholly dependent for support upon the deceased employee at the time of her death. This compensation shall be paid until his death or marriage. *Sec. 10 (B), act of Sept. 7, 1916 (39 Stat. 744).*

149. **Compensation to the widow or widower, if there is a child, and to a minor child.**—To the widow or widower, if there is a child, the compensation payable under clause (A) or clause (B) and in addition thereto ten per centum for each child, not to exceed a total of sixty-six and two-thirds per centum for such widow or widower and children. If a child has a guardian other than the surviving widow or widower, the compensation payable on account of such child shall be paid to such guardian. The compensation payable on account of any child shall cease when he dies, marries, or reaches the age of eighteen, or, if over eighteen, and incapable of self-support, becomes capable of self-support. *Sec. 10 (C), act of Sept. 7, 1916 (39 Stat. 744).*

150. **Compensation to orphan children.**—To the children, if there is no widow or widower, twenty-five per centum for one child and ten per centum additional for each additional child, not to exceed a total of sixty-six and two-thirds per centum, divided among such children share and share alike. The compensation of each child shall be paid until he dies, marries, or reaches the age of eighteen, or, if over eighteen and incapable of self-support, becomes capable of self-support. The compensation of a child under legal age shall be paid to its guardian. *Sec. 10 (D), act of Sept. 7, 1916 (39 Stat. 744).*

151. **Compensation to dependent parents.**—To the parents, if one is wholly dependent for support upon the deceased employee at the time of his death and the other is not dependent to any extent, twenty-five per centum; if both are wholly dependent, twenty per centum to each; if one is or both are partly dependent, a proportionate amount in the discretion of the commission.

The above percentages shall be paid if there is no widow, widower, or child. If there is a widow, widower, or child, there shall be paid so much of the above percentages as, when added to the total percentages payable to the widow, widower, and children, will not exceed a total of sixty-six and two-thirds per centum. *Sec. 10 (E), act of Sept. 7, 1916 (39 Stat. 744).*

152. **Compensation to dependent brothers, sisters, grandparents, and grandchildren.**—To the brothers, sisters, grandparents, and grandchildren, if one is wholly dependent upon the deceased employee for support at the time of his death, twenty per centum to such dependent; if more than one are wholly dependent, thirty per centum, divided among such dependents share and share alike. If there is no one of them wholly dependent, but one or more partly dependent, ten per centum divided among such dependents share and share alike.

The above percentages shall be paid if there is no widow, widower, child, or dependent parent. If there is a widow, widower, child, or dependent parent, there shall be paid so much of the above percentages as, when added to the total percentage payable to the widow, widower, children, and dependent parents, will not exceed a total of sixty-six and two-thirds per centum. *Sec. 10 (F), act of Sept. 7, 1916 (39 Stat. 744).*

152. Duration of compensation to relatives.—The compensation of each beneficiary under clauses (E) and (F) shall be paid for a period of eight years from the time of the death, unless before that time he, if a parent or grandparent, dies, marries, or ceases to be dependent, or, if a brother, sister, or grandchild, dies, marries, or reaches the age of eighteen, or, if over eighteen and incapable of self-support, becomes capable of self-support. The compensation of a brother, sister, or grandchild under legal age shall be paid to his or her guardian. *Sec. 10 (G), act of Sept. 7, 1916 (39 Stat. 745).*

153. Definition of terms child, brother, sister, parent, widow, widower, etc.—As used in this section, the term "child" includes stepchildren, adopted children, and posthumous children, but does not include married children. The terms "brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but do not include married brothers or married sisters. All of the above terms and the term "grandchild" include only persons who at the time of the death of the deceased employee are under eighteen years of age or over that age and incapable of self-support. The term "parent" includes stepparents and parents by adoption. The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death. The term "widower" includes only the decedent's husband dependent for support upon her at the time of her death. The terms "adopted" and "adoption," as used in this clause, include only legal adoption prior to the time of the injury. *Sec. 10 (H), act of Sept. 7, 1916 (39 Stat. 745).*

154. Compensation of remaining persons where compensation of one person ceases.—Upon the cessation of compensation under this section to or on account of any person, the compensation of the remaining persons entitled to compensation for the unexpired part of the period during which their compensation is payable shall be that which such persons would have received if they had been the only persons entitled to compensation at the time of the decedent's death. *Sec. 10 (I), act of Sept. 7, 1916 (39 Stat. 745).*

155. Apportionment of compensation so as to avoid injustice.—In case there are two or more classes of persons entitled to compensation under this section and the apportionment of such compensation, above provided, would result in injustice, the commission may, in its discretion, modify the apportionment to meet the requirements of the case. *Sec. 10 (J), act of Sept. 7, 1916 (39 Stat. 745).*

156. Penalty for accepting compensation after remarriage.—If any person entitled to compensation under this section, whose compensation by the terms of this section ceases upon his marriage, accepts any payments of compensation after his marriage he shall be punished by a fine of not more than $2,000 or by imprisonment for not more than one year, or by both such fine and imprisonment. *Sec. 10 (L), act of Sept. 7, 1916 (39 Stat. 745).*

157. Injury involving claim against third person.—If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the commission may require the beneficiary to assign

to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under this Act.

The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury. *Sec. 26, act of Sept. 7, 1916 (39 Stat. 747).*

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Assignment of right of action.—Neither the taking over and the operation of the railroads by the Government nor the order of the Director General of Railroads requiring that an action to recover damages against a Government-controlled railroad be brought directly against the said Director General of Railroads has deprived the United States Employees' Compensation Commission of the power to require a beneficiary to assign his right of action to the United States or prosecute said action as a condition to settlement. 31 Op. Atty. Gen. 365.

158. Compensation of beneficiary reduced.—That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury. *Sec. 27, act of Sept. 7, 1916 (39 Stat. 747-748).*

159. Employees' compensation fund.—That there is hereby authorized to be appropriated, from any money in the Treasury not otherwise appropriated, the sum of $200,000, to be set aside as a separate fund in the Treasury, to be known as the employees' compensation fund. To this fund there shall be added such sums as Congress may from time to time appropriate for the purpose. Such fund, including all additions that may be made to it, is hereby authorized to be permanently appropriated for the payment of the compensation provided by

this Act, including the medical, surgical, and hospital services and supplies provided by section nine, and the transportation and burial expenses provided by sections nine and eleven. The commission shall submit annually to the Secretary of the Treasury estimates of the appropriations necessary for the maintenance of the fund. *Sec. 35, act of Sept. 7, 1916 (39 Stat. 749).*

Such appropriation appears annually in the acts making appropriations for sundry civil expenses: Public Health Service.

For secs. 9 and 11 of this act see ante, 142 and 143.

160. Compensation for injury administered by the governor of the Panama Canal.—That the President may, from time to time, transfer the administration of this Act so far as employees of the Panama Canal and of the Panama Railroad Company are concerned to the governor of the Panama Canal, and so far as employees of the Alaskan Engineering Commission are concerned to the chairman of that commission, in which cases the words "commission" and "its" wherever they appear in this Act shall, so far as necessary to give effect to such transfer, be read "governor of the Panama Canal" or "chairman of the Alaskan Engineering Commission," as the case may be, and "his"; and the expenses of medical examinations under sections twenty-one and twenty-two, and the reasonable traveling and other expenses and loss of wages payable to employees under section twenty-one, shall be paid out of appropriations for the Panama Canal or for the Alaskan Engineering Commission or out of funds of the Panama Railroad, as the case may be, instead of out of the appropriation for the work of the commission.

In the case of compensation to employees of the Panama Canal or of the Panama Railroad Company for temporary disability, either total or partial, the President may authorize the governor of the Panama Canal to waive, at his discretion, the making of the claim required by section eighteen. In the case of alien employees of the Panama Canal or of the Panama Railroad Company, or of any class or classes of them, the President may remove or modify the minimum limit established by section six on the monthly compensation for disability and the minimum limit established by clause (K) of section ten on the monthly pay on which death compensation is to be computed. The President may authorize the governor of the Panama Canal and the chairman of the Alaskan Engineering Commission to pay the compensation provided by this Act, including the medical, surgical, and hospital services and supplies provided by section nine and the transportation and burial expenses provided by sections nine and eleven, out of the appropriations for the Panama Canal and for the Alaskan Engineering Commission, such appropriations to be reimbursed for such payments by the transfer of funds from the employees' compensation fund. *Sec. 42, act of Sept. 7, 1916 (39 Stat. 750).*

The appointment and general powers and duties of the governor of the Panama Canal are provided for by secs. 4 and 7, act of Aug. 24, 1912.

The Alaskan Engineering Commission was created under the act empowering the President to construct a railroad in Alaska, act Mar. 2, 1914 (38 Stat. 305).

161. Definition of terms.—That wherever used in this Act—

The singular includes the plural and the masculine includes the feminine.

The term "employee" includes all civil employees of the United States and of the Panama Railroad Company.

The term "commission" shall be taken to refer to the United States Employees' Compensation Commission provided for in section twenty-eight.

The term "physician" includes surgeons.

The term "monthly pay" shall be taken to refer to the monthly pay at the time of the injury. *Sec. 40, act of Sept. 7, 1916 (39 Stat. 750).*

This section and sections 41 and 42 apparently make this act sufficiently comprehensive to supersede the last paragraph of act Aug. 24, 1912, sec. 5.

162. United States Employees' Compensation Commission, established.—That a commission is hereby created, to be known as the United States Employees' Compensation Commission, and to be composed of three commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman. No commissioner shall hold any other office or position under the United States. No more than two of said commissioners shall be members of the same political party. One of said commissioners shall be appointed for a term of two years, one for a term of four years, and one for a term of six years, and at the expiration of each of said terms the commissioner then appointed shall be appointed for a period of six years. Each commissioner shall receive a salary of $4,000 a year. The principal office of said commission shall be in Washington, District of Columbia, but the said commission is authorized to perform its work at any place deemed necessary by said commission, subject to the restrictions and limitations of this Act. *Sec. 28, act of Sept. 7, 1916 (39 Stat. 748).*

163. Assistants and employees of the compensation commission.—That the commission shall have such assistants, clerks, and other employees as may be from time to time provided by Congress. They shall be appointed from lists of eligibles to be supplied by the Civil Service Commission, and in accordance with the civil service law. *Sec. 30, act of Sept. 7, 1916 (39 Stat. 748).*

164. Pending claims and personnel transferred to the compensation commission.—Upon the organization of said commission and notification to the heads of all executive departments that the commission is ready to take up the work devolved upon it by this Act, all commissions and independent bureaus, by or in which payments for compensation are now provided, together with the adjustment and settlement of such claims, shall cease and determine, and such executive departments, commissions, and independent bureaus shall transfer all pending claims to said commission to be administered by it. The said commission may obtain, in all cases, in addition to the reports provided in section twenty-four, such information and such reports from employees of the departments as may be agreed upon by the commission and the heads of the respective departments. All clerks and employees now exclusively engaged in carrying on said work in the various executive departments, commissions, and independent bureaus, shall be transferred to, and become employees of, the commission at their present grades and salaries. *Sec. 28a, act of Sept. 7, 1916 (39 Stat. 748).*

The Commissioner of Labor Statistics was charged with the administration of the Employees' Compensation act of May 30, 1908, by act Mar. 4, 1913, sec. 3.

The President may transfer the administration of this act, in so far as it affects certain employees, to the governor of the Panama Canal and the chairman of the Alaskan Engineering Commission, under sec. 42 of this act, ante, 160.

165. Compensation commission authorized to issue process, administer oaths, etc.—That the commission, or any commissioner by authority of the commission, shall have power to issue subpœnas for and compel the attendance of witnesses within a radius of one hundred miles, to require the production of books, papers, documents, and other evidence, to administer oaths, and to examine witnesses, upon any matter within the jurisdiction of the commission. *Sec. 29, act of Sept. 7, 1916 (39 Stat. 748).*

166. Regulations by the compensation commission.—That the commission is thorized to make necessary rules and regulations for the enforcement of t Act, and shall decide all questions arising under this Act. *Sec. 32, act of Se 7, 1916 (39 Stat. 749).*

167. Annual report to Congress by the compensation commission.—That t commission shall make to Congress at the beginning of each regular sessio report of its work for the preceding fiscal year, including a detailed statem of appropriations and expenditures, a detailed statement showing receipts and expenditures from the employees' compensation fund, and its recommen tions for legislation. *Sec. 33, act of Sept. 7, 1916 (39 Stat. 749).*

168. Commission to submit annual estimate for appropriation.—That the c mission shall submit annually to the Secretary of the Treasury estimates the appropriations necessary for the work of the commission. *Sec. 31, act Sept. 7, 1916 (39 Stat. 749).*

CHAPTER 3.

EXECUTIVE DEPARTMENTS IN GENERAL.

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169. Temporary head of a department.—In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease. *R. S. 177.*

See post, 488, act of Mar. 4, 1874 (18 Stat. 19), providing that the Secretary of War, when temporarily absent from the War Department, may authorize the chief clerk of the Department to sign requisitions on the Treasury Department and other papers.

Notes of Decisions.

Previous statutes.—In the acts for the organization of the Departments of State, War, and Treasury, provision was made for the appointment of a subordinate officer, by the head of the department, who should have the charge and custody of the records, books, and papers appertaining to the office, in case of vacancy in the office of the Secretary, and in the act establishing the Navy Department, provision was made likewise for the charge and custody of the books, records, and documents of that department, in case of vacancy in the office of Secretary of the Navy. In re Hennen (1839), 13 Pet. 230, 259, 10 L. Ed. 138.

Presumption of authority.—Lawful exercise of authority by the assistant under this section is presumed. John Shillito Co. *v.* McClung (1892), 51 Fed. 868, 871, 2 C. C. A. 520; Chadwick *v.* U. S. (C. C. 1880), 3 Fed. 750, 756; U. S. *v.* Adams (C. C. 1885), 24 Fed. 348, 350; In re Jem Yuen (D. C. 1910), 188 Fed. 350; Ex parte Tsuie Shee (D. C. 1914), 218 Fed. 256.

Signing instruments.—The signing of an instrument by the assistant of the head of a department, as acting secretary, implies that one of the conditions on which he was authorized to act in that capacity had arisen. Marsh *v.* Nichols, Shepherd & Co. (1888), 9 Sup. Ct. 168, 171, 128 U. S. 605, 32 L. Ed. 538.

When the secretary is absent or sick, if the assistant is in charge of the department, under this section, he should sign as acting secretary. (1888) 19 Op. Atty. Gen. 133.

"Absence."—"Constructive absence" of the head of the department is insufficient to permit an assistant to act. Ex parte Tsuie Shee (D. C. 1914), 218 Fed. 256.

170. Temporary chief of bureau.—In case of the death, resignation, absence, or sickness of the chief of any Bureau, or of any officer thereof, whose appointment is not vested in the head of the Department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such Bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such chief or of

such officer until a successor is appointed or such absence or sickness shall cease. *R. S. 178.*

Notes of Decisions.

Previous statute.—Act July 23, 1868, to authorize the temporary supplying of vacancies in the executive departments, sec. 2 of which was incorporated into this section, applied to existing vacancies. American Wood Paper Co. v. Glen's Falls Paper Co. (C. C. 1871), Fed. Cas. No. 321a.

Assistant or deputy within section.—The phrase "assistant or deputy of such chief," etc., in this section, is to be construed as including an assistant or deputy only whose appointment is specifically provided for by statute. (1890) 19 Op. Atty. Gen. 503.

In the absence of any specific provision for the assignment of an officer of the Navy to duty as assistant to the chief of a bureau in the Navy Department, such an officer so assigned by the Secretary of the Navy under his general powers, is not authorized by this section to perform the duties of such chief in case of his death, resignation, absence, or sickness. Id.

Authority of acting officer.—The officer authorized, under this section, to perform temporarily the duties of the chief of a bureau, succeeds to and is to perform, not simply the duties of the absent chief which relate to that particular bureau, but all the duties of that chief which devolve upon him as such chief of the bureau. (1901) 23 Op. Atty. Gen. 473.

Presumption of authority.—A certificate issuing from the office of the Comptroller of the Currency, and under the seal of that office, given by one as "Acting Comptroller," held good. Keyser v. Hitz (1890), 10 Sup. Ct. 290, 293, 133 U. S. 138, 33 L. Ed. 531.

171. **Temporary chief of bureau detailed from another Department.**—In any of the cases mentioned in the two preceding sections, except the death, resignation, absence, or sickness of the Attorney-General, the President may, in his discretion, authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease. *R. S. 179.*

The President was empowered to authorize and direct the commanding general of the Army or the chief of any military bureau of the War Department to perform the duties of the Secretary of War, under the provisions of this section, by act Aug. 5, 1882, sec. 1, post, 485.

Notes of Decisions.

Vacancies within section.—A vacancy in the office of Paymaster General, created by the retirement of the previous incumbent, may be filled by an ad interim appointment or assignment under the provisions of this section. Such retired officer may be said to be "absent" within the meaning of that section. (1890) 19 Op. Atty. Gen. 500.

No provision was made by R. S. 178–181 (this compilation, 170–173) for temporarily filling a vacancy caused by the retirement of the chief of a bureau. (1909) 27 Op. Atty. Gen. 337.

Officers who may be designated to act.—Officers of the Navy designated by the Secretary of the Navy to act in an advisory capacity to him, but without executive authority over the other bureaus or officers of the Navy Department, can not be legally designated by the President to act as Secretary of the Navy during the absence or sickness of the Secretary or Assistant Secretary. (1909) 28 Op. Atty. Gen. 95.

Authority of acting officer.—An executive order under this section, authorizing the performance of the duties of a vacant office by another officer, devolves upon him all the duties appertaining to the office, including the acting as one of a board of commissions of which the absent officer, as such, was a member. (1892) 20 Op. Atty Gen. 483.

Presumption of authority.—Lawful exercise of powers under this section presumed. In re Jem Yuen (D. C. 1910), 188 Fed. 350.

Signing instruments. When the Secretary is absent or sick, if the assistant is in charge of the department, in pursuance of this section, he should sign as Acting Secretary. (1888) 19 Op. Atty. Gen. 133.

172. Temporary appointment during recess of Senate.—No temporary appointment, designation, or assignment of one officer to perform the duties of another, in the cases covered by sections one hundred and seventy-seven and one hundred and seventy-eight, shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate. *R. S. 181.*

Notes of Decisions.

Filling of vacancy during recess of Senate not limited as to period.—The President has the right under the Constitution, and impliedly under this section, to make a temporary appointment, designation, or assignment of one officer to perform the duties of another in the case of a vacancy caused by death, disability, or otherwise, during the recess of the Senate, and such temporary appointment, designation, or assignment is not limited by law to any particular period. (1904) 25 Op. Atty. Gen. 258.

173. Term of temporary appointments.—A vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than thirty days. *R. S. 180, as amended by act of Feb. 6, 1891 (26 Stat. 733).*

For the three sections mentioned, see ante, 169, 170, 171.

The amendment of this section by act Feb. 6, 1891, cited above, consisted in the change of the period for which such a vacancy may be filled from "ten days," as provided in the original section, to "thirty days."

Notes of Decisions.

Vacancies to which limitation is applicable.—The limitation by this section of the period for which vacancies occasioned by death or resignation should be temporarily filled applies as well where they are filled, under R. S. 177 or 178, ante, 169, 170, without action by the President, as where they are filled, under R. S. 179, ante, 171, by his authority and direction. (1883) 17 Op. Atty. Gen. 535.

Computation of period of limitation.—The period of limitation imposed by this section upon the temporary filling of vacancies occasioned by death or resignation is to be computed from the date of the President's action. (1878) 15 Op. Atty. Gen. 458.

Successive temporary appointments or reappointments to same vacancy.—Under this section and the three preceding sections referred to in it, the President has power to fill temporarily (by an appointment ad interim, as there prescribed), a vacancy occasioned by the death or resignation of the head of a department, or of the chief of a bureau therein, for the prescribed period only. When the vacancy is thus temporarily filled once for that period, the power conferred by the statute is exhausted. It is not competent for the President to appoint either the same or another officer thereafter to perform the duties of the vacant office for an additional period. (1880) 16 Op. Atty Gen. 596; (1883) 17 Op. Atty. Gen. 530; (1884) 18 Op. Atty. Gen. 50, 58.

A vacancy in the head of a department can not be temporarily filled, either by operation of law or by designation of the President, for a longer period than that limited by this section. (1891) 20 Op. Atty. Gen. 8.

The view expressed in (1883) 17 Op. Atty. Gen. 535, that the discretionary power given the President by R. S. 179, ante, 171, might be exercised after the vacancy had already been supplied under the operation of either of the two preceding sections, and that the period of temporary occupancy might be lengthened by allowing the statutory occupation of the office, without designation, for the time allowed, followed by a designation by the President for an additional period, is not accepted. Id.

174. Temporary appointment without extra pay.—An officer performing the duties of another office, during a vacancy, as authorized by sections one hundred and seventy-seven, one hundred and seventy-eight, and one hundred and seventy-nine, is not by reason thereof entitled to any other compensation than that attached to his proper office. *R. S. 182.*

175. Departmental regulations.—The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. *R. S. 161.*

Provisions authorizing each head of a department to alter the distribution of clerks among the various bureaus and offices, and to reduce the force employed, were made by R. S. 166, ante, 43, and act Aug. 15, 1876, sec. 3, ante, 51.

Heads of departments were required to make and enforce regulations to carry out the provisions of act Mar. 29, 1894, relating to the making of returns of public property, by sec. 4 of that act, post, 807.

Heads of departments were also required to make regulations to secure an administrative examination of accounts, before transmission to the Auditors of the Treasury, and for the execution of other requirements, 264, 266, post.

Notes of Decisions.

Making and requisites of regulations.—Usages have been established in every part of the Government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits. U. S. v. Macdaniel (1833), 7 Pet. 1, 14, 8 L. Ed. 587. See Benson v. Henkel (1905), 25 Sup. Ct. 569, 571, 198 U. S. 1, 49 L. Ed. 919.

A decision of a department in a particular case being the opinion of the secretary upon the law and regulations as they existed is not in any sense a regulation under this section, and, though entitled to great respect and consideration by the Supreme Court, is not binding on the court as a valid regulation of the department. Smith v. U. S. (1898), 18 Sup. Ct. 626, 629, 170 U. S. 372, 380, 42 L. Ed. 1074.

Regulations for government of a department need not be promulgated in any set form, nor in writing. Haas v. Henkel (1910), 30 Sup. Ct. 249, 254, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112.

The requirement by the department under whose authority an officer is acting, such as will make his action official, need not be prescribed by written rule or regulation. It may also be found in an established usage which constitutes the common law of the department and fixes the duties of those engaged in its activities. In numerous instances duties not completely defined by written rules are clearly established by settled practice. U. S. v. Birdsall (1914), 34 Sup. Ct. 512, 514, 233 U. S. 223, 58 L. Ed. 930.

A "regulation of an executive department" is a rule made by the head of the department for its action under an act of Congress conferring power so to do. An order of the President or of a secretary of a department is not such a regulation. Harvey v. U. S. (1867), 3 Ct. Cl. 33.

Regulations founded upon a law of Congress will be recognized by the courts, and a conspiracy to avoid the requirements of regulations thus made is punishable under R. S. 5440 (see now sec. 37, Crim Code, act of Mar. 4, 1909; 35 Stat. 1096). Curley v. U. S. (C. C. A. 1904), 130 Fed. 1, 11.

Regulations not to be inconsistent with law.—The head of an executive department is limited in what he does by the law; but he need not show express statutory authority for an administrative detail incident to a power conferred. U. S. v. Macdaniel (1833), 7 Pet. 1, 14, 8 L. Ed. 587; Small v. U. S. (1909), 45 Ct. Cl. 13; (1911) 28 Op. Atty. Gen. 549.

A regulation adopted under this section should not be disregarded or annulled by the courts unless it is plainly and palpably inconsistent with law. Boske v. Comingore (1900), 20 Sup. Ct. 701, 706, 177 U. S. 459, 44 L. Ed. 846.

A regulation of an executive department must conform to the law, if a law exists upon the subject of the regulation. Symonds v. U. S. (1886), 21 Ct. Cl. 148.

A departmental regulation contrary to law is no regulation. Sherlock v. U. S. (1908), 43 Ct. Cl. 161.

The Secretary of the Treasury can not legally, by departmental order, change a practice or course of office procedure prescribed by statute for the settlement of accounts. (1888) 19 Op. Atty. Gen. 176.

A regulation may supplement a statute, but can not supersede it. Roberts v. U. S. (1909), 44 Ct. Cl. 411.

Implied legislative ratification. When Congress permits the orders of an executive department to be formulated as regulations, and published, and carried into effect, the legislative ratification must be implied. Maddux v. U. S. (1885), 20 Ct. Cl. 193, 197.

Treasury regulations having been in force for a number of years and in operation in every port of the United States except one, and having received the tacit, if not express, approval of Congress, the court will not disregard them and hold that they are not authorized by law. Garlinger *v.* U. S. (1895), 30 Ct. Cl. 473.

Rights, duties, and obligations defined by statute can not be taken away or abridged by regulations of department. Laurey *v.* U. S. (1897), 32 Ct. Cl. 259, 265.

A head of a department has, under the powers conferred by this section, the right to say what the officers and clerks under him shall do or not do, so long as he does not go counter to any law. (1889) 19 Op. Atty. Gen. 401, 403.

Under the authority to prescribe regulations given by this section, there seems to be no limitation to the right of the head of a department to demand service of his subordinates. (1894) 20 Op. Atty. Gen. 728, 729.

Regulations for carrying out particular laws.—The head of a department, authorized to make regulations in aid of the law, can not make regulations which defeat the law. Morrill *v.* Jones (1882), 1 Sup. Ct. 423, 106 U. S. 466, 27 L. Ed. 267; Campbell *v.* U. S. (1882), 2 Sup. Ct. 759, 107 U. S. 407, 27 L. Ed. 592; Williamson *v.* U. S. (1908), 28 Sup. Ct. 163, 207 U. S. 425, 52 L. Ed. 278; Bong *v.* Alfred S. Campbell Art Co. (1909), 29 Sup. Ct. 628, 631, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126.

A regulation of an executive officer or department under legislative authority to make rules to enforce an act of Congress, which subjects classes of property to forfeiture and classes of persons to penalties that are excluded by the statute, is void. U. S. *v.* Eleven Thousand One Hundred and Fifty Pounds of Butter (1912), 195 Fed. 657, 115 C. C. A. 463, affirming judgment (D. C. 1911) 188 Fed. 157.

The Secretary of the Treasury is not authorized to impose, by regulations, burdens on commerce not imposed or authorized by the statute. Siegfried *v.* Phelps (C. C. 1889), 40 Fed. 660, 661; reversed (1892), 12 Sup. Ct. 891, 142 U. S. 602, 35 L. Ed. 1128.

Custody, use, etc., of property.—This section, and R. S. 217, post, 490, do not authorize the granting of licenses for the occupation of parts of military reservations for the erection of hotels, church edifices, etc. (1897) 21 Op. Atty. Gen. 537.

Preservation of records, etc.—Papers filed in the proper accounting office of the Treasury as vouchers and documents for settlement of a public account, can not be taken from such office by replevin. Brent *v.* Hagner (C. C. 1836), Fed. Cas. No. 1839, 5 Cranch. C. C. 71.

The archives of a department are not in the possession of the head of the department or chief of a bureau, but in the possession of the United States, and papers can not be taken therefrom, by replevin against such officer, on a claim of them as private property. (1853) 6 Op. Atty. Gen. 7.

Protection from disclosure as evidence of records or of facts known officially.—Official communications on subjects of a confidential nature are privileged from production as evidence in suits between private persons. (1877) 15 Op. Atty. Gen. 378, 415; (1878) 16 Op. Atty. Gen. 24.

Where the disclosure of facts stated, etc., in communications which are not privileged, as made in the course of official and public duties, would, in the judgment of the head of the department, be attended with serious damage to the public interest, the department would be justified in representing to the court that, upon public considerations, it declined to furnish such communications. (1877) 15 Op. Atty. Gen. 415, 416.

The head of an executive department is not legally bound, in obedience to a subpœna of a court, to appear in a suit between private parties and testify to facts which have come to his knowledge officially; but he may appear and give such testimony as he shall deem proper. (1905) 25 Op. Atty. Gen. 326.

Force and effect of regulations as law.—A regulation prescribed by the head of a department, within this section, when not inconsistent with law, has the force of law. Caha *v.* U. S. (1894), 14 Sup. Ct. 513, 517, 152 U. S. 221, 38 L. Ed. 415; Ex parte Reed (1879), 100 U. S. 13, 25 L. Ed. 538; (1895) 21 Op. Atty. Gen. 122.

A regulation of a department, in conformity to a particular act of Congress, becomes a part of the law, and of as binding force as if incorporated in the body of the law itself. Wilkins *v.* U. S. (1899) 96 Fed. 837, 841, 37 C. C. A. 588, writ of certiorari denied (1899), 20 Sup. Ct. 1023, 175 U. S. 727, 44 L. Ed. 339; U. S. *v.* Sibray (C. C. 1910), 178 Fed. 144; reversed (1911), 185 Fed. 401, 107 C. C. A. 483; U. S. *v.* Barrows (D. C. 1869), Fed. Cas. No. 14529, 1 Abb. U. S. 351.

Regulations can not have retroactive effect. U. S. *v.* Davis (1889), 10 Sup. Ct. 105, 132 U. S. 334, 33 L. Ed. 390; Same *v.* Schofield (1889), 10 Sup. Ct. 106, 132 U. S. 337, 33 L. Ed. 392.

The head of an executive department is not liable in damages on account of official communications made by him, pursuant to an act of Congress, and in respect of matters within his authority, by reason of

any personal or malicious motive that prompted his action. Spalding v. Vilas (1896), 16 Sup. Ct. 631, 161 U. S. 483, 40 L. Ed. 780.

Departmental practice in the administration of a statute will control the courts only when such practice is reasonable. Robinson v. Lamerigan (1913), 33 Sup. Ct. 255, 227 U. S. 173, 57 L. Ed. 468.

While department regulations duly promulgated have the force of law, in a limited sense, they can not enlarge or restrict the liability of an officer on his bond. Meade v. U. S. (1897), 81 Fed. 684, 26 C. C. A. 220.

A lawful rule made by the chief of an executive department to which the enforcement of a law is intrusted, which appoints a subordinate for the purpose and imposes upon him the duty of enforcing the law, is a sufficient process of law to authorize him to prevent its violation when he can do so without infringing upon any personal or property right of those who threaten to break it. Buster v. Wright (1905), 135 Fed. 947, 68 C. C. A. 505.

The regulations of a department in settling its accounts are subject to the revision of a court and jury when they work manifest injustice to individuals. U. S. v. Cadwalader (D. C. 1835), Fed. Cas. No. 14706.

Regulations are matters of departmental business; law and justice require that they be upheld so long as the head of the department allows them to be in force. Real Estate Savings Bank of Pittsburgh v. U. S. (1880), 16 Ct. Cl. 335.

Regulations of the heads of departments, within the scope of their respective duties, are treated as the acts of the President. Maxwell v. U. S. (1914), 49 Ct. Cl. 262.

The rules adopted by the Treasury Department for the payment of arrears due deceased officers, seamen, etc., in the Navy have the force of law. Low v. Hanson (1881), 72 Me. 104.

Judicial notice of regulations.—**The courts take judicial notice of the regulations of the executive departments.** Ex parte Reed (1879), 100 U. S. 13, 25 L. Ed. 538; Wilkins v. U. S. (1899), 96 Fed. 837, 841, 37 C. C. A. 588; Weimer v. Zevely (1905), 138 Fed. 1006, 70 C. C. A. 683, affirming decree Zevely v. Weimer (1904), 82 S. W. 941, 5 Ind. T. 646; Beck v. Johnson (C. C. 1909), 169 Fed. 154; Low v. Hanson (1881), 72 Me. 104.

Whenever, by the express language of any act of Congress, power is intrusted to either of the principal departments of Government "to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a part of that body of public records of which the courts take judicial notice. Caha v. U. S. (1894), 14 Sup. Ct. 513, 517, 152 U. S. 221, 38 L. Ed. 415.

A Federal appellate court should not be asked to take judicial notice of department regulations, but where relied on they should be read and put into the record in the trial court. Nagle v. U. S. (1906), 145 Fed. 302, 76, C. C. A. 181.

Violations of regulations.—**Violation of department regulations is not a criminal offense, in the absence of a statute distinctly making it so.** U. S. v. Eaton (1892), 12 Sup. Ct. 764, 767, 144 U. S. 677, 36 L. Ed. 591; U. S. v. 11,150 Pounds of Butter (1912), 195 Fed. 657, 115 C. C. A. 463; U. S. v. Van Wert (D. C. 1912), 195 Fed. 974.

176. Experts to improve business methods.—That no part of any money appropriated in this or any other Act shall be used for compensation or payment of expenses of accountants or other experts in inaugurating new or changing old methods of transacting the business of the United States or the District of Columbia unless authority for employment of such services or payment of such expenses is stated in specific terms in the Act making provision therefor and the rate of compensation for such services or expenses is specifically fixed therein, or be used for compensation of or expenses for persons, aiding or assisting such accountants or other experts, unless the rate of compensation of or expenses for such assistants is fixed by officers or employees of the United States or District of Columbia having authority to do so, and such rates of compensation or expenses so fixed shall be paid only to the person so employed. *Sec. 5, act of Apr. 6, 1914; (38 Stat. 335).*

177. Closing departments in respect for a deceased official.—That hereafter the Executive Departments of the Government shall not be closed as a mark to the memory of any deceased ex-official of the United States. *Sec. 4, act of*

Mar. 3, 1893 (27 Stat. 715), making appropriations for legislative, executive and judicial expenses.

178. **Draping public buildings in mourning.**—That hereafter no building owned, or used for public purposes, by the Government of the United States, shall be draped in mourning and no part of the public fund shall be used for such purpose. *Sec. 3, act of Mar. 3, 1893 (27 Stat. 715), making appropriations for legislative, executive and judicial expenses.*

178½. **Use of Library of Congress.**—The Joint Committee on the Library is authorized to grant the privilege of using and drawing books from the Library, in the same manner and subject to the same regulations as members of Congress, to any of the following persons:

First. Heads of Departments. * * * *R. S. 94.*

The Chief of Engineers is specifically granted the use of the Library of Congress by 603, post.

179. **Telegraph connection with the Capitol.**—That the lines of telegraph, connecting the Capitol with the various Departments in Washington, constructed under and by virtue of the act of Congress approved March third, eighteen hundred and seventy-three, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes," be, and the same are hereby, placed under the supervision of the officer in charge of the public buildings and grounds; and that the said officer be authorized and empowered to make rules and regulations for the working of said lines. And the Secretary or Head of each Executive Department, and the Congressional Printer, are hereby authorized to detail one person from their present force of employees to operate the instruments in said Departments and printing office, and each House of Congress may provide for the employment of an operator in their respective wings of the Capitol, at a compensation not exceeding one hundred dollars per month, during the sessions of Congress. *Act of Feb. 4, 1874 (18 Stat. 14).*

Act Mar. 3, 1873 (17 Stat. 519), referred to in this act, made an appropriation "for connecting the Capitol by telegraph, to be solely for public business, with all the departments of Government and the Government Printing Office in the City of Washington."

180. **Use of the telegraph between the Capitol and Executive Departments.**—* * * *Provided*, That said lines of telegraph shall be for the use only of Senators, Members of Congress, Judges of the United States courts, and officers of Congress and of the Executive Departments, and solely on public business. *Act of Mar. 7, 1874 (18 Stat. 20).*

181. **Telephone service.**—That no money appropriated by this or any other Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for the public business, and so shown by vouchers duly sworn to and approved by the head of the department, division, bureau, or office in which the official using such telephone or incurring the expense of such tolls shall be employed. *Sec. 7, act of Aug. 23, 1912 (37 Stat. 414), making appropriations for legislative, executive, and judicial expenses.*

The District of Columbia appropriation act for the fiscal year 1917 and other recent years provided that telephones might be maintained under those appropriations in the residences of certain officers of the District. Act Sept. 1, 1916 (39 Stat. 682).

The accounting officers were directed to allow in the accounts of the disbursing officers payments for telephones disallowed under this section, by act Aug. 29, 1916 (39 Stat. 581).

182. **The official register.**— • • • To enable the officer charged with the duty of preparing the Official Register of the United States to publish the same, the Secretary of the Senate, the Clerk of the House of Representatives, the head of each Executive Department of the Government, and the chief of each and every bureau, office, commission, or institution not embraced in an Executive Department, in connection with which salaries are paid from the Treasury of the United States, shall, on the first day of July in each year in which a new Congress is to assemble, cause to be filed with the Secretary of the Interior a full and complete list of all officers, agents, clerks, and other employees of said Department, bureau, office, commission, or institution connected with the legislative, executive, or judicial service of the Government, or paid from the United States Treasury, including military and naval officers of the United States, cadets, and midshipmen.

Said lists shall exhibit the salary, compensation, and emoluments allowed to each of said officers, agents, clerks, and other employees, the State or country in which he was born, the State or Territory and Congressional district and county of which he is a resident and from which he was appointed to office, and where employed.

A list of the names, force, and condition of all ships and vessels belonging to the United States, and when and where built, shall also be filed with the Secretary of the Interior by the heads of the Departments having supervision of such ships and vessels, for incorporation in the Official Register. • • • *Sec. 73, act of Jan. 12, 1895 (28 Stat. 618).*

• • • Of the Official Register three thousand copies shall be printed and bound, which shall be distributed as follows: • • • to the War Department, fifty copies; • • • *Sec. 73, act of Jan. 12, 1895 (28 Stat. 619).*

• • • And the Director of the Census shall edit, index, and publish the Official Register of the United States, and the provisions of existing law imposing that duty upon the Department of the Interior are hereby repealed, and the data to be included in the Official Register, which is now required to be transmitted to the Secretary of the Interior, shall hereafter be transmitted to the Director of the Census. *Sec. 7, act of Mar. 6, 1902 (32 Stat. 52), as amended by act of June 7, 1906 (34 Stat. 219).*

Notes of Decisions.

Cost of printing official register.—The official register of the United States, being a public document emanating from the Census Office, all expense incurred in its actual preparation for printing, apart from the creation of the manuscript, is chargeable under joint resolution, Mar. 30, 1908 (34 Stat. 825), post, 807, to the appropriation or allotment of appropriation for printing and binding for the Census Office; and the balance of the cost thereof, which includes the cost of binding and any charge which may be incurred in the creation of the manuscript, should be charged to the congressional allotment and the appropriate executive allotment in proportion to the number of copies delivered to Congress and to each department. (1908) 26 Op. Atty. Gen. 552.

183. **Recording clocks.**— • • • No money appropriated by this Act shall be used for expense of repairing recording clocks used for recording time of clerks or other employees in any of the Executive Departments at Washington, nor shall there thereafter be used in any of the Executive Departments at Wash-

ington any such recording clocks. * * * *Act of Feb. 24, 1899 (30 Stat. 864), making appropriations for legislative, executive, and judicial expenses.*

A previous provision that no recording clocks should be purchased for use in any of the executive departments at Washington, D. C., except from moneys specifically appropriated therefor, contained in act July 7, 1898, sec. 1 (30 Stat. 655), was superseded by this provision.

184. Membership fees, etc.—No money appropriated by this or any other Act shall be expended for membership fees or dues of any officer or employee of the United States or of the District of Columbia in any society or association or for expenses of attendance of any person at any meeting or convention of members of any society or association, unless such fees, dues, or expenses are authorized to be paid by specific appropriations for such purposes or are provided for in express terms in some general appropriation. *Sec. 8, act of June 26, 1912 (37 Stat. 184).*

This section was part of the District of Columbia appropriation act for the fiscal year 1913.

185. Forging, etc., public records.—Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than one thousand dollars, or imprisoned not more than ten years, or both. *Sec. 28, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1094).*

Notes of Decisions.

Offense in general.—The offense defined in the act of Apr. 5, 1866 (R. S. sec. 5418 [embodied herein]), consists in the false and fraudulent making, altering, forging, or counterfeiting of any bid, proposal, guaranty, or any instrument or document named in the statute, and does not consist in the making of a false or fraudulent instrument or document. In the first case the crime is forgery, while in the latter it would be perjury; and this distinction must regulate the allegations and proof in each case. U. S. *v.* Wentworth (C. C. 1882), 11 Fed. 52.

It is not lawful for an official to accept an office and then use false means and methods to obtain money for carrying it on, as by certifying charges for boat services, the expenses of janitor's fees, carriage hire, ice, gas, etc., in order to obtain money from one department for services which had been rendered in another, and for the payment of which the Government has made no provision. U. S. *v.* Houghton (D. C. 1882), 14 Fed. 544.

It is not essential to charge or prove an actual financial or property loss to make a case under R. S. 5418 (embodied herein). U. S. *v.* Plyler (1911) 222 U. S. 15.

Invalid instrument as basis of forgery.—Where a false instrument is so absolutely invalid that it can not defraud or injure under any circumstances, it may not form the basis of the charge of forgery, or of transmitting it to an officer to defraud the United States. Neff *v.* U. S. (1908), 165 Fed. 273, 91 C. C. A. 241.

Fraudulent documents, as well as those that are forged or counterfeited, are embraced herein. U. S. *v.* Davis (1913), 231

[S 152; U. S. v. Staats (1850), 8 How. 41.

False or forged affidavits in general.—One presenting accounts to the Government can not be convicted under R. S. sec. 5479 (embodied herein), for forging the name of a justice of the peace to the affidavit attached thereto, unless it be done to defraud the United States. Staton v. U. S. (1898), 88 Fed. 253, 31 C. C. A. 521.

Application to Civil Service Commission.—An application for a Government clerkship filed a sworn application in the form required for an examination by the Civil Service Commission, and was afterwards notified by postal card to appear for examination at a time stated. By previous arrangement, another person, impersonating the applicant, presented himself for examination, and filled out a paper known as the "Declaration Sheet," which contained questions concerning the applicant, and signed the applicant's name thereto. Held, that these two persons were indictable, under R. S. 5440, 5418, which denounce, respectively, the offense of conspiring to commit any offense against the United States or to defraud the United States, and the offense of falsely making, altering, or forging various enumerated papers, including affidavits or other writings, for the purpose of defrauding the United States. U. S. v. Bunting (D. C. 1897), 82 Fed. 862.

Military land warrant.—A military land warrant is neither an indenture nor a public security, within the meaning of the crimes act of Mar. 3, 1825, sec. 17, relating to forgery. U. S. v. Irwin (C. C. 1851), Fed. Cas. No. 15,446.

Insertion of false item in blank receipt.—The insertion of a false item in a blank receipt for money, used as a voucher in a disbursing officer's accounts certified by him to be correct, with intent to defraud the United States, is a criminal offense, under R. S. secs. 5418, 5479, whether forgery at common law or not. Howgate v. U. S. (1895), 7 App. D. C. 217.

Indictment.—An indictment charging that defendant forged the name of a justice of the peace to accounts presented by him to the Government accounting officers, "with intent to defraud the United States," must be regarded as based on R. S. secs. 5418, 5479 (embodied herein), and not on R. S. sec. 5421, which denounces the making, altering, forging, etc., of papers, for the purpose of "obtaining or receiving * * * from the United States or any of their officers or agents any sum of money." Staton v. U. S. (1898), 88 Fed. 253, 31 C. C. A. 521.

An indictment for forging a writing with intent to defraud the United States is sufficient to charge the offense, so far as concerns the nature of the instrument, if it is made to appear that it is one by which the Government might have been defrauded, and it need not aver the existence of extraneous facts which would or might be necessary to that result. Meldrum v. U. S. (1907), 151 Fed. 177, 80 C. C. A. 545, 10 Ann. Cas. 324, affirming judgment U. S. v. Meldrum (D. C. 1906), 146 Fed. 390.

The insertion of a false item in a blank receipt for money used as a voucher in a disbursing officer's accounts certified by him to be correct, with intent to defraud the United States, being a criminal offense under R. S., 5418, 5479, whether forgery at common law or not, an indictment which charges such offense in the words of the statute and which sets forth the circumstances, is good. Howgate v. U. S. (1895), 7 App. D. C. 217.

An averment that a note was forged with intent to defraud the United States is necessary to withdraw the forgery from the general jurisdiction of the State courts. State v. White (1888), 101 N. C. 770, 7 S. E. 715.

Evidence.—In order to a conviction of the offense defined in sec. 5418, R. S. (embodied herein), the jury must be satisfied beyond a reasonable doubt (1) that the time and pay roll described in the indictment was a false, forged, and counterfeit writing; (2) that the same was transmitted to the proper officer of the Government by the defendant; and (3) that the false character of the writing was known by the defendant at the time of the sending, and that it was sent with the intent to defraud the United States. U. S. v. Houghton (D. C. 1882), 14 Fed. 544.

186. False entries in public records.—That whoever, being an officer, clerk, agent, or other person holding any office or employment under the Government of the United States and, being charged with the duty of keeping accounts or records of any kind, shall, with intent to deceive, mislead, injure, or defraud the United States or any person, make in any such account or record any false or fictitious entry or record of any matter relating to or connected with his duties, or whoever with like intent shall aid or abet any such officer, clerk,

agent, or other person in so doing; or whoever, being an officer, clerk, agent, or other person holding any office or employment under the Government of the United States and, being charged with the duty of receiving, holding, or paying over moneys or securities to, for, or on behalf of the United States, or of receiving or holding in trust for any person any moneys or securities, shall, with like intent, make a false report of such moneys or securities, or whoever with like intent shall aid or abet any such officer, clerk, agent, or other person in so doing, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both. *Act of Mar. 4, 1911 (36 Stat. 1355).*

Notes of Decisions.

Construction.—The words "officer, clerk, agent," etc., embrace clerks of courts. U. S. *v.* Dodge (D. C. 1918), 251 Fed. 742.

Indictment.—In an indictment for the falsification of an account, other false accounts made by the defendant at about the same time may be introduced in evidence for the purpose of proving guilty knowledge. U. S. *v.* Russell (D. C. 1884), 19 Fed. 591.

187. Destroying, etc., public records.—Whoever shall willfully and unlawfully conceal, remove, mutilate, obliterate, or destroy, or attempt to conceal, remove, mutilate, obliterate, or destroy, or, with intent to conceal, remove, mutilate, obliterate, destroy, or steal, shall take and carry away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than two thousand dollars, or imprisoned not more than three years, or both. *Sec. 128, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1111).*

Notes of Decisions.

Specific intent as element of offense.—The specific intent to destroy a public record, as such, is the essential element of the offense denounced by R. S. sec. 5403 (embodied herein); and a defendant who had stolen papers belonging to the internal revenue office from a barn where they were stored, under the belief that they were old paper, or without knowledge of the fact that they were public records, can not be convicted under that statute. U. S. *v.* De Groat (D. C. 1887), 30 Fed. 764.

Meaning of "record" and "document."—In R. S. sec. 5403 (embodied herein), which makes it a criminal offense to steal or destroy "any record, paper, or proceeding of a court of justice," or "any paper or document or record filed or deposited in any public office or with any judicial or public officer," the words "record" and "document" are not limited in their meaning to the technical common-law records of courts as enrolled, or to technical documents, but are used in the common and ordinary sense, and include all and every part, not only of such technical records or documents, but of any paper filed and which becomes a part of the records of the court or office, broadly speaking, and is treated as a record of what it contains. McInerney *v.* U. S. (1906), 143 Fed. 729, 74 C. C. A. 655.

Defense to prosecution for theft or destruction.—It is not a defense to a prosecution under R. S. sec. 5403 (embodied herein), for stealing or destroying a record of a court that such record was technically imperfect or incorrectly kept. McInerney *v.* U. S. (1906), 143 Fed. 729, 74 C. C. A. 655.

188. Destruction of public records by the custodian.—Whoever, having the custody of any record, proceeding, map, book, document, paper, or other thing specified in the preceding section, shall willfully and unlawfully conceal, remove, mutilate, obliterate, falsify, or destroy any such record, proceeding, map, book, document, paper, or thing, shall be fined not more than two thousand dollars, or imprisoned not more than three years, or both; and shall moreover forfeit his office and be forever afterward disqualified from holding any office

under the Government of the United States. *Sec. 129, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1112).*

See A. W. 34–36, ch. 52, post, as to disposition of records of courts-martial.

Notes of Decisions.

Custody of record or document.—"Custody" means keeping, and implies responsibility for the protection and preservation of the thing in custody. Martin v. U. S. (1909), 168 Fed. 198, 93 C. C. A. 484.

A document in a public office in the general custody of a commissioner and in the particular custody of his chief clerk, under whom five or six subordinate clerks are employed who have access to it in order to discharge their duties, is not in the custody of one of them. Id.

Fraudulent taking or destruction.—An attempt or an intent to injure the rights or interests of another, or an effect to so injure or alter some of them, is essential to a fraud, and, without such an attempt or effect, an act can not be done "fraudulently" under R. S. sec 5408 (embodied herein). Martin v. U. S. (1909), 168 Fed. 198, 93 C. C. A. 484.

The quoted words in R. S. sec. 5408 (embodied herein), subjecting an officer who fraudulently "takes away or withdraws" or destroys a record or document, mean a taking away or withdrawal whereby some injury is attempted or inflicted on the record or document, or on some one who has an interest in it and is entitled to use it. Id.

Indictment.—An allegation that an act innocent in itself, but criminal if done fraudulently, was performed fraudulently, or with an intent to defraud, without the averment of any acts tending to show fraud, is a legal conclusion, and insufficient to charge the offense of fraudulently taking away or removing a record or document, under this section. Martin v. U. S. (1909), 168 Fed. 198, 93 C. C. A. 484, reversing judgment (Ind. T. 1907), 104 S. W. 678.

189. **Useless papers destroyed.**—That whenever there shall be in any one of the Executive Departments of the Government an accumulation of files of papers, which are not needed or useful in the transaction of the current business of such Department and have no permanent value or historical interest, it shall be the duty of the head of such Department to submit to Congress a report of that fact, accompanied by a concise statement of the condition and character of such papers. And upon the submission of such report, it shall be the duty of the presiding officer of the Senate to appoint two Senators, and of the Speaker of the House of Representatives to appoint two Representatives, and the Senators and Representatives so appointed shall constitute a joint committee, to which shall be referred such report, with the accompanying statement of the condition and character of such papers, and such joint committee shall meet and examine such report and statement and the papers therein described, and submit to the Senate and House, respectively, a report of such examination and their recommendation. And if they report that such files of papers or any part thereof are not needed or useful in the transaction of the current business of such Department, and have no permanent value or historical interest, then it shall be the duty of such head of the Department to sell as waste paper, or otherwise dispose of such files of papers upon the best obtainable terms after due publication of notice inviting proposals therefor, and receive and pay the proceeds thereof into the Treasury of the United States, and make report thereof to Congress. *Act of Feb. 16, 1889 (25 Stat. 672).*

That the Act entitled "An Act to authorize and provide for the disposition of useless papers in the Executive Departments," approved February sixteenth, eighteen hundred and eighty-nine, be, and the same is hereby, amended so as to include in its provisions any accumulation of files of papers of a like character therein described now or hereafter in the various public buildings under the

control of the several Executive Departments of the Government. *Act of Mar. 2, 1895 (28 Stat. 933).*

190. Department libraries are depositaries of public documents.—The libraries of the eight Executive Departments, of the United States Military Academy, and United States Naval Academy are hereby constituted designated depositories of Government publications, and the superintendent of documents shall supply one copy of said publications, in the same form as supplied to other depositories, to each of said libraries. *Sec. 98, act of Jan. 12, 1895 (28 Stat. 624).*

The Secretary of the United States Senate is required to furnish annually to the Military Academy certain public documents. See 2711, post.

191. Public libraries are depositaries of public documents.—That libraries heretofore designated by law as depositaries to receive books and other Government publications shall hereafter, during their existence, continue such receipt; and new designations may be made when libraries heretofore chosen shall cease to exist or other designations shall hereafter be authorized by law. *Sec. 5, act of June 23, 1913 (38 Stat. 75), making appropriations for sundry civil expenses.*

192. Distribution of public documents.—That no money appropriated by this or any other Act shall be used after the first day of October, nineteen hundred and twelve, for services in any executive department or other Government establishment at Washington, District of Columbia, in the work of addressing, wrapping, mailing, or otherwise dispatching any publication for public distribution, except maps, weather reports, and weather cards issued by an executive department or other Government establishment at Washington, District of Columbia, or for the purchase of material or supplies to be used in such work; and on and after October first, nineteen hundred and twelve, it shall be the duty of the Public Printer to perform such work at the Government Printing Office. * * * and each head of such executive department and other Government establishment at Washington, District of Columbia, shall furnish from time to time to the Public Printer mailing lists, in convenient form, and changes therein, or franked slips, for use in the public distribution of publications issued by such department or establishment; and the Public Printer shall furnish copies of any publication only in accordance with the provisions of law or the instruction of the head of the department or establishment issuing the publication. * * * *Provided*, That nothing in this section shall be construed as applying to orders, instructions, directions, notices, or circulars of information, printed for and issued by any of the executive departments or other Government establishments or to the distribution of public documents by Senators or Members of the House of Representatives or to the folding rooms and documents rooms of the Senate or House of Representatives. *Sec. 8, act of Aug. 23, 1912 (37 Stat. 414), making appropriations for legislative, executive, and judicial expenses.*

By this same act it was ordered that equipment and personnel for this purpose be transferred from the executive departments to the Public Printer prior to Oct. 1, 1912.

193. When to make annual reports.—Except where a different time is expressly prescribed by law, the various annual reports required to be submitted to Congress by the heads of Departments shall be made at the commencement of each regular session, and shall embrace the transactions of the preceding year. *R. S. 195.*

The Secretary of War was required to forward to Congress a detailed statement of the expenses of joint encampments and maneuvers of the Regular Army and the organized militia at the session next following the encampment. See 2574, post, and note thereto.

194. When to send annual report, etc., to the Public Printer.—That appropriations herein and hereafter made for printing and binding shall not be used for any annual report or the accompanying documents unless the copy therefor is furnished to the Public Printer in the following manner: Copies of the documents accompanying such annual reports on or before the fifteenth day of October of each year; copies of the annual reports on or before the fifteenth day of November of each year; complete revised proofs of the accompanying documents and the annual reports on the tenth and twentieth days of November of each year, respectively; and all of said annual reports and accompanying documents shall be printed, made public, and available for distribution not later than within the first five days after the assembling of each regular session of Congress. The provisions of this section shall not apply to the annual reports of the Smithsonian Institution, the Commissioner of Patents, or the Comptroller of the Currency. *Sec. 3, act of July 1, 1916 (39 Stat. 336).*

This section may be regarded as superseding the provisions of R. S. 196, which provided that copies of the documents mentioned should be furnished on or before the 1st day of November in each year, and of the annual report on or before the third Monday in each year.

195. Unnecessary matter excluded from annual reports.— * * * and the heads of the Executive Departments, before transmitting their annual reports to Congress, the printing of which is chargeable to this appropriation, shall cause the same to be carefully examined, and shall exclude therefrom all matter, including engravings, maps, drawings, and illustrations, except such as they shall certify in their letters transmitting such reports to be necessary and to relate entirely to the transaction of the public business. *Act of Aug. 30, 1890 (26 Stat. 411).*

196. Penalty for failure to make an annual report.—Every officer who neglects or refuses to make any return or report which he is required to make at stated times by any Act of Congress or regulation of the Department of the Treasury, other than his accounts, within the time prescribed by such Act or regulation, shall be fined not more than one thousand dollars. *Sec. 101, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1107).*

197. Book of Estimates.—All annual estimates for the public service shall be submitted to Congress through the Secretary of the Treasury, and shall be included in the book of estimates prepared under his direction. *R. S. 3669.*

The Secretary of the Treasury, besides transmitting the estimates to Congress, as required by this section, was required, if such estimates exceeded the estimated revenues, to transmit a statement of the estimates to the President, so that he might make recommendations thereon to Congress, by act Mar. 4, 1909, sec. 7.

198. When to submit annual estimates.—That hereafter it shall be the duty of the heads of the several Executive Departments, and of other officers authorized or required to make estimates, to furnish to the Secretary of the Treasury, on or before the fifteenth day of October of each year, their annual estimates for the public service, to be included in the Book of Estimates prepared by law under his direction, and in case of failure to furnish estimates as herein required it shall be the duty of the Secretary of the Treasury to cause to be prepared in the Treasury Department, on or before the first day of November of each year, estimates for such appropriations as in his judgment shall be requisite in every such case, which estimates shall be included in the Book of Estimates prepared by law under his direction for the consideration of Congress.

Sec. 5, act of Mar. 3, 1901 (31 Stat. 1009), making appropriations for legislative, executive, and judicial expenses.

This section superseded the previous provision requiring the estimates to be furnished Oct. 1 of each year, contained in act Mar. 3, 1875, sec. 3 (18 Stat 370).

199. Official responsible for estimates.—That hereafter the head of each executive department and other Government establishment shall, on or before July first in every fiscal year, designate from among the officials employed therein one person whose duty it shall be to supervise the classification and compilation of all estimates of appropriations, including supplemental and deficiency estimates to be submitted by such department or establishment. In the performance of their duties persons so designated shall have due regard for the requirements of all laws respecting the preparation of estimates, including the manner and time of their submission through the Treasury Department to Congress; they shall also, as nearly as may be practicable, eliminate from all such estimates unnecessary words and make uniform the language commonly used in expressing purposes or conditions of appropriations. *Sec. 3, act of June 23, 1913 (38 Stat. 75), making appropriations for sundry civil expenses.*

200. Arrangement of annual estimates.—Hereafter the estimates for expenses of the Government, except those for sundry civil expenses, shall be prepared and submitted each year according to the order and arrangement of the appropriation Acts for the year preceding. And any changes in such order and arrangement, and transfers of salaries from one office or bureau to another office or bureau, or the consolidation of offices or bureaus desired by the head of any Executive Department may be submitted by note in the estimates. * * * *Sec. 4, act of June 22, 1906 (34 Stat. 448), making appropriations for legislative, executive, and judicial expenses.*

201. Manner of preparing estimates to be shown.—The heads of Departments, in communicating estimates of expenditures and appropriations to Congress, or to any of the committees thereof, shall specify, as nearly as may be convenient, the sources from which such estimates are derived, and the calculations upon which they are founded, and shall discriminate between such estimates as are conjectural in their character and such as are framed upon actual information and applications from disbursing officers. They shall also give references to any law or treaty by which the proposed expenditures are, respectively, authorized, specifying the date of each, and the volume and page of the Statutes at Large, or of the Revised Statutes, as the case may be, and the section of the act in which the authority is to be found. *R. S. 3660.*

202. Annual estimates to show outstanding appropriations.—The head of each Department, in submitting to Congress his estimates of expenditures required in his Department during the year then approaching, shall designate not only the amount required to be appropriated for the next fiscal year, but also the amount of the outstanding appropriation, if there be any, which will probably be required for each particular item of expenditure. *R. S. 3665.*

203. Variation of annual estimate for current appropriations.—Whenever the head of a Department, being about to submit to Congress the annual estimates of expenditures required for the coming year, finds that the usual items of such estimates vary materially in amount from the appropriation ordinarily asked for the object named, and especially from the appropriation granted for the same objects for the preceding year, and whenever new items not theretofore usual are introduced into such estimates for any year, he shall accompany the estimates by minute and full explanations of all such variations and new items,

showing the reason and grounds upon which the amounts are required, and the different items added. *R. S. 366½.*

Notes of Decisions.

Statutory restrictions.—The statute restricts in every possible way the expenditures, expenses, and liabilities of the Government, so far as executive officers are concerned, to the specific appropriations for each fiscal year. Wilder v. U. S. (1880), 16 Ct. Cl. 528.

204. Special or additional estimates.— * * * Hereafter the heads of the several Executive Departments and all other officers authorized or required to make estimates for the public service shall include in their annual estimates furnished the Secretary of the Treasury for inclusion in the Book of Estimates all estimates of appropriations required for the service of the fiscal year for which they are prepared and submitted, and special or additional estimates for that fiscal year shall only be submitted to carry out laws subsequently enacted, or when deemed imperatively necessary for the public service by the Department in which they shall originate, in which case such special or additional estimate shall be accompanied by a full statement of its imperative necessity and reasons for its omission in the annual estimates. *Sec. 4, act of June 22, 1906 (34 Stat. 448), making appropriations for legislative, executive, and judicial expenses.*

That the Secretary of the Treasury shall not hereafter transmit special or additional estimates of appropriations to Congress unless they shall conform to the requirements of section four of the Act approved June twenty-second, nineteen hundred and six (Thirty-fourth Statutes, page four hundred and forty eight). *Sec. 4, act of Sept. 8, 1916 (39 Stat. 830).*

Act June 22, 1906, sec. 4, referred to in this section, is set forth ante, 200.

205. Estimates forwarded through the Secretary of the Treasury.— * * * And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department. *Sec. 2, act of July 7, 1884 (23 Stat. 254).*

206. Statement of rented buildings included in annual estimate.— * * * and it shall be the duty of the heads of the several executive departments to submit to Congress each year, in the annual estimates of appropriations, a statement of the number of buildings rented by their respective departments, the purposes for which rented, and the annual rental of each. *Act of Mar. 3, 1883 (22 Stat. 552), making appropriations for legislative, executive and judicial expenses.*

Hereafter the statement of buildings rented within the District of Columbia for use of the Government, required by the act of July sixteenth, eighteen hundred and ninety-two (Statutes at Large, volume twenty-seven, page one hundred and ninety-nine), shall indicate as to each building rented the area thereof in square feet of available floor space for Government uses, the rate paid per square foot for such floor space, the assessed valuation of each building, and what proportion, if any, of the rental paid includes heat, light, ele-

vator, or other service. *Sec. 3, act of May 1, 1913 (38 Stat. 3), making appropriations for legislative, executive and judicial expenses.*

That hereafter the statement of buildings rented within the District of Columbia for the use of the Government, required by the Act of July 16, 1892, shall indicate, in addition to the data required by section 3 of the Act of May 1, 1913, the cost of the care, maintenance, and operation of each building per square foot of floor space of the building or portion of building rented. *Sec. 7, act of May 29, 1920 (41 Stat. 691), making appropriations for legislative, executive, and judicial expenses.*

207. Statement of Government-owned buildings.—That hereafter it shall be the duty of the head of each department and independent establishment of the Government to submit to Congress annually in the Book of Estimates, a statement giving for each of the Government-owned buildings in the District of Columbia under their respective jurisdiction the following information for the preceding fiscal year: The location and valuation of each building, the purposes for which used, and the cost of care, maintenance, upkeep, and operation thereof per square foot of floor space. *Sec. 3, act of June 5, 1920 (41 Stat. 945), making appropriations for sundry civil expenses.*

208. Estimates for public works accompanied by plans, etc.—Whenever any estimate submitted to Congress by the head of a Department asks an appropriation for any new specific expenditure, such as the erection of a public building, or the construction of any public work, requiring a plan before the building or work can be properly completed, such estimate shall be accompanied by full plan and detailed estimates of the cost of the whole work. All subsequent estimates for any such work shall state the original estimated cost, the aggregate amount theretofore appropriated for the same, and the amount actually expended thereupon, as well as the amount asked for the current year for which such estimate is made. And if the amount asked is in excess of the original estimate, the full reasons for the excess and the extent of the anticipated excess shall be also stated. *R. S. 3663.*

Section thirty six hundred and sixty-three is amended by striking out, in the fifth line, the word "plan," and inserting the word "plans." *Act of Feb. 27, 1877 (19 Stat. 249), amending R. S. 3663.*

Further restrictions on contracts and expenditures for public buildings and sites therefor were imposed by 1021, 1150, 1153, post.

Restrictions on contracts for the rent of buildings for the Government until an appropriation is made therefor were imposed by provisions of 1180, 1181, post.

209. Annual estimates for fortifications, etc.—That estimates of appropriations for fortifications and other works of defense, for the armament thereof, and for the procurement of heavy ordnance for trial and service shall be submitted to Congress in the Book of Estimates for the fiscal year 1921 and each fiscal year thereafter upon an annual basis. And section 5 of the legislative, executive, and judicial appropriation Act approved June 20, 1874, and section 7 of the sundry civil appropriation Act approved August 24, 1912, so far as they except "appropriations for fortifications" from the operations thereof, are repealed. *Sec. 6, act of Mar. 3, 1919 (40 Stat. 1309), making appropriations for fortifications, etc.*

Hereafter estimates shall not be submitted to Congress for appropriations for construction of gun and mortar batteries, modernizing older emplacements, and other construction under the Engineer Department, in connection with fortifications, until after plans and estimates of cost shall have

been prepared therefor. *Act of Feb. 13, 1913 (37 Stat. 671), making appropriations for fortifications, etc.*

For act of June 20, 1874, and sec. 7, act Aug. 24, 1912, mentioned above, see §31, 227, post.

210. Estimates for fortifications for insular possessions.—Hereafter all estimates for fortifications for insular possessions of the United States shall be made and submitted to Congress showing amount proposed to be expended at each harbor in each insular possession. *Act of Mar. 3, 1905 (33 Stat. 847), making appropriations for fortifications.*

211. Estimates for cable or telegraph lines in Alaska.— * * * *Provided further*, That hereafter detailed estimates shall be submitted to Congress for any further extension of the cable or telegraph lines in the district of Alaska. *Act of Mar. 2, 1907 (34 Stat. 1159), making appropriations for the support of the Army.*

212. Annual estimates for river and harbor improvements.—And hereafter the Secretary of War shall annually submit estimates in detail for river and harbor improvements required for the ensuing fiscal year to the Secretary of the Treasury to be included in, and carried into, the sum total of, the Book of Estimates. *Act of June 4, 1897 (30 Stat. 48), making appropriations for sundry civil expenses.*

The legislative, executive, and judicial appropriation acts for many years have authorized the employment by the Secretary of War of skilled draftsmen and other services in the Signal Office and the office of Chief of Ordnance and of draftsmen, civil engineers, and other services in the office of the Chief of Engineers, to carry into effect appropriations for fortifications, etc., rivers and harbors, and surveys, requiring the Secretary of War to report to Congress each year the number of persons so employed, their duties, and the amount paid to each.

213. Annual estimates for printing and binding.—Hereafter there shall be submitted in the regular annual estimates to Congress under and as a part of the expenses for "Printing and binding," estimates for all printing and binding required by each of the Executive Departments, their bureaus and offices, and other Government establishments at Washington, District of Columbia, for each fiscal year; * * * *Sec. 2, act of June 30, 1906 (34 Stat. 762), making appropriations for sundry civil expenses.*

This section was not to apply to printing and binding necessary to expedite the work of the branch of The Adjutant General's Office, formerly known as the Record and Pension Office, by a provision of act Mar. 4, 1907 (34 Stat. 1367).

This statute is understood to supersede R. S. 3661.

214. Annual estimates for transportation.— * * * *Provided*, That estimates for the next fiscal year shall be submitted to the Congress of the United States covering transportation of the Army and its supplies in one estimate, and additional estimates shall be submitted covering other items heretofore carried in appropriation bills under the head of transportation of the Army and its supplies: * * * *Act of Mar. 2, 1907 (34 Stat. 1170), making appropriations for the support of the Army: Transportation.*

215. Annual estimates for trusses.—So much of section eleven hundred and seventy-eight of the Revised Statutes of the United States as makes a permanent indefinite appropriation to purchase trusses for soldiers is repealed, to take effect after June thirtieth, nineteen hundred and nine, and estimates of sufficient sums for the purchase of such trusses shall be submitted to Congress for the fiscal year nineteen hundred and ten, and annually thereafter, in the

regular Book of Estimates. *Act of May 27, 1908 (35 Stat. 367), making appropriations for sundry civil expenses.*

For R. S. 1178, see post, 2028.

216. Annual estimates to include statement of salaries.—That there shall be submitted hereafter, in the annual Book of Estimates following every estimate for a general or lump-sum appropriation, except public buildings or other public works constructed under contract, a statement showing in parallel columns:

First, the number of persons, if any, intended to be employed and the rates of compensation to each, and the amounts contemplated to be expended for each of any other objects or classes of expenditures specified or contemplated in the estimate, including a statement of estimated unit cost of any construction work proposed to be done; and

Second, the number of persons, if any, employed and the rate of compensation paid each, and the amounts expended for each other object or class of expenditure, and the actual unit cost of any construction work done, out of the appropriation corresponding to the estimate so submitted, during the completed fiscal year next preceding the period for which the estimate is submitted.

Other notes shall not be submitted following any estimate embraced in the annual Book of Estimates other than such as shall suggest changes in form or order of arrangement of estimates and appropriations and reasons for such changes. *Sec. 6, act of Aug. 24, 1912 (37 Stat. 487), as amended by sec. 10, act of Aug. 1, 1914 (38 Stat. 680), making appropriations for sundry civil expenses.*

That the information required in connection with estimates for general or lump-sum appropriations by section ten of the sundry civil appropriation Act, approved August first, nineteen hundred and fourteen, shall be submitted hereafter according to uniform and concise methods which shall be prescribed by the Secretary of the Treasury, but with reference to estimates for pay of mechanics and laborers there shall be submitted in detail only the ratings and trades and the rates per diem paid or to be paid. *Sec. 4, act of July 1, 1916 (39 Stat. 336), making appropriations for sundry civil expenses.*

See also ante, 66.

217. Estimates for salaries.—All estimates for the compensation of officers authorized by law to be employed shall be founded upon the express provisions of law, and not upon the authority of executive distribution. *R. S. 3662.*

Provisions that no officer, clerk, etc., or other employee should be employed in any of the executive departments or subordinate bureaus or offices thereof at the seat of Government, except as specifically appropriated for each year, were contained in ante, 33.

See notes under 220, post.

218. Annual estimates for the National Home for Disabled Volunteer Soldiers.— * * * And hereafter the provisions of section thirty-six hundred and ninety and thirty-six hundred and ninety-one of the Revised Statutes of the United States shall apply to all appropriations made for the maintenance of the National Home for Disabled Volunteer Soldiers: *Provided further*, That it shall be the duty of the managers of said Home, on or before the first day of October in each year, to furnish to the Secretary of War estimates, in detail, for the support of said Home for the fiscal year commencing on the first day of July thereafter, and the Secretary of War shall annually include

such estimates in his estimates for his Department. *Act of Oct. 2, 1888 (25 Stat. 543), making appropriations for sundry civil expenses.*

A permanent appropriation for the support of the home was made by R. S. 3689, but was repealed by a provision of act Mar. 3, 1875, post, 1982.

R. S. 3690, 3691, mentioned in this section, are set forth, post, 229, 231.

Appropriations for the construction of buildings at any of the branches of the home were to continue available until expended, by a provision of act June 6, 1900, sec. 1, post, 1999.

219. **Annual report of inefficient employees.**— * * * That hereafter it shall be the duty of the heads of the several executive Departments of the Government to report to Congress each year, in the annual estimates, the number of employees in each bureau and office and the salaries of each who are below a fair standard of efficiency. *Sec. 2, act of July 11, 1890 (26 Stat. 268), making appropriations for legislative, executive and judicial expenses.*

220. **Appropriations of public money.**— * * * No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. * * * *Art. I, sec. 9, Constitution of the United States.*

Notes of Decisions.

Provision as to appropriations as directed exclusively to Treasury officers.—This provision is exclusively a direction to the officers of the Treasury. It neither controls courts nor prohibits the creation of legal liabilities. Collins v. U. S. (1879), 15 Ct. Cl. 22.

This provision is a restriction and limitation only upon the executive officers of the Treasury Department, and does not prevent Congress from involving the Government in liabilities to pay money to any extent. Mitchell v. U. S. (1883), 18 Ct. Cl. 281; judgment reversed (1883), 19 Ct. Cl. 703.

Money subject to provision as to appropriations.—The money received from captured and abandoned property under the construction given by the Treasury Department it is not subject to this provision. Rice v. U. S. (1887), 7 Sup. Ct. 1377, 1383, 122 U. S. 611, 30 L. Ed. 793.

Several Secretaries of the Treasury so construed the law that money received from captured and abandoned property was merely deposited with the Treasurer, and was not technically covered into the Treasury, and was not subject to this provision. U. S. v. Johnston (1888), 8 Sup. Ct. 440, 454, 124 U. S. 236, 31 L. Ed. 389.

When a pecuniary penalty, accruing to the United States, has been actually paid into the Treasury, although it may be remitted of right by the President, still by reason of constitutional prohibition, which is coequal in force with the constitutional power to pardon, the amount of the penalty can not be drawn from the Treasury without appropriation by act of Congress. (1857) 8 Op. Atty. Gen. 281.

Necessity of appropriation to pay debt or claims.—No officer of the Government can pay a debt due by the United States without an appropriation of Congress, and without an appropriation a claim can not be paid by the Treasury, whether the claim is by verdict or judgment. Reeside v. Walker (1850), 11 How. 272, 291, 13 L. Ed. 693.

Payment of officers.—Mandamus will not lie against the Secretary of the Navy to enforce the payment of an officer's pay, as this section necessitates an appropriation. Brashear v. Mason (1848), 6 How. 92, 101, 12 L. Ed. 357.

Contract without appropriation.—A contract by the clerk of the House of Representatives, made with a person to furnish wood, where no appropriation has been made to pay for the same, is not binding on either party. U. S. v. Derringer (C. C. 1851), Fed. Cas. No. 14950a.

Where the constitution or laws require the President to do something requiring the expenditure of money, he may lawfully do it, or contract to have it done, in the absence of an appropriation therefor, and the expense becomes a lawful charge on the Government, but a contract in excess of an appropriation is subject to the contingency of a future appropriation, without which it is not binding on the United States as to such excess. (1853) 6 Op. Atty Gen. 26.

Disposition of money as within discretion of Congress.—The disposition of public money is in the discretion of Congress, whose reasons can not be inquired into by

executive officers or by the courts. Mumford v. U. S. (1896), 31 Ct. Cl. 210.

Right of Congress to prohibit payment.—Congress has a constitutional right to prohibit the officers of the Government from paying persons who encouraged rebellion, and can not consider such claims, although the claimants may have received an executive pardon. Hart's Adm'r v. U. S. (1880), 16 Ct. Cl. 459.

What is appropriation in general.—An appropriation is per se the legislative authorization prescribed by the constitution that money may be paid out at the Treasury. Campagna v. U. S. (1891), 26 Ct. Cl. 316.

A statute should not be construed as making an appropriation, or authorizing the expenditure of money, unless the language is sufficiently explicit to clearly justify it; authority for the use of the public money can not arise by inference without very clear terms requiring it. (1885), 18 Op. Atty. Gen. 174.

Subsequent enactments.—A statute which fixes the annual salary of a public officer at a designated sum without limitation as to time, is not abrogated by subsequent enactments appropriating a less amount for his services for a particular fiscal year, but containing no words which expressly or impliedly repeal it. U. S. v. Langston, 118 U. S. 389.

It is otherwise, however, when the sum appropriated is "in full compensation" for the salary of a particular officer, in which case the earlier act is suspended for the time covered by the appropriation. U. S. v. Fisher, 109 U. S. 143; U. S. v. Mitchell, id. 146.

Executive control of salaries.—A salary that is established by statute can not be increased nor diminished by executive officers. It is not a subject of contract between such officers. The incumbent of an office is entitled to the salary attached thereto by law, and if he receives a less sum from disbursing officers, he can claim and receive the balance. Dyer v. U. S., 20 Ct. Cls. 166, 171; Adams v. U. S., id. 115.

Such recovery may be had though by terms of his appointment he was to receive less and though he may have been compelled to execute a receipt in full therefor. Id.

It is not within the power of the head of an executive department to reduce or change the salary of an officer which Congress has specifically prescribed, and an agreement to that effect, being contrary to public policy, will not be enforced or given effect as an estoppel. Miller v. U. S., 103 Fed. 413. But, for express authority to reduce the salaries of clerks, see sec. 3, act of Aug. 15, 1876 (18 Stat. 169).

221. Appropriations specifically made.—No Act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed. *Sec. 9, act of June 30, 1906 (34 Stat. 764), making appropriations for sundry civil expenses.*

This section superseded a previous similar restriction on the construction of acts as making appropriations in act July 1, 1902 (32 Stat. 560).

The style and title of acts making appropriations were prescribed by R. S. 11.

Notes of Decisions.

Rules for construing statutes.—The presumption is that provisions of a general character in an appropriation act are limited to the subject matter of the act and are not permanent regulations unless clearly so provided. U. S. v. Jarvis (D. C. 1846), Fed. Cas. No. 15,468.

The intention of Congress must govern when there is a conflict between the Revised Statutes and subsequent appropriation acts. Belknap v. U. S. (1889), 24 Ct. Cl. 433.

A proviso to an appropriation which will permanently affect the pay of officers irrespective of the appropriation to which it is attached is not properly a proviso, but has simply the meaning of the conjunction "and." Carden v. U. S. (1910), 45 Ct. Cl. 171.

A statute should not be construed as making an appropriation or authorising the expenditure of money unless the language is sufficiently explicit to clearly justify it; authority for the use of the public money can not rise by inference without very clear terms requiring it. (1885) 18 Op. Atty. Gen. 176.

The appropriation of specific funds "to be immediately available" ordinarily imposes the duty of expending them for the

purposes named in the act. (1896) 21 Op. Atty. Gen. 420.

Specific and general appropriations.—The rule that a specific appropriation is exclusive and that another general appropriation is not available for the same purpose is a rule of administration firmly established by the accounting branch of the Government and is not a statutory limitation. This rule, while a proper one, has obvious exceptions and limitations and must be applied reasonably. (1906) 26 Op. Atty. Gen. 81.

The general rule of law is that when Congress makes a specific appropriation for any particular purpose, this is construed as meaning that no more shall be expended for that purpose than is thus appropriated, and if a general appropriation applicable to the same purpose, together with other purposes of the like class, would otherwise be available to meet the same expenditure, the specific appropriation operates pro tanto as a repeal or suppression of the general, and renders its use for the specific purpose illegal. (1908) 27 Op. Atty. Gen. 31.

Permanent appropriations.—No clause, phrase, or section of an appropriation act ought to be construed as permanent legislation unless such words are used therein as make that purpose clear. (1908) 27 Op. Atty. Gen. 108.

The presumption against general and permanent enactments in appropriation acts is against permanence. (1909) 27 Op. Atty. Gen. 288, 289.

The general public system for the appropriation and disbursement of public moneys is permanent, and unless charges are within the objects for which an appropriation is made they can not be applied to that appropriation. (1911) 28 Op. Atty. Gen. 634.

222. Expenditure of an appropriation as specified.—All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others. *R. S. 3678.*

Funds appropriated for a National Soldiers' Home may, in case such home is destroyed, or rendered unfit for habitation, be used to transfer its inmates to another home, by act Aug. 23, 1894, sec. 1, incorporated into R. S. 4833, post, 1069.

No part of the appropriations for the support of the Regular Army is to be used to pay any part of the expenses of the Organized Militia while engaged in joint encampment, maneuvers, and field instruction, as provided by act Jan. 21, 1903, sec. 15, as amended, ante, 2574.

No part of the appropriations for the Ordnance Department is to be used in payment of freight on ordnance, etc., issued by said department, by a provision of act June 30, 1902, post, 1228.

Appropriations for the Ordnance Department are applicable to defray expenses in connection with the procurement by it of stores for other executive departments or bureaus, by a provision of act June 12, 1906, post, 858.

Certain appropriations for ordnance stores, ammunition, etc., for the Army, were made available for two years, by a provision of act Mar. 2, 1907, 853.

The appropriations to which the cost of printing and binding, etc., for the executive departments, bureaus, etc., is to be charged, were prescribed, and the application of appropriations to the printing and binding, etc., of publications required by law, for which estimates have been furnished as required, was directed by Joint Res. 13, March 30, 1906, post, 986.

Amounts appropriated or authorized for completion of river and harbor works, proving insufficient for completion, may be applied to the prosecution of the work, by a provision of act of Mar. 2, 1907, post, 1525.

Lump sum appropriations were not to be available for the payment of increased salaries, by sec. 7, act Aug. 26, 1912, post, 77.

Chapter IV of the Army appropriation act of July 11, 1918 (40 Stat. 878), provides "That during the present emergency when pressing obligations are required to be paid by a disbursing officer of the Army and the allotment to his official credit under the proper appropriation or appropriations is temporarily insufficient to pay the same, he is authorized to make payments from the total available balance to his official credit, provided sufficient funds under proper appropriation or appropriations have been appropriated by the chief officer of the bureau or department for the expenditure. When such disbursements are made, the accounts of the disbursing officer shall show the charging of the proper appropriations, and the balances thereunder, which will be adjusted by the disbursing officer on receipt of funds, or by the accounting officer of the Treasury."

Notes of Decisions.

Statutory restrictions.—The statute restricts in every possible way the expenditures, expenses, and liabilities of the Government, so far as executive officers are concerned, to the specific appropriation for each fiscal year. Wilder *v.* U. S. (1880), 16 Ct. Cl. 528.

Effect of appropriation.—An appropriation of a given amount of money for a specified purpose is not a designation of a specific parcel of money, but is simply an authority to apply that amount of money to that purpose. Hukill *v.* U. S. (1880), 16 Ct. Cl. 562.

Every appropriation for the payment of a particular demand or class of demands involves and includes a congressional recognition of their legality and justice, and is equivalent to a mandate to the officers of the Treasury for the payment thereof. Id.

Recovery of money paid.—Money paid by authority of a specific appropriation of Congress can not be recovered back. City of Louisville *v.* U. S. (1895), 31 Ct. Cl. 1.

Reimbursement between departments.—Where one department receives from another department supplies which are within the scope of appropriations belonging to each, a reimbursement of the appropriation of the one from the appropriation of the other of the cost of such supplies is not a violation of this section. (1882), 17 Op. Atty. Gen. 480.

223. Expenditures for commissions and inquiries.—No accounting or disbursing officer of the Government shall allow or pay any account or charge whatever, growing out of, or in any way connected with, any commission or inquiry, except courts-martial or courts of inquiry in the military or naval service of the United States, until special appropriations shall have been made by law to pay such accounts and charges. This section, however, shall not extend to the contingent fund connected with the foreign intercourse of the Government, placed at the disposal of the President. *R. S. 3681.*

That hereafter no part of the public moneys, or of any appropriation heretofore or hereafter made by Congress, shall be used for the payment of compensation or expenses of any commission, council, board, or other similar body, or any members thereof, or for expenses in connection with any work or the results of any work or action of any commission, council, board, or other similar body, unless the creation of the same shall be or shall have been authorized by law; nor shall there be employed by detail, hereafter or heretofore made, or otherwise personal services from any executive department or other government establishment in connection with any such commission, council, board, or other similiar body. *Sec. 9, act of Mar. 4, 1909 (35 Stat. 1027), making appropriations for sundry civil expenses.*

Notes of Decisions.

Construction and operation.—This section does not require a specific authorization of a commission by a law of the United States; it being sufficient if their appointment is authorized in a general way by law. (1909) 27 Op. Atty. Gen. 432.

A board created pursuant to implied authority of 32 Stat. 941, would be "authorized by law" within the meaning of this section. (1909) 27 Op. Atty. Gen. 459.

This section does not either repeal any portion of R. S. 1158, post, 600, or revoke the implied power there given to the President to order Army engineers to any duty, nor does it curtail his power under that section, or otherwise, to assign such engineers to any duty. (1910) 28 Op. Atty. Gen. 270.

224. Expenditures not to exceed appropriations.—No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract

or obligation is authorized by law. * * * *R. S. 3679, as amended by sec. 3, act Feb. 27, 1906 (34 Stat. 49).*

The heads of the executive departments were required to apportion the appropriations for the contingent funds among the bureaus and offices of the departments by act Aug. 23, 1912, sec. 6, post, 273.

Other provisions prohibiting contracts or purchases on behalf of the United States, unless under an adequate appropriation, were made by R. S. 3732, post, 726.

Restrictions on contracts for public buildings or any public improvements, exceeding the amount appropriated for the specific purpose, were made by R. S. 3733, post, 1153.

Restrictions on contracts for the rent of any building in the city of Washington, until an appropriation therefor had been made, were made by a provision of act Mar. 3, 1877, post, 1180.

A further restriction on contracts or purchases, unless authorized by law or under an adequate appropriation, except in the War and Navy Departments for certain supplies, etc., was made by a provision of act June 12, 1906, post, 752.

Notes of Decisions.

Construction and operation.—These provisions apply to the public service in general, and must yield to special provisions relating to a particular department. New York Cent. & H. R. R. r. U. S. (1886), 21 Ct. Cl. 468.

This section and sec. 748, post, should be construed together. The latter section authorizes the heads of the War and Navy Departments, in the absence of appropriations, to purchase or contract for clothing, subsistence, forage, fuel, quarters, or transportation, not exceeding the necessities of the current year. Such contracts are not within the prohibition of the former section. (1876) 15 Op. Atty. Gen. 124; (1877), Id. 209.

The words "contingent expenses" mean such incidental, casual expenses as are necessary or appropriate and convenient to the performance of duties required by law of the department or the office for which the appropriation is made. (1879) 16 Op. Atty. Gen. 412.

The object of this section was to prevent executive officers from involving the Government in expenditures or liabilities beyond those contemplated and authorized by the law making power. (1895) 21 Op. Atty. Gen. 248.

Implied contracts. The statute does not extend to implied contracts arising from the acts of public officers in the performance of their duties. Semmes r. U. S. (1891), 26 Ct. Cl. 119; Rives r. Same (1893), 28 Ct. Cl. 249.

Restriction to appropriation for fiscal year. The statute restricts in every possible way the expenditures, expenses, and liabilities of the Government, so far as executive officers are concerned, to the specific appropriation for each fiscal year. Wilder v. U. S. (1880) 16 Ct. Cl. 528.

General legislation in an appropriation act, beginning with the word "hereafter," takes effect at the date of the act, and not at the beginning of the ensuing fiscal year. Chance r. U. S. (1903), 38 Ct. Cl. 75.

Obligations beyond amount of appropriation.—This section and R. S., sec. 3772, in effect prohibited any expenditure or contract in behalf of the Government in excess of appropriations therefor, except in the War and Navy Departments for specific purposes. Leavitt r. U. S. (D. C. 1888), 34 Fed. 623, 626.

Where an alleged liability of the Government rests wholly on an appropriation, they must stand or fall together, so that when the latter is exhausted the former comes to an end. Shipman r. U. S. (1883), 18 Ct. Cl. 138.

The fact that an appropriation is exhausted justifies an officer in stopping a contractor's work, but does not constitute a defense in a suit for breach of contract. Ferris r. U. S. (1892), 27 Ct. Cl. 542.

Where, by the special provision for a particular work commenced and in progress, it was provided that nothing in the act should be so construed as to authorize any officer of the Government to bind the United States by contract beyond the amount of existing appropriation, held that if the public interest required the President to make a contract for the work exceeding such amount he might lawfully do so, subject to the chance of future appropriations for the object, without which the contract would not bind the United States. (1853) 6 Op. Atty. Gen. 27.

In general, where the Constitution or an act of Congress requires the President to do a thing which requires the expenditure of money he may lawfully do it or contract to have it done in the absence of any adequate appropriation for the object; and the cost of the thing becomes a lawful charge on the Government. Id.

Contracts and purchases in the War and Navy Departments for clothing, subsistence, etc., may be made, though there is no appropriation adequate to their fulfillment, provided such contracts and purchases do not exceed the necessities of the current year. (1876) 15 Op. Atty. Gen. 124.

Executive officers are prohibited from continuing the employment of the contractors and involving the Government in expenditures or liabilities beyond those contemplated by Congress or authorized by law. If further appropriations are made, there must be a new contract for their expenditure. (1895) 21 Op. Atty. Gen. 244.

Leases.—A failure by Congress to appropriate the full amount of the rent reserved in a valid lease does not imply a new lease nor relieve the Government from liability for the rent reserved in the old lease. Freedman's Savings & Trust Co. *v.* U. S. (1880), 16 Ct. Cl. 19.

Leases entered into under an appropriation for one fiscal year, though for a term of years are binding on the lessee, the Government, only for the year covered by the appropriation act, but the extended term named in the lease in effect gives an option to the Government to continue it, holding, if subsequent appropriations be made, until the expiration of the designated term. McCollum *v.* U. S. (1881), 17 Ct. Cl. 92.

Though a tenancy from year to year will continue until terminated by notice, yet the Postmaster General has authority to bind the Government no longer than the current fiscal year. Connecticut Mutual Life Ins. Co. *v.* U. S. (1886), 21 Ct. Cl. 195.

The statute in effect prohibits a lease for a longer term than the fiscal years for which appropriations may be made. Smoot *v.* U. S. (1903), 38 Ct. Cl. 418.

A lease for a term of years is binding on the Government only until the end of the fiscal year in which it is made, with a future option from year to year until the end of the term. Id.

No contract can be implied from the occupancy of buildings which will involve the Government in a greater liability than that fixed by Congress. Hooe *v.* U. S. (1908), 43 Ct. Cl. 245.

By reason of this section and sec. 726, post, the Secretary of the Treasury has no power, in the absence of statutory authority, to make for the United States a contract to lease for five years a building for the use of the Customs Service, and such a contract is not binding on the United States. U. S. *v.* Doullut (C. C. A. 1914), 218 Fed. 729.

Obligations incurred after appropriation exhausted.—A party employed by the proper officer may recover for services necessarily required by the United States notwithstanding that the appropriation for the work has been previously exhausted. King *v.* U. S. (1863), 1 Ct. Cl. 38.

If a contract dependent upon an appropriation for its validity does not exceed the appropriation it will be deemed valid, though the appropriation be exhausted. New York Cent. & H. R. R. *v.* U. S. (1886), 21 Ct. Cl. 468.

After an appropriation is exhausted a contract not for the completion of any specific work, as the erection of a building, the construction of a road or rendering a channel adequate for the passage of vessels of a certain draft is at an end. Work done after the appropriation is exhausted would not come within such a contract. And if further appropriations are made there must be a new contract for their expenditure. (1895) 21 Op. Atty. Gen. 244.

The Secretary of War is without authority to continue the employment of certain contractors or to supervise their work after the appropriation under which they are employed is exhausted and their contract with the Government, so far as authorized by Congress, has been exhausted. Id.

After an appropriation has been exhausted the Secretary of the Navy has no power to incur any obligation for work on an uncompleted dry dock, even though immediate action is very important. (1896) 21 Op. Atty. Gen. 288.

Obligations incurred without appropriation.—The absence of an appropriation constitutes no bar to the recovery of a judgment in cases where the liability of the Government has been established. Parsons *v.* U. S. (1879), 15 Ct. Cl. 240.

If an officer is clothed with authority to do a piece of work without limitation as to cost, the contracts made by him therefor are binding on the Government whether money is appropriated for the purpose or not. Shipman *v.* U. S. (1883), 18 Ct. Cl. 138.

The absence of an appropriation out of which payment can be made is no defense to a valid claim. Winchester & Potomac R. Co. *v.* U. S. (1892), 27 Ct. Cl. 494, citing Collins' Case (1879), 15 Ct. Cl. 35; Shipman's Case (1883), 18 Ct. Cl. 147.

Validation by future appropriation.—A contract for postal-car facilities which makes the liability of the Government conditional upon future appropriations is valid and becomes operative if appropriations be subsequently made. New York Cent. & H. R. R. *v.* U. S. (1886), 21 Ct. Cl. 468.

Knowledge chargeable to contracting party.—Where one contract on its face assumes to provide for all the work an-

thorized by an appropriation the contractor is bound to know the amount of the appropriation and can not recover beyond it. It is otherwise where the contract is for partial service under a general appropriation. Dougherty v. U. S. (1883), 18 Ct. Cl. 496.

Thus a contractor, building a vessel under a general appropriation is not chargeable with a knowledge of the condition of the fund. Myerle v. U. S. (1896), 31 Ct. Cl. 105; Id. (1897), 33 Ct. Cl. 1.

The contractor is bound to know the restrictions imposed by statute. Sanger & Mosely v. U. S. (1904), 40 Ct. Cl. 47.

Salary and compensation.—An employee of the Government is entitled to the salary allowed by law and is not limited by the amount appropriated by Congress. Graham v. U. S. (1865), 1 Ct. Cl. 380; French v. Same (1880), 16 Ct. Cl. 419; Mitchell v. Same (1883), 18 Ct. Cl. 281; judgment reversed (1883), 19 Ct. Cl. 703, and (1883), 109 U. S. 146, 3 Sup. Ct. 151, 27 L. Ed. 887; Langston v. U. S. (1886), 21 Ct. Cl. 10. But this right does not extend to cases where the appointment and salary depend upon appropriations alone. Smith v. U. S. (1902), 37 Ct. Cl. 119.

The compensation of public officers depends upon general and continuing laws irrespective of the annual appropriation acts. Collins v. U. S. (1879), 15 Ct. Cl. 22.

A statute which establishes a salary or prescribes a rate of remuneration expresses the intent of both parties, as a written agreement does in the cases of private employers and employees. Upton v. U. S. (1884), 19 Ct. Cl. 46.

Where an appropriation is made specifically as compensation for a designated service, it may be inferred that the legislative intent was that the amount appropriated should be the measure of compensation; but where the salary or pay is contingent or variable, it must be inferred that an appropriation in excess of the minimum salary was intended to provide for the contingencies. Campagna v. U. S. (1891), 26 Ct. Cl. 316.

The Secretary of War may properly issue an order authorizing paymasters of the Army to make a certificate upon the pay accounts of officers in the following form: "The within account is believed to be correct, and would be paid by me if I had public funds available for that purpose." (1877), 15 Op. Atty. Gen. 271.

Continuance and expiration of offices.—Where an appropriation act authorizes the Secretary of the Treasury to appoint assistant agents at a designated place, the office will expire by its own limitation with the expenditure of the appropriation, and the incumbent can not prolong its existence by continuing to perform its duties. Beaman v. U. S. (1883), 19 Ct. Cl. 5.

Application of balances.—The balance of an appropriation made for a specific purpose may be used for that purpose in the discharge of obligations imposed by a lawful continuous contract. (1887), 18 Op. Atty. Gen. 566.

225. Scientific investigations.—During the fiscal year 1922 the head of any department or independent establishment of the Government having funds available for scientific investigations and requiring cooperative work by the Bureau of Standards on scientific investigations within the scope of the functions of that bureau and which it is unable to perform within the limits of its appropriations may, with the approval of the Secretary of Commerce, transfer to the Bureau of Standards such sums as may be necessary to carry on such investigations. The Secretary of the Treasury shall transfer on the books of the Treasury Department any sums which may be authorized hereunder and such amounts shall be placed to the credit of the Bureau of Standards for the performance of work for the department or establishment from which the transfer is made. *Act of Mar. 3, 1921 (41 Stat. 1302), making appropriations for legislative, executive, and judicial expenses; Bureau of Commerce.*

Similar provision appears in previous appropriation acts.

226. Apportionment of appropriations for monthly expenditures.— • • • All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to

prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstances which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such Executive Department or other Government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month. *R. S. 3679, as amended by sec. 3, act of Feb. 27, 1906 (34 Stat. 49).*

227. Restriction of appropriations to fiscal year.—No specific or indefinite appropriation made hereafter in any regular annual appropriation Act shall be construed to be permanent or available continuously without reference to a fiscal year unless it belongs to one of the following five classes: "Rivers and harbors," "lighthouses," "fortifications," "public buildings," and "pay of the Navy and Marine Corps," last specifically named in and excepted from the operation of the provisions of the so-called "covering-in Act" approved June twentieth, eighteen hundred and seventy-four, or unless it is made in terms expressly providing that it shall continue available beyond the fiscal year for which the appropriation Act in which it is contained makes provision. *Sec. 7, act of Aug. 24, 1912 (37 Stat. 487), making appropriations for sundry civil expenses.*

This section, so far as it excepts appropriations for "fortifications" from the operation thereof, is repealed by sec. 6, act of Mar. 3, 1919 (40 Stat. 1309). See ante, 209.

The "covering-in act," act June 20, 1874, sec. 5, mentioned in this section, is set forth post, 231.

Notes of Decisions.

Permanent and indefinite appropriations distinguished. — Permanent appropriations are those made for an unlimited period; indefinite appropriations are those in which no amount is named. (1870) 13 Op. Atty. Gen. 289.

228. Fiscal year.—That the fiscal year of the Treasury of the United States in all matters of accounts, receipts, expenditures, estimates, and appropriations, except accounts of the Secretary of the Senate for compensation and traveling expenses of Senators, and accounts of the Sergeant-at-Arms of the House of Representatives for compensation and mileage of members and delegates, shall commence on the first day of July in each year; and all accounts of receipts and expenditures required by law to be published annually shall be prepared and published for the fiscal year, as thus established. The fiscal year for the adjustment of the accounts of Secretary of the Senate for compensation and traveling expenses of Senators, and of the Sergeant-at-Arms of the House of Representatives for compensation and mileage of members and delegates, shall extend to and include the third day of July. *R. S. 237, as amended by sec. 9, act of Oct. 1, 1890 (26 Stat. 646).*

Notes of Decisions.

Previous practice and statutes.—Before the passage of act Aug. 26, 1842, provisions of which and of subsequent acts were carried into this section, the fiscal year commenced with and ended with the calendar year, but for the convenience of the public service in the administration of the expense, accounts, and estimates of the Government, Congress changed the law so as to make the 1st day of July the commencement of the fiscal year. Bachelor v. U. S. (1872), 8 Ct. Cl. 235, 238; Sweet v. U. S. (1899), 34 Ct. Cl. 377, 387.

The necessity of the situation requires that the Government have a fixed time in the form of a fiscal year. Whether it be with the commencement of the calendar year or at some other fixed period is not material, but that there should be a limit to accounts and expenses into distinct sections of time is an absolute necessity. Sweet v. U. S. (1899), 34 Ct. Cl. 377, 386.

Adjustment of compensation and accounts of officers.—Where the compensation to which an officer is entitled is an annual compensation, as it is derived from his official acts within each fiscal year, it becomes due at the end of each year. If not paid, a right of action then accrues, and the statute of limitations then begins to run. The same principle applies to compensation which consists of commissions upon deposits. Bachelor v. U. S. (1872), 8 Ct. Cl. 235; Ellsworth v. U. S. (1878), 14 Ct. Cl. 382, 395.

229. Unexpended balances of annual appropriations.—All balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund. This section, however, shall not apply to appropriations known as permanent or indefinite appropriations. *R. S. 3690.*

The provisions of this section was to apply to appropriations for the maintenance of the National Home for Disabled Volunteer Soldiers, by a provision of act Oct. 2, 1888, ante, 218.

230. Unexpended balances reported to Congress.—The Secretary of War shall make an annual report to Congress containing a statement of the appropriations of the preceding fiscal year for the Department of War, showing the amount appropriated under each specific head of appropriation, the amount expended under each head, and the balance which, on the thirtieth day of June preceding such report, remained unexpended. Such reports shall be accompanied by estimates of the probable demands which may remain on each appropriation. *R. S. 228.*

Provisions applicable to all the departments, relating to the time of making annual reports, and the time of furnishing copies thereof to the printer, are contained in R. S. 195, ante, 193, and sec. 3, act of July 1, 1916 (39 Stat. 336), ante, 194.

231. Balances remaining after two years.—All balances of appropriations which shall have remained on the books of the Treasury, without being drawn against in the settlement of accounts, for two years from the date of the last appropriation made by law, shall be reported by the Secretary of the Treasury to the Auditor of the Treasury, whose duty it is to settle accounts thereunder, and the Auditor shall examine the books of his office, and certify to the Secretary whether such balances will be required in the settlement of any accounts pending in his office; and if it appears that such balances will not be required for this purpose, then the Secretary may include such balances in his surplus-fund warrant whether the head of the proper Department shall have certified that it may be carried into the general Treasury or not. But no appropriation for the payment of the interest or principal of the public debt, or to which a longer duration is given by law, shall be thus treated. *R. S. 3691.*

That from and after the first day of July, eighteen hundred and seventy-four, and of each year thereafter, the Secretary of the Treasury shall cause all unexpended balances of appropriations which have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury: *Provided*, That this provision shall not apply to permanent specific appropriations, appropriations for rivers and harbors, light-houses, fortifications, public buildings, or the pay of the navy and marine corps; but the appropriations named in this proviso shall continue available until otherwise ordered by Congress, * * * *Sec. 5, act of June 20, 1874 (18 Stat. 110).*

The provisions of this section and the section preceding were to apply to appropriations for the maintenance of the National Home for Disabled Volunteer Soldiers, by a provision of act Oct. 2, 1888, post, 218.

Sec. 5, act of June 20, 1874 (18 Stat. 110), so far as it excepts appropriations for "fortifications" from the operation thereof, is repealed by sec. 6, act of Mar. 3, 1919 (40 Stat. 1309). See 209, ante.

Provisions similar to those of this section, for the disposal of unexpended balances of appropriations, remaining in the Treasury on July 1, 1904, were made by act Mar. 4, 1909, sec. 10 (35 Stat. 1027).

No specific or indefinite appropriation made in any regular annual apropriation act is to be construed as permanent unless it belongs to one of the five classes excepted from the operation of this section, or unless it is in terms made available continuously, by act Aug. 24, 1912, sec. 7, ante, 227.

Notes of Decisions.

Duties of disbursing officers.—Under this section it is the duty of disbursing officers, with whom funds have been placed for disbursement, when the time arrives at which unexpended balances of the appropriations from which such funds were drawn lapse, to repay the funds remaining in their hands, in order that they may be carried to the surplus fund and covered into the Treasury. (1877) 15 Op. Atty. Gen. 358.

Where previous to that time, these officers have issued certificates by which claims upon such appropriations have been definitely ascertained, and payment thereof has not actually been made before that time, such claims may thereafter be paid by them out of the proper funds remaining in their hands. Id.

For what period and to what amount such officers should be allowed to retain in their hands funds for that purpose, after the date when unexpended balances of the appropriation lapse, is a matter of administration, falling within the province of the Secretary of the Treasury to regulate. Id. Farmers' Nat. Bank *v.* Jones (C. C. 1900), 105 Fed. 459, 465.

232. Reappropriation and diversion of unexpended balances.—That the reappropriation and diversion of the unexpended balance of any appropriation to a purpose other than that for which it was originally made shall be construed and accounted hereafter as a new appropriation and the unexpended balance shall be reduced by the sum proposed to be so diverted. *Sec. 4, act of Mar. 4, 1915 (38 Stat. 1161).*

233. Proceeds of sales revert to special appropriations.—All moneys received from the leasing or sale of marine hospitals, or the sale of revenue-cutters, or from the sale of commissary stores to the officers and enlisted men of the Army, or from the sale of materials, stores, or supplies sold to officers and soldiers of the Army, or from sales of condemned clothing of the Navy, or from sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall respectively revert to that appropriation out of which they were originally expended, and shall be applied to the purposes for which they are appropriated by law. *R. S. 3692.*

234. Funds derived from transfer of stores to the Philippine government.—Hereafter all funds received as the value of military stores transferred by the

several staff departments of the Army to the Insular Department of the Philippines, or work done, shall be deposited in the Treasury of the United States and remain available during the fiscal year in which the transaction occurred and the following year for the procurement of like military stores to replace those so transferred. *Act of June 12, 1906 (34 Stat. 258), making appropriations for the support of the Army.*

235. **Deductions for loss or damage of stores in transit.**—Hereafter moneys arising from deductions made from carriers on account of the loss of or damage to military stores in transit shall be credited to the proper appropriation or funds out of which such or similar stores shall be replaced * * *. *Act of Mar. 2, 1905 (33 Stat. 840), making appropriations for the support of the Army.*

236. **Bonds of disbursing officers.**—All officers of the Quartermaster's, Subsistence, and Pay Departments, the chief medical purveyor and assistant medical purveyors, and all store-keepers shall, before entering upon the duties of their respective offices, give good and sufficient bonds to the United States, in such sums as the Secretary of War may direct, faithfully to account for all public moneys and property which they may receive. The President may, at any time, increase the sums so prescribed. *R. S. 1191.*

Section eleven hundred and ninety-one is amended by adding at the end of section the following: "But the Quartermaster General shall not be liable for any money or property that may come into the hands of the subordinate officers of his department." *Act of Feb. 27, 1877 (19 Stat. 243), amending R. S. 1191.*

Notes of Decisions.

Necessity of bond.—The appointment of a paymaster is complete when he is appointed by the President and confirmed by the Senate, and the giving of a bond is a mere ministerial act for the security of the Government, and not a condition precedent to his authority to act as a paymaster. U. S. v. Bradley (1836), 10 Pet. 343, 364, 9 L. Ed 448; Same v. Linn (1841), 15 Pet. 290, 313, 10 L. Ed. 742.

The failure of a disbursing officer to give a bond does not preclude him from relief for lost funds. Wood v. U. S. (1889), 25 Ct. Cl. 98.

Validity and effect of bond.—A bond may properly be required from a "property and disbursing officer," although no bond is required by statute, provided that the consideration or condition of the bond must not be in violation of law, must not run counter to any statute, and must not be either malum prohibitum or malum in se. Mason v. U. S. (1897), 17 Sup. Ct. 682, 166 U. S. 571, 586, 41 L. Ed. 1119.

The compensation of a paymaster in the Army runs from the date of the acceptance of his appointment, not from the date of approval of his bond. (1878) 16 Op. Atty. Gen. 58.

Form of bond.—This section merely prescribes the form and purport of the bond to be taken of paymasters by the War Department, and does not declare that all other bonds not taken in the prescribed form shall be void, and a bond conforming to the act and containing additional provisions is valid, so far as it is in conformity with the act. U. S. v. Bradley (1836), 10 Pet. 343, 364, 9 L. Ed. 448.

See (1885) 18 Op. Atty. Gen. 274, holding that, where the form of the bond is not prescribed by statute, its form may be determined by the officer whose duty it is to approve the same.

Blanks in instrument.—A printed form of bond, with blanks left therein, signed by persons who had consented to become sureties, the blanks being subsequently filled out without express authority from them and subsequently accepted by the United States was not a valid bond as to the sureties. U. S. v. Nelson (C. C. 1822), Fed. Cas. No. 15,862.

Extent of liability on quartermaster's bond.—A bond by a battalion quartermaster conditioned "to expend faithfully all public moneys and to account for all public property" requires an accounting, not with the Quartermaster General but the Treasury Department, and the obligation extends to moneys as well as property and to expenditures made by the obligor while acting

as a deputy of the Quartermaster General. U. S. *v.* Lent (C. C. 1825), Fed. Cas. No. 15,593.

Accrual of liability on paymaster's bond.—The debt of a paymaster to the United States is created by the advances made to him and not at the time of striking a balance of accounts against him on the Treasury books; and his surety becomes a debtor as soon as the paymaster fails to account according to law. U. S. *v.* Clark (C. C. 1826), Fed. Cas. No. 14,807.

Extent of liability on paymaster's bond.—The sureties of the official bond of a regimental paymaster are not liable for his failure to account for funds placed in his hands after six months' neglect to account for funds previously placed in his hands. U. S. *v.* Vanzandt (C. C. 1822), Fed. Cas. No. 16,611.

The sureties on a paymaster's bond are liable for the penalty named therein, and for interest thereon from the commencement of the suit to the entry of judgment. U. S. *v.* Meeker (D. C. 1873), Fed. Cas. No. 15,757.

Funds for the support of the Army raised by individual contribution are not public funds within the bonds of disbursing officers. (1877) 15 Op. Atty. Gen. 209.

Discharge of surety on paymaster's bond.—The omission of the proper officer to recall a delinquent paymaster does not discharge his surety. U. S. *v.* Vanzandt (1826), 11 Wheat. 184, 188, 6 L. Ed. 448.

Action on paymaster's bond.—Certified copies of a regimental paymaster's account and of his bond are competent evidence in an action against sureties. U. S. *v.* Vanzandt (C. C. 1822), Fed. Cas. No. 16,611.

237. Bonds waived for certain officers of the Quartermaster Corps.— * * * *Provided further*, That hereafter the provision of section eleven hundred and ninety-one of the Revised Statutes of the United States may, in discretion of the Secretary of War, be waived in the cases of officers of the Quartermaster Corps who are not accountable for public funds or public property. *Act of Aug. 29, 1916 (39 Stat. 626), making appropriations for the support of the Army.*

238. Bonds of special disbursing agents.—Whenever it becomes necessary for the head of any Department or office to employ special agents, other than officers of the Army or Navy, who may be charged with the disbursement of public moneys, such agents shall, before entering upon duty, give bond in such form and with such security as the head of the Department or office employing them may approve. *R. S. 3614.*

Notes of Decisions.

Liability of disbursing officer.—The forcible seizure by public enemies of public moneys in the hands of a Government agent against his will and without his fault is a sufficient discharge from the obligation of his official bond. U. S. *v.* Thomas (1872), 15 Wall. 337, 341, 21 L. Ed. 89.

A disbursing officer's liability is as great as that of a common carrier, and in some respects greater. Boggs *v.* U. S. (1909), 44 Ct. Cl. 367.

That money was never in the Treasury is immaterial, inasmuch as it was public money, and the receiver's bond expressly bound him to account for all public moneys coming into his hands. (1891), 20 Op. Atty. Gen. 24.

Necessity for bond.—It is in the discretion of the President whether or not to require bonds of an officer of the Engineer Corps employed as disbursing agent of the Government. (1853), 6 Op. Atty. Gen. 24.

Form of bond.—Where, during temporary absence of Secretary and Assistant Secretaries, chief clerk of Department of Interior, by authority of the Secretary, designated a special disbursing agent, under act Mar. 4, 1911 (36 Stat. 1213), the bond should so show. (1911) 29 Op. Atty. Gen. 273.

Validity of bonds.—A bond extorted against the requirements of statute is illegal. U. S. *v.* Tingey (1831), 5 Pet. 115, 127, 8 L. Ed. 66.

A voluntary bond held binding, though not prescribed by positive law. Id.

Though the small penalty named in an official bond may show that it was not supposed the officer would have such large sums to disburse as in fact came to his hands, that fact forms no defense to an action on the bond. Moses *v.* U. S. (1897), 17 Sup. Ct. 682, 687, 166 U. S. 571, 41 L. Ed. 1119.

The Government may, through the head of a department, take bond from a disbursing officer, though there be no law or general regulation requiring it; and a bond

is none the less a voluntary bond because demanded by the superior officer, if not illegally extorted. Id.

Defenses.—The acceptance by the United States of a new bond from a receiver of public money is no satisfaction for the damages accruing for the breach of the condition of the old bond. U. S. v. Girault (1850), 11 How. 22, 29, 13 L. Ed. 587.

239. Increase of bonds of disbursing agents.— * * * The President is authorized, if in his opinion the interest of the United States requires the same, to regulate and increase the sums for which bonds are, or may be, required by law, of all district attorneys, collectors of customs, naval officers, and surveyors of customs, navy agents, receivers and registers of public lands, paymasters in the Army, Commissary-General, and by all other officers employed in the disbursement of the public moneys, under the direction of the War or Navy Departments. *R. S. 3639.*

240. Premium for a surety bond.—Until otherwise provided by law no bond shall be accepted from any surety or bonding company for any officer or employee of the United States which shall cost more than thirty-five per centum in excess of the rate of premium charged for a like bond during the calendar year nineteen hundred and eight: *Provided*, That hereafter the United States shall not pay any part of the premium or other cost of furnishing a bond required by law or otherwise of any officer or employee of the United States. *Act of Aug. 5, 1909 (36 Stat. 125).*

Notes of Decisions.

Bonds given to superior officers.—This act does not apply to bonds voluntarily given by an employee or officer of the United States to a superior officer. (1909) 28 Op. Atty. Gen. 28.

Legality of bond extorted against requirements of law.—A bond extorted against the requirements of statute is illegal. U. S. v. Tingey (1831), 5 Pet. 115, 129, 8 L. Ed. 66.

241. Examination of surety bonds.— * * * Hereafter every officer required by law to take and approve official bonds shall cause the same to be examined at least once every two years for the purpose of ascertaining the sufficiency of the sureties thereon; and every officer having power to fix the amount of an official bond shall examine it to ascertain the sufficiency of the amount thereof and approve or fix said amount at least once in two years and as much oftener as he may deem it necessary. * * * *Sec. 5, act of Mar. 2, 1895 (28 Stat. 807), making appropriations for legislative, executive, and judicial expenses.*

Notes of Decisions.

Examination by United States attorney.—United States attorneys are not authorized, and can not be required by the Navy Department, to make examination into the sufficiency of sureties upon official bonds provided for in this section. (1895) 21 Op. Atty. Gen. 154.

242. Renewal of surety bonds.— * * * Hereafter every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a new bond may be waived for the period of service of a bonded officer after the expiration of a four-year term of service pending the appointment and qualification of his successor: * * * *Sec. 5, act of Mar. 2, 1895 (28 Stat. 808), making appropriation for legislative, executive and judicial expenses.*

All disbursing officers of the pay department shall renew their bonds, or furnish additional security, at least once in four years, and as much oftener as the President may direct. *R. S. 1192.*

Notes of Decisions.

Effect of renewal bond on liability of surety on original bond.—Bonds of officers of the United States given for the faithful discharge of their duties which are not in terms limited to a specified period expressed in dates remain in full force and effect so long as such officers continue in office, even though another and different bond be given by way of renewal. (1906) 26 Op. Atty. Gen. 70.

A provision in an official bond shortening the life of the bond from the entire period during which the office is held until such time as "a new official bond shall be accepted by the proper authority and substituted" therefor runs counter to the statute and would be without effect. In its other particulars the bond would be good.

Suspension of officer as involving suspension of bond.—The suspension of an officer involves a suspension of his bond; the bond required of the person designated to take the place of the former being substituted therefor while the person so designated is performing the duties of the office. (1885) 18 Op. Atty. Gen. 318.

Liability of sureties after principal ceases to hold office.—The sureties of a public officer are not liable to the United States for moneys improvidently advanced to such party by the Government after he shall have ceased to hold office. (1856) 8 Op. Atty. Gen. 7.

Payment of old debt or defalcation from moneys in which new sureties are interested.—The moneys of the second term of an officer in which his new sureties are interested can not be taken to pay off an old debt or defalcation with which they had no concern. U. S. *v.* Able (D. C. 1872), Fed. Cas. No. 14,417.

Liability on Navy agent's bond.—The sureties on the bond of a Navy agent are liable only for his acts during the continuance of his commission. (1865) 11 Op. Atty. Gen. 286.

243. Liability under a surety bond.— * * * *Provided*, That the nonperformance of any requirement of this section on the part of any official of the Government shall not be held to affect in any respect the liability of principal or sureties on any bond made or to be made to the United States: *Provided further*, That the liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal: * * * *Sec. 5, act of Mar. 2, 1895 (28 Stat. 808).*

244. Surety companies acceptable as sureties.—That whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: *Provided*, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company. *Sec. 1, act of Aug. 13, 1894 (28 Stat. 279).*

Notes of Decisions.

State laws restricting or authorizing dealings of surety company with the United States.—This act does not create surety companies acting thereunder instrumentalities of the United States, and relieve them from compliance with the laws of, or pay-

ment of the lawful taxes in the States in which they transact their business. Fidelity & Deposit Co. v. Pennsylvania (1916), 240 U. S. 319.

If the laws of a State under which a surety company is incorporated limit the amount of liability to a certain percentage of the capital, which can be incurred on account of any one partnership or association, and if a greater amount of liability is incurred it is to be secured by a collateral agreement of indemnity, such provision is thereby made a part of its charter, and to that extent it is restricted in its dealings with the United States. (1899) 22 Op. Atty. Gen. 421.

Bonds given to superior officers.—Voluntary bonds given by employees or officers of the United States to superior officers do not come within the purview of this act. (1909) 28 Op. Atty. Gen. 28.

Conditions and regulations by Government officials.—The act authorizing the acceptance of bonds and undertakings of surety and fidelity companies (28 Stat. 279) does not permit the imposition of conditions and regulations by Government officials relative to the percentage of capital stock to liability on a single official bond, or the minimum rates to be charged for such insurance, etc. (1899) 22 Op. Atty. Gen. 421.

The Attorney General is not authorized to fix a limit of the percentage of capital stock to liability beyond which a surety company may not go upon a single official bond, or prescribe rates which such company shall charge for such insurance. Id.

Affixing corporate seals to bonds.—An agent of a corporation appointed by an instrument under the corporate seal of the corporation, may, on its behalf, adopt a special seal, so as to make it, in executing the purpose for which he was appointed, the corporate seal of the corporation. (1906) 26 Op. Atty. Gen. 507.

A corporation may adopt for the purpose and use a seal other than its corporate seal on a bond, so as to make the bond a corporate deed of the corporation. Id.

Acknowledgment of bond.—An acknowledgment of a bond is not necessary. (1908) 26 Op. Atty. Gen. 507.

Nature of instruments.—A bond given by a contractor for Government work, conditioned as provided by this section, is in effect two separate instruments; one securing performance of the contract to the United States, and the other the payment by the contractor of bills for labor and materials furnished, and in the latter aspect the surety is not discharged from liability by a variation of the contract which might relieve it from liability to the United States, as by a change in the site of a building. U. S. v. California Bridge & Construction Co. (C. C. 1907), 152 Fed. 559.

Bonds of deputy disbursing clerks.—The surety on a bond of an acting or deputy disbursing clerk selected under act Mar. 4, 1909, sec. 8 (35 Stat. 1027), should be such as is authorized under act Aug. 13, 1894 (28 Stat. 279), or such personal surety as may be acceptable to the proper authorities. (1909) 27 Op. Atty. Gen. 624.

Certification as sole surety.—The Globe Surety Co., of Kansas City, Mo., having the power to guarantee the fidelity of persons holding positions of public or private trust and the power to execute and guarantee bonds and undertakings in judicial proceedings, possesses appropriate corporate powers to entitle it to certification as a sole surety under the provisions of act Aug. 13, 1894 (28 Stat. 279), and act Mar. 23, 1910 (36 Stat. 241). (1910) 28 Op. Atty. Gen. 411.

Acceptance of corporate surety by Secretary of the Navy.—The Secretary of the Navy may, in his discretion, under sec. 7 of the act of Aug. 3, 1886 (24 Stat. 216), authorizing proposals for certain work to be invited which shall be subject to "such provisions as to bonds and security for the quality and due completion of the work as the Secretary of the Navy shall prescribe," accept as surety (instead of an individual) a body corporate empowered to assume that relation. (1887) 19 Op. Atty. Gen. 57.

245. Agents of surety companies. That no such company shall do business under the provisions of this act beyond the limits of the State or Territory under whose laws it was incorporated and in which its principal office is located nor beyond the limits of the District of Columbia, when such company was incorporated under its laws or the laws of the United States and its principal office is located in said District, until it shall by a written power of attorney appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, who shall be a citizen of the State, Territory, or District of Columbia, wherein such court is held, as its agent, upon whom may be served all lawful process against

such company, and who shall be authorized to enter an appearance in its behalf. A copy of such power of attorney, duly certified and authenticated, shall be filed with the clerk of the district court of the United States for such district at each place where a term of such court is or may be held, which copy, or a certified copy thereof, shall be legal evidence in all controversies arising under this Act. If any such agent shall be removed, resign, or die, become insane, or otherwise incapable of acting, it shall be the duty of such company to appoint another agent in his place as hereinbefore prescribed, and until such appointment shall have been made, or during the absence of any agent of such company from such district, service of process may be upon the clerk of the court wherein such suit is brought, with like effect as upon an agent appointed by the company. The officer executing such process upon such clerk shall immediately transmit a copy thereof by mail to the company, and state such fact in his return. A judgment, decree, or order of a court entered or made after service of process as aforesaid shall be as valid and binding on such company as if served with process in said district. *Sec. 2, act of Aug. 13, 1894 (28 Stat. 279).*

Notes of Decisions.

Surety companies doing business in States where they are not authorized.—Bonds of surety companies, executed in States in which they are not licensed, for principals residing in those States or for contracts to be performed therein, are valid and enforceable against such companies, no matter how flagrant their violations of the law of the State may have been as regards failure to qualify to do business in the State. (1909) 28 Op. Atty. Gen. 127.

The execution of a bond by a surety company at its home office, or outside of the boundaries of a State wherein it is not licensed, for a principal residing in such State, or for a contract to be performed there, would not be the doing of business by the surety within the State. Id.

The question whether or not in either such case the Treasury Department should accept such bonds is one of administrative policy, regarding which the Attorney General can not properly express an opinion. Id.

The Treasury Department should not accept the bond of a surety company in a State where the company is forbidden by the laws of the State to do business, notwithstanding the company may have complied with the provisions of this section. (1909) 28 Op. Atty. Gen. 34.

Process agents.—A surety company authorized by the statute to transact a surety business, which has appointed an agent at Guthrie, Okla., upon whom all lawful process issued against it may be served, and has filed copies of such appointment at all places in that Territory where court is held, thereby consents to accept service upon such agent of a summons issued from any county in that Territory, and effectuates the purpose of this section. (1906) 25 Op. Atty. Gen. 598.

Place of appointment.—Sec. 5, act of Aug. 13, 1894 (28 Stat. 280), does not so qualify this section as to make the appointment of a process agent in the district only where the bond is returnable or filed a compliance with the statute. The purpose is also to require the appointment of an agent in the district where the contract is to be performed. (1906) 25 Op. Atty. Gen. 598.

This section requires the appointment of a process agent in the district where the principal resides and also in the district where the contract is to be performed. (1909) 28 Op. Atty. Gen. 34.

Service of process on agent.—A petition against a company as surety on a contractor's bond in the district where it was given, where service appears to have been made on its authorized agent, is not demurrable on the ground that it is not an inhabitant of the district. U. S. *v.* Sheridan (C. C. 1902), 119 Fed. 236.

Application of act to Canal Zone.—The Canal Zone is not within the contemplation of this act. (1909) 27 Op. Atty. Gen. 136.

A surety company may be accepted as surety on the official bond of an officer of the Government who is to discharge his duties in the Panama Canal Zone, provided the surety company has appointed process agents in the judicial district in which the principal in the bond resided at the time it was made or guaranteed, and in the judicial district in which the office is located to which it is returnable, and provided the company has also complied with all other legal requirements. (1909) 27 Op. Atty. Gen. 208.

Application of act to Porto Rico and Philippine Islands.—Surety companies may, under the provisions of this section, appoint process agents in Porto Rico, but not in the Philippine Islands. (1909) 27 Op. Atty. Gen. 208.

246. Deposit by surety companies of charter and statement of liabilities.—That every company, before transacting any business under this Act, shall deposit with the Secretary of the Treasury of the United States a copy of its charter or articles of incorporation, and a statement, signed and sworn to by its president and secretary, showing its assets and liabilities. If the said Secretary of the Treasury shall be satisfied that such company has authority under its charter to do the business provided for in this Act, and that it has a paid up capital of not less than two hundred and fifty thousand dollars, in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority in writing to such company to do business under this Act. *Sec. 3, act of Aug. 13, 1894 (28 Stat. 279), as amended by act of Mar. 23, 1910 (36 Stat. 241).*

The amendment of this section and the section next following consisted in the substitution of the Secretary of the Treasury for the Attorney General, wherever the latter was mentioned in said sections as originally enacted.

Notes of Decisions.

Written authority to do business.—The validity of a bond executed jointly and severally to the American Surety Co. of New York and the People's Trust Co. of Lancaster, Pa., guaranteeing the faithful performance of the duties of a pay officer of the Navy, is not impaired by the fact that the latter company has not obtained written authority to do business, as required by this section (1907). 26 Op. Atty. Gen. 276.

The People's Trust Co., having exercised the powers conferred by its charter and received the benefit arising therefrom, can not discharge itself from the duties imposed by the above-named act, notwithstanding the company has not complied with certain statutory requirements, to which the State alone can object. Id.

247. Surety companies to file quarterly statement.—That every such company shall in the months of January, April, July, and October of each year, file with the said Secretary of the Treasury a statement, signed and sworn to by its president and secretary, showing its assets and liabilities, as is required by section three of this Act. And the said Secretary of the Treasury shall have the power, and it shall be his duty, to revoke the authority of any such company to transact any new business under this Act whenever in his judgment such company is not solvent or is conducting its business in violation of this Act. He may institute inquiry at any time into the solvency of said company and may require that additional security be given at any time by any principal when he deems such company no longer sufficient security. *Sec. 4, act of Aug. 13, 1894 (28 Stat. 279), as amended by act of Mar. 23, 1910 (36 Stat. 241).*

248. Release of sureties.—That if, upon the statement of the account of any official of the United States, or of any officer disbursing or chargeable with public moneys, by the accounting officers of the Treasury, it shall thereby appear that he is indebted to the United States, and suit therefor shall not be instituted within five years after such statement of said account, the sureties on his bond shall not be liable for such indebtedness. *Sec. 2, act of Aug. 8, 1888 (25 Stat. 357).*

Notes of Decisions.

Conflict of laws.—The liability of sureties on a bond given by a Navy agent at New Orleans, constituted for the accounting for public moneys, is governed by the rules of the common law. His accountability being at Washington, and the bond being joint and several, each is bound for the whole. Contribution between the sureties

is a matter in which the United States has no concern. Cox v. U. S. (1832), 6 Pet. 172, 203, 8 L. Ed. 359.

When limitations begin to run.—The five year limitation fixed by this section within which suits may be brought upon the official bonds of disbursing officers of the Government begins to run from the time the accounting officers of the Treasury make the statement of the account showing an indebtedness to the United States. (1899) 22 Op. Atty. Gen. 611.

Whether the accounting officer makes the statement showing an indebtedness to the United States as early as he should, or does not, the limitation fixed by sec. 2 of that act begins to run only from the time that the accounting officer of the Treasury makes the statement of account showing an indebtedness to the United States, as provided in that section. (1899) 22 Op. Atty. Gen. 613.

Discharge of sureties.—This section is absolute as regards the discharge of sureties if suit on the bond be not instituted "within five years after such statement of said account" by the accounting officer of the Treasury. It makes no exception in case the accounting officer does not make such statement as early as he should, or when a deficiency is discovered by him. (1899) 22 Op. Atty. Gen. 612.

Laches.—The right of the United States to recover on the bond of an officer for a defalcation can not be affected by the laches of its other officers or agents in permitting such officer to remain in office after knowledge of prior defalcations. U. S. v. Campbell (1909), 170 Fed. 318, 95 C. C. A. 114; judgment reversed, Campbell v. U. S. (1912), 32 Sup. Ct. 398, 224 U. S. 99, 56 L. Ed. 684.

249. Public money handled by disbursing officers.—It shall be the duty of every disbursing officer having any public money intrusted to him for disbursement to deposit the same with the Treasurer or some one of the assistant treasurers of the United States, and to draw for the same only as it may be required for payments to be made by him in pursuance of law; and all transfers from the Treasurer of the United States to a disbursing officer shall be by draft or warrant on the Treasury or an assistant treasurer of the United States. In places, however, where there is no treasurer or assistant treasurer, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depository, or, in writing, authorize the same to be kept in any other manner, and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors. *R. S. 3620.*

Section thirty-six hundred and twenty is amended by inserting, after the word "law" in the fifth line, the words "and draw for the same only in favor of the persons to whom payment is made." *Act of Feb. 27, 1877 (19 Stat. 249), amending R. S. 3620.*

A disbursing officer unlawfully depositing, converting, loaning, or transferring public money was punishable for embezzlement by R. S. 5488, which was incorporated in the Criminal Code, in sec. 87 thereof, post, 280, and was repealed by sec. 341 thereof.

Notes of Decisions.

Selection of depositaries.—Under order of the Treasury Department disbursing officers may legally keep public moneys entrusted to them on deposit in banks theretofore selected by the Treasury. (1837) 3 Op. Atty. Gen. 233.

Disbursing officers may legally make special deposits of their funds in nonspecie-paying banks if so directed by the President. Id.

An agent of the Government can not require it to receive the credit of a bank or any other third party in place of that of himself and his sureties. (1854) 6 Op. Atty. Gen. 314.

Payments of disbursing agents.—Payments made by a disbursing officer in good faith, though excessive, may be legal. Jones v. U. S. (1906), 41 Ct. Cl. 493.

Duty of disbursing officer.—A disbursing officer of the United States holding a Treasury draft payable to the order of certain contractors can not with propriety or safety be directed to turn it over to a receiver appointed by a State court in an action between contesting claimants. (1894) 21 Op. Atty. Gen. 75.

Duties and liabilities of disbursing officers.—Vast sums of money are paid for salaries and on other accounts by disburs-

ing officers before the claims have passed the Treasury accounting, such officers being under bonds, and responsible for the legality and correctness of their payments. Their accounts are finally settled through the accounting officers, and every item charged therein is subject to examination and adjustment, as are all other demands, and only such are allowed as are found to be sufficiently vouched for and to have been legally and rightly paid. All others are rejected, and the disbursing officer and his bondsmen are held liable for any balances found against him on such settlement. McKnight *v.* U. S. (1877), 13 Ct. Cl. 292, 304.

250. Agents of officers, Finance Department.— * * * *Provided*, That under such regulations as may be prescribed by the Secretary of War, officers of the Finance Department, accountable for public moneys, may intrust moneys to other officers for the purpose of having them make disbursements as their agents, and the officer to whom the moneys are intrusted, as well as the officer who intrusts the moneys to him, shall be held pecuniarily responsible therefor to the United States. *Sec. 9a, added to the act of June 3, 1916, by sec. 9, act of June 4, 1920 (41 Stat. 766).*

In case of sickness or unavoidable absence of any disbursing clerk or disbursing agent in any executive department, etc., in Washington, D. C., the clerk of highest grade might be authorized to act in his place, by act Mar. 4, 1909, sec. 8, ante, 109.

251. Agents of disbursing officers.—That during the present emergency, under such regulations as may be prescribed by the Secretary of War, officers of the Army, accountable for public moneys, may intrust such moneys to other officers for the purpose of having them make disbursements as their agents, and the officers to whom the moneys are intrusted, as well as the officers who intrusted such funds to them, shall be held pecuniarily responsible therefor to the United States. * * * *Chap. III, act of July 9, 1918 (40 Stat. 878).*

252. Deposit of public moneys.—Every person who shall have moneys of the United States in his hands or possession, and disbursing officers having moneys in their possession not required for current expenditure, shall pay the same to the Treasurer, an Assistant Treasurer, or some public depositary of the United States, without delay, and in all cases within thirty days of their receipt. And the Treasurer, the Assistant Treasurer, or the public depositary shall issue duplicate receipts for the moneys so paid, transmitting forthwith the original to the Secretary of the Treasury, and delivering the duplicate to the depositor: *Provided*, That postal revenues and debts due to the Post-Office Department shall be paid into the Treasury in the manner now required by law. *R. S. 3621, as amended by sec. 5, act of May 28, 1896 (29 Stat. 179).*

Officers intrusted with the disbursement of funds for the subsistence of the Army might be authorized to keep in their possession restricted amounts of such funds, by a provision of act Mar. 2, 1907, post, 906.

Notes of Decisions.

Proper depositaries. Government moneys in the hands of the assistant quartermaster for disbursement, deposited by him with an assistant treasurer of the United States, still continue to be moneys of the United States, and such treasurer is not liable in assumpsit to the depositor therefor. Morgan *v.* Van Dyck (C. C. 1870), Fed. Cas. No. 9,810.

National banking associations are "public depositaries," and disbursing officers may avail themselves of such associations, except for the deposit of receipts for customs. (1864) 11 Op. Atty. Gen. 23.

Applicability of act.—This section can not apply to public officers as to whom Congress has specifically provided some other and different method of disposing of moneys of the United States which may come to their hands. U. S. *v.* Brendel (1905), 136 Fed. 737, 738, 739, 69 C. C. A. 389.

Credits.—Moneys collected by the Government on execution may be proved as a credit in a subsequent action on the same bond, against a different party to the bond, without exhibiting the voucher for such payment to the Treasury Department. Myers *v.* U. S. (C. C. 1839), Fed. Cas. No. 9,996.

253. Deposit of gross receipts of public moneys.—The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in the next section, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post-Office Department. *R. S. 3617.*

Notes of Decisions.

Intent of act.—This act was intended to take away all excuse from collectors to withhold payments into the Treasury, under pretense that they were responsible, as collectors, to individuals for services rendered. U. S. *v.* Forsythe (C. C. 1855), Fed. Cas. No. 15,133.

Duty to make deposits.—An order of the Treasury directing a collector of customs to deposit in the Treasury all moneys received by him is equally obligatory upon his successor. Ellsworth *v.* U. S. (1878), 14 Ct. Cl. 382.

Set-offs against the Government.—A claim of damages sustained by a public officer against the Government can not be set off against a legal demand. U. S. *v.* Wells (C. C. 1808), Fed. Cas. No. 16,663.

A party claiming a set-off against the Government has the burden of showing that the claim has been presented to the accounting officers, and disallowed. U. S. *v.* Martin (C. C. 1832) Fed. Cas. No. 15,732.

In an action by the Government against an officer or individual to recover moneys claimed of him, defendant is entitled to an allowance of all equitable demands of his against the United States which have been disallowed by the accounting officers. U. S. *v.* Collier (C. C. 1855), Fed. Cas. No. 14,833.

In such action defendant is entitled to a credit for moneys reasonable in amount paid by such officer, and for services rendered by him in good faith, in the proper discharge of his official duties. U. S. *v.* Corwin (C. C. 1857), Fed. Cas. No. 14,870.

In an action to recover a balance due from a receiver of public moneys, a claim that a certain sum had been stolen from him, held not supported, he never having presented a claim for a credit of such amount. U. S. *v.* Reymert (C. C. 1865), Fed. Cas. No. 16,149.

A receiver of public moneys is not entitled to offset rejected accounts for unauthorized clerk hire, fuel, lights, or for transmitted money. Office rent may be allowed under extraordinary circumstances. U. S. *v.* Lowe (C. C. 1871), Fed. Cas. No. 15,635.

A defendant sued by the United States is not entitled to a finding in any form of a sum due him by the United States in excess of the claim for which he was sued. Schaumburg *v.* U. S. (C. C. 1878), Fed. Cas. No. 12,442.

Government agent must be reimbursed damages paid in consequence of protest of bill of exchange authorized to be drawn by him. Armstrong *v.* U. S. (D. C. 1833), Fed. Cas. No 548.

Unliquidated damages arising from torts may be set-off against a Government claim, but such damages can only include actual loss, not anticipated profits. U. S. *v.* Buchanan (D. C. 1845), Fed. Cas. No. 14,678.

Claims against the Government are not admissible as a set-off which have not previously been presented to and disallowed by the proper accounting officer, except in the case of absence from the United States, or unavoidable accident preventing such presentation, but rejection does not preclude the claim being used as a set-off. U. S. *v.* Smith (D. C. 1856), Fed. Cas. No. 16,321.

Liability of collectors for loss.—This section does not make a customs collector liable on his bond for the loss of part of the contents of an express package before it reaches the Assistant Treasurer to whom it is properly addressed by the collector who followed directions in making up the package and in taking a receipt for the same from the express company. U. S. *v.* Brendel (1905), 136 Fed. 737, 738, 69 C. C. A. 389.

Liable only to the Government.—Federal officers holding the public money as money of the United States are only accountable to the United States. Vasse *v.* Comegys (C. C. 1825), Fed. Cas. No. 16,894.

254. Deposit of proceeds of sales.—All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of revenue-cutters, or of the sales of commissary stores to the officers and enlisted men of the Army, or of the sale of condemned Navy clothing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of "proceeds of Government property," and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law. *R. S. 3618.*

Section thirty-six hundred and eighteen is amended by inserting, after the word "Army" in the fifth line, the words "or of materials, stores, or supplies sold to officers and soldiers of the Army." *Act of Feb. 27, 1877 (19 Stat. 249), amending R. S. 3618.*

See 799, post.

Exceptions to above:

Moneys arising from disposition of serviceable ordnance and ordnance stores, post, 878.

A similar provision relating to moneys arising from dispositions of medical and hospital supplies, post, 847.

Funds received as the value of military stores transferred by the several staff departments of the Army to the Insular Department of the Philippines, ante, 234.

The sale of arms, equipments, etc., of the militia, and the disposition of the proceeds of such sale, post, 2615.

The proceeds of the sale of surplus cuttings of material for clothing manufactured by the Quartermaster Corps of the Army are to be deposited to the credit of that appropriation out of which the material was purchased, by a provision of act Aug. 29, 1916, sec. 1, post, 941.

Notes of Decisions.

What constitutes material.—Lumber made at the Grande Ronde Reservation, at a sawmill erected by the United States under the treaty with the Indians, is not the property of the United States under this section. U. S. v. Sinnott (C. C. 1886), 26 Fed. 84, 89.

This section does not authorize the President or Secretary of War to sell improvements on a military post afterwards ascertained to be on land covered by a Mexican land grant. (1891) 20 Op. Atty. Gen. 24.

Disposition and purchase of material.—The transfer of old material in the Navy in payment of work done or to be done, or in exchange for other material, is in effect prohibited; so a naval constructor who turns over material to the contractor must account for it. Steele v. U. S. (1884), 19 Ct. Cl. 141.

The Navy agent at New York is not competent to become a purchaser at a sale made by himself on account of the Government. (1844) 4 Op. Atty. Gen. 351.

The Chief of the Bureau of Engraving and Printing can not be authorized by the Secretary of the Treasury to exchange old presses for a new press with the manufacturers so that but a small amount of money in addition will have to be paid to them therefor; yet that the Secretary may authorize a sale of the old presses to the manufacturers, the proceeds to be covered into the Treasury, and at the same time a purchase of the new press can be made from them, paying for the same out of the appropriation available for that purpose. (1877) 15 Op. Atty. Gen. 322.

Duty to account for material.—A party to whom has been delivered, without sanction of law, material of old ships, property of the United States, to which he had no title whatever, by contract or otherwise, is accountable to the Government for its full value, notwithstanding that his account has been settled by the officers of the Navy Department at a sum less than its full value; and, where he sells the property for an amount greatly in excess of the amount with which he has been charged in the settlement of his accounts, the excess may be set off by the United States in an action against it. Steele v. U. S. (1885), 5 Sup. Ct. 396, 398, 113 U. S. 128, 28 L. Ed. 952.

Where one department receives from another supplies which are within the scope of appropriations belonging to each, the section does apply to a reimbursement of the appropriation of the one from the appropriation of the other of the cost of such supplies. (1882) 17 Op. Atty. Gen. 480.

Sec. 5 of the act of June 30, 1906 (34 Stat. 763), requiring the heads of executive departments or other Government estab-

lishments to furnish the Secretary of the Treasury annually a statement of all money received by them during the previous fiscal year, arising from proceeds of public property applies to sales, and purchases from the proceeds of sales, of commissary stores, under this section. (18 Stat. 410); (1906) 26 Op. Atty. Gen. 38.

255. Expenses of sales.—That from the proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, before being deposited into the Treasury, either as miscellaneous receipts on account of "proceeds of Government property" or to the credit of the appropriations to which such proceeds are by law authorized to be made, there may be paid the expenses of such sales, as approved by the accounting officers of the Treasury, so as to require only the net proceeds of such sales to be deposited into the Treasury, either as miscellaneous receipts or to the credit of such appropriations, as the case may be. *Act of June 8, 1896 (29 Stat. 268).*

256. Accounts of public moneys.—All persons charged by law with the safekeeping, transfer, and disbursement of the public moneys, other than those connected with the Post-Office Department, are required to keep an accurate entry of each sum received and of each payment or transfer. *R. S. 3643.*

257. Accounting according to appropriations.—All officers, agents, or other persons receiving public moneys, shall render distinct accounts of the application thereof according to the appropriation under which the same may have been advanced to them. *R. S. 3623.*

Notes of Decisions.

Persons to whom applicable.—The provisions of this section are applicable to commissioners, and their bondsmen are liable to suit on their bonds with recovery of balances due on settlements of their accounts. (1883) 17 Op. Atty. Gen. 574.

258. Accounting to be by items.—That hereafter all officers, agents, or other persons receiving public moneys appropriated by this or any subsequent Army appropriation act shall account for the disbursement thereof according to the several and distinct items of appropriation expressed in such act. *Act of July 5, 1884 (23 Stat. 113), making appropriations for the support of the Army.*

259. Reckoning the total amount of an appropriation.—That hereafter the total amount appropriated in the various paragraphs of an appropriation Act shall be determined by the correct footing up of the specific sums or rates appropriated in each paragraph contained therein unless otherwise expressly provided. *Act of May 28, 1896 (29 Stat. 148), making appropriations for legislative, executive and judicial expenses.*

Provisions allowing payment of pressing obligations by disbursing officers of the Quartermaster's Department and the Ordnance Department, in cases of insufficient balance under the proper appropriation, and authorizing the adjustment of the accounts of the disbursing officers, and by disbursing officers of the Engineer Department, 821, 898, post.

260. Forms of keeping and rendering accounts.—The Comptroller of the Treasury shall, under the direction of the Secretary of the Treasury, prescribe the forms of keeping and rendering all public accounts, except those relating to the postal revenues and expenditures therefrom. *Sec. 5, act of July 31, 1894 (28 Stat. 206).*

This section was part of the Dockery Act.

261. Accounts of moneys received to be rendered monthly.—Every officer or agent of the United States who receives public money which he is not au-

thorized to retain as salary, pay, or emolument, shall render his accounts monthly. Such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be sent by mail, or otherwise, to the Bureau of which they pertain, within ten days after the expiration of each successive month, and, after examination there, shall be passed to the proper accounting officer of the Treasury for settlement. Disbursing officers of the Navy shall, however, render their accounts and vouchers direct to the proper accounting officer of the Treasury. In case of the non-receipt at the Treasury, or proper Bureau, of any accounts within a reasonable and proper time thereafter, the officer whose accounts are in default shall be required to furnish satisfactory evidence of having complied with the provisions of this section. The Secretary of the Treasury may, if in his opinion the circumstances of the case justify and require it, extend the time hereinbefore prescribed for the rendition of accounts. Nothing herein contained shall, however, be construed to restrain the heads of any of the Departments from requiring such other returns or reports from the officer or agent, subject to the control of such heads of Department, as the public interest may require. *R. S. 3622.*

Section thirty-six hundred and twenty-two is amended by striking out, in the nineteenth line, the work "Department," and inserting the word "Departments." *Act of Feb. 27, 1877 (19 Stat. 249), amending R. S. 3622.*

* * * Section thirty-six hundred and twenty-two of the Revised Statutes is amended by striking therefrom the following words: "The Secretary of the Treasury may, if in his opinion the circumstances of the case justify and require it, extend the time hereinbefore prescribed for the rendition of accounts." *Sec. 12, act of July 31, 1894 (28 Stat. 209), amending R. S. 3622.*

Notes of Decisions.

Time for accounting.—The right of the Secretary of the Treasury, when, in his opinion, the circumstances of the case justify and require it, to extend the time prescribed for the rendition of accounts, does not authorize him to institute a new system of rendering accounts—e. g., by permitting disbursing officers to render their accounts bimonthly, quarterly, or at longer intervals, instead of monthly, as now required, but applies only to exceptional cases. (1878), 16 Op. Atty. Gen. 222.

The requirement that officers and agents of the United States to render accounts monthly is applicable to every officer who receives advances of public money to be disbursed, or who collects and receives fees and revenues which it is his duty to account for; and the requirement is not subject to direction of the Secretary of the Treasury, save in exceptional cases. (1890), 19 Op. Atty. Gen. 557.

Settling of accounts.—After the accounts of an officer of the Navy have been stated and settled by the Treasury Department, the auditor has no power to open or resettle them of his own mere authority. Ex parte Randolph (C. C. 1833), Fed. Cas. No. 11,558.

Where the accounting officers of the Treasury, in mistake of law, have certified a balance in favor of a party upon a contract or obligation which was invalid, and the party brings a suit founded upon the same contract, the defendants may set up as a counterclaim and recover back the money paid on the accounting officers' settlement ex equo et bono. McKee v. U. S. (1876), 12 Ct. Cl. 504.

When the accounting officers of the Treasury, in settling the accounts of a disbursing officer, has allowed an alleged payment upon a genuine receipt of the party to whom the money purports to have been paid, the latter cannot be suffered to claim the money in his own name on the pretense that he gave the receipt without actually receiving the money; his remedy being against the disbursing agent of the Government. (1854) 7 Op. Atty. Gen. 40.

Presumptions from accounting.— Presumptions arising from the showings of the books of the Treasury Department in account with a Navy paymaster, considered, together with what evidence is necessary to rebut the same. U. S. v. Kuhn (C. C. 1833), Fed. Cas. No. 15,545.

262. Accounts of disbursing officers rendered quarterly.—Hereafter all disbursing officers of the United States shall render their accounts quarterly; and the Secretary of the Senate shall render his accounts as heretofore; but the Secretary of the Treasury may direct any or all such accounts to be rendered more frequently when in his judgment the public interests may require. *Sec. 4, act of Aug. 30, 1890 (26 Stat. 415), making appropriations for sundry civil expenses.*

Failure of an officer to render account of public money was declared to be and was punished as embezzlement, by R. S. 5491, incorporated into Crim. Code, sec. 90, post, 281.

263. Forwarding accounts to Washington.—All monthly accounts shall be mailed or otherwise sent to the proper officer at Washington within ten days after the end of the month to which they relate, and quarterly and other accounts within twenty days after the period to which they relate, * * * *Sec. 12, act of July 31, 1894 (28 Stat. 209).*

264. Administrative examination of accounts.— * * * It shall also be the duty of the heads of the several Executive Departments and of the proper officers of other Government establishments, not within the jurisdiction of any Executive Department, to make appropriate rules and regulations to secure a proper administrative examination of all accounts sent to them, as required by section twelve of this Act, before the transmission to the Auditors, and for the execution of other requirements of this Act in so far as the same relate to the several Departments or establishments. *Sec. 22, act of July 31, 1894 (28 Stat. 210).*

Hereafter the administrative examination of all public accounts, preliminary to their audit by the accounting officers of the Treasury, shall be made as contemplated by the so-called Dockery Act, approved July thirty-first, eighteen hundred and ninety-four, and all vouchers and pay rolls shall be prepared and examined by and through the administrative heads of divisions and bureaus in the executive departments and not by the disbursing clerks of said departments, except those vouchers heretofore prepared outside of Washington may continue to be so prepared and the disbursing officers shall make only such examination of vouchers as may be necessary to ascertain whether they represent legal claims against the United States. *Act of Aug. 23, 1912 (37 Stat. 375), making appropriations for legislative, executive and judicial expenses.*

265. Transmittal of accounts to the auditors.—All * * * accounts shall be mailed or otherwise sent to the proper officer at Washington * * * and shall be transmitted to and received by the Auditors within twenty days of their actual receipt at the proper office in Washington in the case of monthly, and sixty days in the case of quarterly and other accounts. * * * *Sec. 12, act of July 31, 1894 (28 Stat. 209).*

The time for examination of monthly accounts, covering expenditures from appropriations for the Army, by the bureaus and offices of the War Department, after the date of actual receipt and before transmitting the same to the Auditor for the War Department, as limited by section twelve, Act approved July thirty-first, eighteen hundred and ninety-four, is hereby extended from twenty to sixty days. *Act of Mar. 2, 1901 (31 Stat. 910), making appropriations for the support of the Army.*

* * * That the Secretary of the Treasury is hereby authorized in time of war, upon request to the Secretary of War, to extend the period during which money accounts covering expenditures from appropriations for the Army may be transmitted to the Auditor for the War Department after their receipt in

the War Department from sixty to ninety days. *Chap. XVIII, act of July 9, 1918 (40 Stat. 892), making appropriations for the support of the Army.*

266. Delinquency in transmitting accounts.— * * * Should there be any delinquency in this regard at the time of the receipt by the Auditor of a requisition for an advance of money, he shall disapprove the requisition, which he may also do for other reasons arising out of the condition of the officer's accounts for whom the advance is requested; but the Secretary of the Treasury may overrule the Auditor's decision as to the sufficiency of these latter reasons: *Provided*, That the Secretary of the Treasury shall prescribe suitable rules and regulations, and may make orders in particular cases, relaxing the requirement of mailing or otherwise sending accounts, as aforesaid, within ten or twenty days, or waiving delinquency, in such cases only in which the * is, or is likely to be, a manifest physical difficulty in complying with the same, it being the purpose of this provision to require the prompt rendition of accounts without regard to the mere convenience of the officers, and to forbid the advance of money to those delinquent in rendering them: *Provided further*, * * * *Sec. 12, act of July 31, 1894 (28 Stat. 209).*

The second proviso of section twelve of the legislative, executive, and judicial appropriations Act, approved July thirty-first, eighteen hundred and ninety-four, is hereby amended to read as follows:

"That should there be a delay by the administrative Department beyond the aforesaid twenty or sixty days in transmitting accounts, an order of the President, or, in the event of the absence from the seat of Government or sickness of the President, an order of the Secretary of the Treasury, in the particular case, shall be necessary to authorize the advance of money requested." *Sec. 4, act of Mar. 2, 1895 (28 Stat. 807), amending sec. 12, act of July 31, 1894 (28 Stat. 209).*

Further provisions requiring the administrative examination of accounts to be made as contemplated by this act, and relating to the preparation and examination of vouchers and pay rolls, contained in act Aug. 23, 1912, sec. 1, are set forth, 264, ante.

267. Delinquency as to accounts reported to Congress. - * * * The Secretary of the Treasury shall, on the first Monday of January in each year, make report to Congress of such officers and administrative departments and offices of the Government as were, respectively, at any time during the last preceding fiscal year delinquent in rendering or transmitting accounts to the proper offices in Washington and the cause therefor, and in each case indicating whether the delinquency was waived, together with such officers, including postmasters and officers of the Post-Office Department, as were found upon final settlement of their accounts to have been indebted to the Government, with the amount of such indebtedness in each case, and who, at the date of making report, had failed to pay the same into the Treasury of the United States. *Sec. 12, act of July 31, 1894 (28 Stat. 209), as amended by sec. 4, act of May 28, 1896 (29 Stat. 179).*

R. S. 250, which empowered the Secretary of the Treasury to require settlements of accounts of public money within the fiscal year or other fixed period, and R. S. 272, which required a report to Congress by the First Comptroller of officers failing to make settlement were repealed by this section.

268. Report on condition of business. It shall be the duty of the head of each Executive Department or other Government establishment in the city of Washington to submit to the first regular session of the Fifty-fourth Congress, and annually thereafter, in the Annual Book of Estimates, a statement as to the condition of business in his Department or other Government establishment,

showing whether any part of the same is in arrears, and, if so, in what divisions of the respective bureaus and offices of his Department or other Government establishment such arrears exist, the extent thereof, and the reasons therefor, and also a statement of the number and compensation of employees appropriated for in one bureau or office who have been detailed to another bureau or office for a period exceeding one year. *Sec. 7, act of Mar. 2, 1895 (28 Stat. 808), making appropriations for legislative, executive, and judicial expenses.*

* * * Hereafter it shall be the duty of the head of each Executive Department, or other Government establishment at the seat of Government, not under an Executive Department, to make at the expiration of each quarter of the fiscal year a written report to the President as to the condition of the public business in his Executive Department or Government establishment, and whether any branch thereof is in arrears. *Sec. 5, act of Mar. 3, 1893 (27 Stat. 715), as amended by sec. 7, act of Mar. 15, 1898 (30 Stat. 317), making appropriations for legislative, executive, and judicial expenses.*

269. Statement of all receipts and expenditures.—Hereafter the Secretary of the Treasury shall require, and it shall be the duty of the head of each Executive Department or other Government establishment to furnish him, within thirty days after the close of each fiscal year, a statement of all money arising from proceeds of public property of any kind or from any source other than the postal service, received by said head of Department or other Government establishment during the previous fiscal year for or on account of the public service, or in any other manner in the discharge of his official duties other than as salary or compensation, which was not paid into the General Treasury of the United States, together with a detailed account of all payments, if any, made from such funds during such year. All such statements, together with a similar statement applying to the Treasury Department, shall be transmitted by the Secretary of the Treasury to Congress at the beginning of each regular session. *Sec. 5, act of June 30, 1906 (34 Stat. 763), making appropriations for sundry civil expenses.*

Notes of Decisions.

Commissary stores.—This applies to sales and purchases from the proceeds of sales of commissary stores, under sec. 3618 R. S., ante, 254, and act Mar. 3, 1875 (18 Stat. 410). (1906) 26 Op. Atty. Gen. 38.

270. Annual report of expenditure of contingent fund.—The head of each Department shall make an annual report to Congress, giving a detailed statement of the manner in which the contingent fund for his Department, and for the Bureaus and offices therein, has been expended, giving the names of every person to whom any portion thereof has been paid; and if for anything furnished, the quantity and price; and if for any service rendered, the nature of such service, and the time employed, and the particular occasion or cause, in brief, that rendered such service necessary; and the amount of all former appropriations in each case on hand, either in the Treasury or in the hands of any disbursing officer or agent. And he shall require of the disbursing officers, acting under his direction and authority, the return of precise and analytical statements and receipts of all the moneys which may have been from time to time during the next preceding year expended by them, and shall communicate the results of such returns and the sums total, annually, to Congress. *R. S. 193.*

* * * And hereafter a detailed statement of the expenditure for the preceding year of all sums appropriated for contingent expenses of the Independent Treasury, or in any department or bureau of the Government shall be presented to Congress at the beginning of each regular session. *Act of Mar. 3, 1877 (19 Stat. 306), making appropriations for legislative, executive and judicial expenses.*

271. **Salaries not paid out of contingent funds.**—No moneys appropriated for contingent, incidental, or miscellaneous purposes shall be expended, or paid for official or clerical compensation. *R. S. 3682.*

Notes of Decisions.

Construction and operation.—The adjectives "contingent," "incidental," and "miscellaneous" have a technical and well-understood meaning; and where a specific appropriation is made for specific objects, such as clerks, messengers, light fuel, no disbursement can be made therefor from the appropriation for "miscellaneous expenses." Dunwoody *v.* U. S. (1887), 22 Ct. Cl. 209.

272 **Purchase from contingent fund.**—No part of the contingent fund appropriated to any Department, Bureau, or office, shall be applied to the purchase of any articles except such as the head of the Department shall deem necessary and proper to carry on the business of the Department, Bureau, or office, and shall, by written order, direct to be procured. *R. S. 3683.*

Restrictions on the purchase of law books, books of reference, and periodicals from appropriations for contingent expenses were imposed by post, 973.

Restrictions on the expenditure of appropriations for contingent expenses for private telephone service were imposed by ante, 181.

Notes of Decisions.

Construction and operation.—Heads of departments are alone authorized to give orders for purchases payable from the contingent fund and to approve vouchers therefor. (1886) 18 Op. Atty. Gen. 424.

273. **Apportionment of contingent funds.**—That in addition to the apportionment required by the so-called antideficiency Act, approved February twenty-seventh, nineteen hundred and six (Statutes at Large, volume thirty-four, page forty-nine), the head of each executive department shall, on or before the beginning of each fiscal year, apportion to each office or bureau of his department the maximum amount to be expended therefor during the fiscal year out of the contingent fund or funds appropriated for the entire year for the department, and the amounts so apportioned shall not be increased or diminished during the year for which made except upon the written direction of the head of the department, in which there shall be fully expressed his reasons therefor; and hereafter there shall not be purchased out of any other fund any article for use in any office or bureau of any executive department in Washington, District of Columbia, which could be purchased out of the appropriations made for the regular contingent funds of such department or of its offices or bureaus. *Sec. 6, act of Aug. 23, 1912 (37 Stat. 414), making appropriations for legislative, executive and judicial expenses.*

274. **Annual report of expenditures under deficiencies appropriations.**—That in addition to the reports now required by law the Secretaries of the Treasury, War, and Navy shall each on the first Monday in December, nineteen hundred and seventeen, and annually thereafter, transmit to the Congress a detailed

statement of all expenditures under this Act. *Sec. 5, act of June 15, 1917 (40 Stat. 217).*

275. Exchange of funds.—No exchange of funds shall be made by any disbursing officer or agent of the Government, of any grade or denomination whatsoever, or connected with any branch of the public service, other than an exchange for gold, silver, United States notes, and national-bank notes; and every such disbursing officer, when the means for his disbursements are furnished to him in gold, silver, United States notes, or national-bank notes, shall make his payments in the money so furnished; or when they are furnished to him in drafts, shall cause those drafts to be presented at their place of payment, and properly paid according to law, and shall make his payments in the money so received for the drafts furnished, unless, in either case, he can exchange the means in his hands for gold and silver at par. And it shall be the duty of the head of the proper Department immediately to suspend from duty any disbursing officer or agent who violates the provisions of this section, and forthwith to report the name of the officer or agent to the President, with the fact of the violation, and all the circumstances accompanying the same, and within the knowledge of the Secretary, to the end that such officer or agent may be promptly removed from office, or restored to his trust and the performance of his duties, as the President may deem just and proper. *R. S. 3651.*

Notes of Decisions.

Operation of statute.—The provisions of this section in effect prohibit the exchange of gold and silver coin for United States notes by the Treasurer, assistant treasurers, and other depositaries of public funds. (1879), 16 Op. Atty. Gen. 381.

276. Premium on sale of public security.—No officers of the United States shall, either directly or indirectly, sell or dispose of to any person, for a premium, any Treasury note, draft, warrant, or other public security, not his private property, or sell or dispose of the avails or proceeds of such note, draft, warrant, or security, in his hands for disbursement, without making return of such premium, and accounting therefor by charging the same in his accounts to the credit of the United States; and any officer violating this section shall be forthwith dismissed from office. *R. S. 3652.*

277. Counterfeit money.—That all United States officers charged with the receipt or disbursement of public moneys, and all officers of national banks, shall stamp or write in plain letters the word "counterfeit" "altered" or "worthless," upon all fraudulent notes issued in the form of, and intended to circulate as money, which shall be presented at their places of business; and if such officers shall wrongfully stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face-value thereof. *Sec. 5, act of June 30, 1876 (19 Stat. 64).*

278. Receipting for a sum larger than paid.—Whoever, being an officer, clerk, agent, employee, or other person charged with the payment of any appropriation made by Congress, shall pay to any clerk or other employee of the United States a sum less than that provided by law, and require such employee to receipt or give a voucher for an amount greater than that actually paid to and received by him, is guilty of embezzlement, and shall be fined in double the amount so withheld from any employee of the Government and imprisoned not more than two years. *Sec. 86, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1105).*

Notes of Decisions.

Indictment.—An indictment under this section which stated that defendant was instrumental in prosecuting a certain person's claim for a pension, and wrongfully withheld certain moneys of the pensioner, was sufficient, without setting forth the particular circumstances in which such instrumentality consisted. U. S. v. Connally (D. C. 1880), 1 Fed. 779, 780.

279. Loan or conversion of public moneys.—Every officer or other person charged by any Act of Congress with the safe-keeping of the public moneys, who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safe-keeping, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years. *Sec. 89, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1105).*

Notes of Decisions.

Use of moneys for private purpose.—It is unlawful for an officer charged with the safekeeping of moneys to use the same for his own private purposes. U. S. v. Dimmick (D. C. 1901), 112 Fed. 350, affirmed (C. C.) 116 Fed. 825, 54 C. C. A. 329.

The willful withdrawing of public funds by a pay officer of the Navy for his personal use while absent from his station on duty, even though there be no intention on his part to defraud the United States and the funds withdrawn are subsequently replaced, is a violation of the provisions of secs. 87 and 89 of the Criminal Code. (1912) 29 Op. Atty. Gen. 563.

Overpayment to self.—The overpayment to a pay officer of the Navy to himself from public funds, where the officer is guilty of such negligence or indifference as to indicate a willful disregard of the duties imposed upon him by law with respect to the safe-keeping of the moneys in his charge, is in violation of secs. 87, post 88 and 89 of the Criminal Code. (1912) 29 Op. Atty. Gen. 563.

Cashing certificate of deposit.—The willful use of Government funds by a pay officer of the Navy for the purpose of cashing a certificate of deposit as an accommodation to a personal friend constitutes embezzlement under the provisions of secs. 87, post 280, and 89 of the Criminal Code. (1912) 29 Op. Atty. Gen. 563.

Loan by officer.—On the unlawful loan of public moneys by a public officer to persons having knowledge of the fact, both lender and borrower are principals and are equally guilty. U. S. v. Hartwell (C. C. 1869) Fed. Cas. No. 15,318.

Indictment.—An allegation that defendant, "then and there being an officer of the United States, having the safe keeping and disbursement of public moneys, • • • did then and there knowingly, willfully, and feloniously convert and embezzle a portion of said public moneys intrusted to him," states defendant's official character directly, and not by way of recital merely. U. S. v. Bornemann (C. C. 1888), 36 Fed. 257.

280. Wrongful conversion by a disbursing officer.—Whoever, being a disbursing officer of the United States, or a person acting as such, shall in any manner convert to his own use, or loan with or without interest, or deposit in any bank or in any manner, except as authorized by law, any public money intrusted to him; or shall, for any purpose not prescribed by law, withdraw from the Treasury, or any assistant treasurer, or any authorized depositary, or transfer, or apply, any portion of the public money intrusted to him, shall be deemed guilty of an embezzlement of the money so converted, loaned, deposited, withdrawn transferred, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both. *Sec. 87, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1105).*

Notes of Decisions.

See notes under 279, ante.

Offenses by Army officers.—An Army officer in charge of river and harbor improvements, who pays out the money subject to his order, and control on false accounts, represented by false and fraudulently certified vouchers purporting to be issued as against the appropriation for the improvements, which moneys, to his knowledge, are not due or owing from the United States to the parties paid, or to anyone else, applies to a purpose not prescribed by law public moneys of the United States, within the meaning of R. S. sec. 5488 (embodied herein). Carter *v.* McClaughry (1902), 22 Sup. Ct. 181, 194, 183 U. S. 365, 46 L. Ed. 236, affirming order (C. C. 1900), 105 Fed. 614.

Under the sixty-second article (see ninety-sixth article of present code) providing that all crimes not capital, which officers and soldiers may be guilty of, not mentioned in the foregoing articles, are to be taken cognizance of by a court-martial, and "punished at the discretion of the court"; and R. S. 5488 (embodied herein), providing that every disbursing officer, who, for any purpose not prescribed by law, transfers or applies any money intrusted to him, is deemed guilty of an embezzlement, and may be punished both by "fine and imprisonment,"—where an officer of the Army has been found guilty by a court-martial of willfully misappropriating money appropriated by Congress for the improvement of rivers and harbors, the court has authority to impose a penalty, both by fine and imprisonment. In re Carter (C. C. 1899), 97 Fed. 496.

The offense of embezzlement by a disbursing officer of the United States as defined in R. S. 5488 (embodied herein), is broader than that defined in either the first, fourth, or ninth paragraph of the sixtieth article of war, and such offense, at least if not within the narrower definition of the sixtieth (now ninety-fourth) article, is punishable under the sixty-second (now ninety-sixth) article which covers all offenses to the prejudice of good order and military discipline, "though not mentioned in the foregoing articles." Carter *v.* McClaughry (C. C. 1900), 105 Fed. 614; order affirmed (1902), 22 Sup. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

In proceedings by a court-martial against an officer of the Army, a charge of embezzlement as defined by R. S. 5488 (embodied herein), is supported by a specification which sets forth that the accused was a disbursing officer of the United States, and as such was intrusted with certain public money, which he willfully and knowingly caused to be paid on false accounts, the amounts paid not being due or owing by the United States to the parties to whom the payments were made, as he well knew. Id.

Indictment.—An indictment against a public officer for embezzlement of public funds need not state what kind of money was embezzled—whether coin, and if so, whether gold or silver, or bills, or of what denominations, and how many of each. U. S. *v.* Bornemann (C. C. 1888), 36 Fed. 257.

281. Failure to render accounts.—Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years. *Sec. 90, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1105).*

See notes under 279, ante.

282. Failure to deposit public money.—Whoever, having money of the United States in his possession or under his control, shall fail to deposit it with the Treasurer, or some assistant treasurer, or some public depositary of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the Treasury, shall be deemed guilty of embezzlement thereof, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years. *Sec. 91, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1105).*

Notes of Decisions.

See notes under 279, ante.

Necessity of actual embezzlement.—The offense denounced by this section may be complete without any actual embezzlement, and is committed where there is a willful and fraudulent failure to comply with a specified requirement of the Secretary of the Treasury or the head of a department, as to deposits of moneys of the United States. Dimmick v. U. S. (1903), 121 Fed. 638 (57 C. C. A. 664); writ of certiorari denied (1903), 24 Sup. Ct. 846, 191 U. S. 574, 48 L. Ed. 308.

To constitute an offense under this section, it is not necessary that a person having moneys in his possession should have been "required" to deposit the same by a specific order directed to him, which he failed to obey, but such requirement may be made by a general rule or regulation of the Treasury department requiring such moneys to be deposited at stated times, and a willful failure to comply with such rule is within the statute. U. S. v. Dimmick (D. C. 1901), 112 Fed. 350; judgment affirmed, Dimmick v. U. S. (1902), 116 Fed. 825, 54 C. C. A. 329; writ of certiorari denied (1903), 23 Sup. Ct. 850, 189 U. S. 509, 47 L. Ed. 923.

283. General liability for public money.—The provisions of the five preceding sections shall be construed to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same. *Sec. 92, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1105).*

284. Refusal to make payment.—The refusal of any person, whether in or out of office, charged with the safe-keeping, transfer, or disbursement of the public money to pay any draft, order, or warrant, drawn upon him by the proper accounting officer of the Treasury, for any public money in his hands belonging to the United States, no matter in what capacity the same may have been received, or may be held, or to transfer or disburse any such money, promptly, upon the legal requirement of any authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, prima facie evidence of such embezzlement. *Sec. 94, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1106).*

285. Forwarding receipt without having made sufficient payment.—If any officer charged with the disbursement of the public moneys accepts, receives, or transmits to the Treasury Department to be allowed in his favor any receipt or voucher from a creditor of the United States without having paid to such creditor in such funds as the officer received for disbursement, or in such funds as he may be authorized by law to take in exchange, the full amount specified in such receipt or voucher, every such act is an act of conversion by such officer to his own use of the amount specified in such receipt or voucher. *Sec. 95, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1106).*

286. Penalty for embezzlement.—Any officer connected with, or employed in, the Internal-Revenue Service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both. *Sec. 97, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1106).*

Notes of Decisions.

Indictment.—A deputy clerk of the district court of Hawaii who converts to his own use fees deposited by litigants is punishable under this section. U. S. *v.* Davis (1917), 243 Fed. 570. Likewise a United States commissioner receiving funds to be paid over to the receiver of the land office. Stallings *v.* Splain (U. S. 1920), 64 L. Ed. 578. And a clerk of the district court who embezzles unearned fees. U. S. *v.* Dodge (D. C. 1918), 251 Fed. 740; id. 742.

287. Evidence of embezzlement.—Upon the trial of any indictment against any person for embezzling public money under any provision of the six preceding sections, it shall be sufficient evidence, prima facie, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money. *Sec. 93, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1105).*

288. Trading in funds of the United States.—Whoever, being an officer of the United States concerned in the collection or the disbursement of the revenues thereof, shall carry on any trade or business in the funds or debts of the United States, or of any State, or in any public property of either, shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both, and be removed from office, and thereafter be incapable of holding any office under the United States. *Sec. 103, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1107).*

289. Making false certificate.—Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, shall knowingly make and deliver as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both. *Sec. 106, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1107).*

CHAPTER 4.

TREASURY DEPARTMENT.

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290. Treasurer of the United States.—There shall be in the Department of the Treasury a Treasurer of the United States, who shall be appointed by the President, by and with the advice and consent of the Senate, * * *. *R. S. 301.*

291. Assistant treasurers of the United States.—There shall be assistant treasurers of the United States, appointed from time to time by the President, by and with the advice and consent of the Senate, to serve for the term of four years, as follows:

One at Boston.
One at New York.
One at Philadelphia.
One at Baltimore.
One at Charleston.
One at New Orleans.
One at Saint Louis.
One at San Francisco.
One at Cincinnati.
One at Chicago.

R. S. 3595.

* * * And so much of section thirty-five hundred and ninety-five of the Revised Statutes as provides for the appointment of an assistant treasurer of the United States at Charleston is hereby repealed from and after September, thirtieth, eighteen hundred and seventy-six; * * *. *Act of Aug. 15, 1876 (19 Stat. 155).*

The superintendent of the mint at Carson City, and the superintendent of the assay-office at Boisé City, shall be assistant treasurers of the United States, and shall respectively have the custody and care of all public moneys deposited therein, and shall perform all the duties required of them in reference to the receipt, safe-keeping, transfer, and disbursement of all such moneys, as provided by law. *R. S. 3594.*

Section 3595 of the Revised Statutes of the United States, as amended, providing for the appointment of an Assistant Treasurer of the United States at Boston, New York, Philadelphia, Baltimore, New Orleans, Saint Louis, San Francisco, Cincinnati, and Chicago, and all laws or parts of laws so far as they authorize the establishment or maintenance of officers of such Assistant Treasurers or of Subtreasuries of the United States are hereby repealed from and after July 1, 1921; and the Secretary of the Treasury is authorized and directed to discontinue from and after such date or at such earlier date or dates as he may deem advisable, such subtreasuries and the exercise of all duties and functions by such assistant treasurers or their offices. The office of each assistant treasurer specified above and the services of any officers or other employees assigned to duty at his office shall terminate upon the discontinuance of the functions of that office by the Secretary of the Treasury. *Act of May 29, 1920 (41 Stat. 653-655), making appropriations for legislative, executive, and judicial expenses.*

292. Deposit of public funds at mints and Federal reserve banks.—The mints at Carson City, and at Denver, and the assay office at Boisé City, shall be places of deposit for such public moneys as the Secretary of the Treasury may direct. *R. S. 3592.*

The Secretary of the Treasury is hereby authorized, in his discretion, to transfer any or all of the duties and functions performed or authorized to be performed by the assistant treasurers above enumerated, or their offices, to the Treasurer of the United States or the mints or assay offices of the United States, under such rules and regulations as he may prescribe, or to utilize any of the Federal reserve banks acting as depositaries or fiscal agents of the United States, for the purpose of performing any or all of such duties and functions, notwithstanding the limitations of section 15 of the Federal reserve Act, as amended, or any other provisions of law: *Provided*, That if any moneys or bullion, constituting part of the trust funds or other special funds heretofore required by law to be kept in Treasury offices, shall be deposited with any Federal reserve bank, then such moneys or bullion shall by such bank be kept separate and distinct from the assets, funds, and securities of the Federal reserve bank and be held in the joint custody of the Federal reserve agent and the Federal reserve bank: *Provided further*, That nothing in this section shall be construed to deny the right of the Secretary of the Treasury to use member banks as depositaries as heretofore authorized by law. *Act of May 29, 1920 (41 Stat. 655), making appropriations for legislative, executive, and judicial expenses.*

293. Deposit of public funds with national banks.—All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections. *R. S. 3533, as amended by sec. 3, act of Mar. 4, 1907 (34 Stat. 1289).*

By a provision of the Federal reserve act of Dec. 23, 1913, sec. 27 (38 Stat. 274), as amended by act Aug. 4, 1914 (38 Stat. 682), this section and secs. 5172, 5191, and 5214 of the Revised Statutes, which were amended by act May 30, 1908, were reenacted to read as such sections stood prior to May 30, 1908, subject to such amendments or modifications as were prescribed in said Federal reserve act.

Notes of Decisions.

Public funds on deposit and matters related thereto. Disbursing officers may legally make special deposits of their funds in nonspecie paying banks, if so directed

by the President, where they will agree to receive the funds in that way. (1837) 3 Op. Atty. Gen. 233.

Where a disbursing agent of the United States had paid public money into a bank, the Government will not undertake to settle incidental matters of controversy between him and the bank, but leaves all such questions to the courts of justice. (1854) 6 Op. Atty. Gen. 314.

An agent of the Government can not require it to receive the credit of a bank or any other third party in the place of that of himself and his sureties. Id.

A bank can not lawfully take public funds which have been deposited with it, knowing them to be such, and divert them from a public debt to the payment of the private debt of the public agent, or to a debt contracted by him in violation of law and of his duty to the Government. Id.

In action by United States against national depositary for payments on checks drawn by Government officer who forged indorsements, the bank held not entitled to credit for moneys paid on legitimate claims in the absence of an accounting by the officer. National Bank of Commerce v. U. S. (1915), 224 Fed. 679, 140 C. C. A. 219.

Liability of Government.—This is a provision to attain security for the benefit of the party ultimately entitled to the money, and does not render the Government liable in case of the failure of the depositary. Branch v. U. S. (1876), 12 Ct. Cl. 281.

When public money is deposited in a designated depositary, it is not retained in kind as the special property of the Government, but is mingled with other funds and becomes the property of the bank. Id.

294. Depositaries for public funds in Cuba and Porto Rico.—That the Secretary of the Treasury is hereby authorized to designate one or more banks or bankers in the Philippine Islands and in the islands of Cuba and Porto Rico in which public moneys may be deposited: *Provided*, That the banks or bankers thus designated shall give satisfactory security for the safe-keeping and prompt payment of the public moneys so deposited by depositing in the Treasury United States bonds to an amount not less than the aggregate sum at any time on deposit with such banks or bankers: *And provided further*, That this Act shall apply to Cuba only while occupied by the United States. *Act of June 6, 1900 (31 Stat. 658).*

295. Depositaries for public funds in the Philippine Islands.—The treasury of the Philippine Islands and such banking associations in said islands with a paid up capital of not less than two million dollars and chartered by the United States or any State thereof as may be designated by the Secretary of War and the Secretary of the Treasury of the United States shall be depositories of public money of the United States, subject to the provisions of existing law governing such depositories in the United States: *Provided*, That the treasury of the government of said islands shall not be required to deposit bonds in the Treasury of the United States, or to give other specific securities for the safe-keeping of public money except as prescribed, in his discretion, by the Secretary of War. *Sec. 85, act of July 1, 1902 (32 Stat. 711).*

296. Depositaries for public funds in foreign countries.— * * * The Secretary of the Treasury is hereby authorized to designate depositaries in foreign countries with which shall be deposited all public money which it may be necessary or desirable to have on deposit in such countries to provide for current disbursements to the military and naval forces of the United States and to the diplomatic and consular and other representatives of the United States in and about such countries until six months after the termination of the war between the United States and the Imperial German Government, and

to prescribe the terms and conditions of such deposits. *Sec. 8, act of Sept. 24, 1917 (40 Stat. 291), as amended by sec. 5, act of Apr. 4, 1918 (40 Stat. 505).*

297. Fiscal agents responsible for public funds.—The Treasurer of the United States, all assistant treasurers, and those performing the duties of assistant treasurer, all collectors of the customs, all surveyors of the customs, acting also as collectors, all receivers of public moneys at the several land-offices, all postmasters, and all public officers of whatsoever character, are required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper Department or officer of the Government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the Government which may be imposed by any law, or by any regulation of the Treasury Department made in conformity to law. * * * *R. S. 3639.*

Notes of Decisions.

Liability of custodians.—Public officers are not responsible for the fraudulent transactions of their clerks where they are free from negligence. U. S. v. Brodhead (D. C. 1829), Fed. Cas. No. 14654.

There can be no recovery against the United States by a public officer for the loss of money by ordinary theft and robbery where the amount has been withheld from him by the accounting officers. Delaney *v.* U. S. (1895), 31 Ct. Cl. 44.

298. Acknowledgment for public moneys.—The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by either Comptroller, and recorded by the Register, and not otherwise. He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury, without which warrant, so signed, no acknowledgment for money received into the public Treasury shall be valid. * * * *R. S. 305.*

* * * so much of section three hundred and five of the Revised Statutes as required the Register of the Treasury to record warrants is repealed. *Sec. 11, act of July 31, 1894 (28 Stat. 209), amending R. S. 305.*

The office of Second Comptroller was abolished, the designation First Comptroller was changed to Comptroller of the Treasury, and the Comptroller of the Treasury was to perform the duties of the offices of First Comptroller, Second Comptroller and Commissioner of Customs, by sec. 4, act of July 31, 1894 (28 Stat. 205).

The Second and Fourth Auditors of the Treasury were designated as Auditor for the War Department and Auditor for the Navy Department, respectively, by sec. 3 of said act.

299. Public moneys subject to draft of the Treasurer.—All public moneys paid into any depository shall be subject to the draft of the Treasurer of the United States, drawn agreeably to appropriations made by law. *R. S. 3593.*

300. Draft of public money for the War Department.—All moneys appropriated for the use of the War and Navy Departments shall be drawn from the Treasury, by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of those Departments, respectively, countersigned by the Second Comptroller of the Treasury, and registered by the proper Auditor. *R. S. 3673.*

Notes of Decisions.

Former practice.—This act changes the former practice of placing the moneys appropriated for the War and Navy departments in the Treasury to the credit of the respective secretaries. Brashear *v.* Mason (1848), 6 How. 92, 101, 12 L. Ed. 357.

301. Advances of public money.—No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled can not be regularly effected. *R. S. 3648.*

That the Secretary of War and the Secretary of the Navy are authorized, during the period of the existing emergency, from appropriations available therefor to advance payments to contractors for supplies for their respective departments in amounts not exceeding thirty per centum of the contract price of such supplies; *Provided*, That such advances shall be made upon such terms as the Secretary of War and the Secretary of the Navy, respectively, shall prescribe and they shall require adequate security for the protection of the Government for the payments so made. *Sec. 5, act of Oct. 6, 1917 (40 Stat. 383).*

Army appropriation acts for recent years have provided that R. S. 3648 should not apply to subscriptions for foreign and professional newspapers and periodicals, to be paid for from the appropriation for certain divisions, schools, etc. Thus in the act of June 5, 1920, such provision is made for the Military Intelligence Division, Coast Artillery School, Air Service and Engineer School (41 Stat. 949, 951, 954, 969). Similar provision for the Military Academy appeared in its appropriation acts down to act of June 27, 1918 (40 Stat. 629).

Payment in advance for subscriptions to newspapers, magazines, periodicals, and other publications, purchased from funds of the Quartermaster Corps, was authorized by act Apr. 27, 1914, post, 977.

Payment in advance for subscriptions to periodicals for the executive departments or other Government establishments for official use was authorized by act Mar. 4, 1915, sec. 5, post, 976.

Notes of Decisions.

Construction and operation of statute in general.—This section does not preclude a payment in any case where the money has been actually earned and the Government has received an equivalent therefor. (1885) 18 Op. Atty. Gen. 105. Or where the contractor has performed, though the Government may have received no benefit therefrom. McClure *v.* U. S. (1884), 19 Ct. Cl. 173.

Unauthorized acceptances.—If acceptances of drafts, drawn on the Secretary of War by Army contractors before services contracted for are received or supplies furnished are delivered, are given and received as payment, they are void under this section as payments in advance of the services rendered and supplies furnished. Pierce *v.* U. S. (1868), 7 Wall. 666, 682, 683, 19 L. Ed. 169.

See also (1862), 10 Op. Atty. Gen. 288.

An acceptance given by the Secretary of War to contractors, upon whose contract no payments have become due, is either an advance upon the contract, or a loan of the public credit to the contractors, both of which transactions are prohibited by express acts of Congress and are illegal. (3 Stat. 723; 9 Stat. 59.) Peirce *v.* U. S. (1865), 1 Ct. Cl. 270.

A statement made by a public officer to the purchaser of official acceptances, before the purchase, that there is "an express law" against advancing money to the

drawers, but that it has been "the custom of the department" to aid parties under PA circumstances by accepting their bills, is sufficient notice of the illegal and fraudulent character of the paper, and renders the acceptances void in the hands of the claimant. Id.

A payment made to a man after he has ceased to be an employee in lieu of a leave of absence which he was entitled to, but did not take, is unauthorized. Harrison v. [illegible] (1891), 26 Ct. Cl. 250.

Direction of the President.—This section does not require the personal and ministerial performance of the prescribed duty to be exercised in every instance by the President under his own hand. Williams v. U. S. (1843), 1 How 290, 296, 11 L. Ed. 135.

The direction of the President will be presumed, where money is advanced by the [illegible] of the head of a proper department. U. S. v. Cutter (C. C. 1856), Fed. Cas. No. 14,911.

Part payment on contracts.—This section does not preclude a payment in any case where the money has been actually earned and the Government has received an equivalent therefor. (1885) 18 Op. Atty. Gen. 105.

This section prevents part payments upon Government contracts unless the United States thereupon becomes the owner of the work paid for. (1894) 20 Op. Atty. Gen. 746.

The general rule would seem to be well recognized that, in the absence of statutory prohibition, partial payments may be made on account of work done in the construction of vessels for the Navy if: (1) Title to the vessel shall have passed to the United States at the time of such payments, or (2) a lien shall have been created by law or contract upon the unfinished vessel to the amount of such partial payments. (1911) 29 Op. Atty. Gen. 46.

302. Advances to disbursing officers and agents of the Army.—That the Secretary of War be, and he hereby is, authorized to issue his requisitions for advances to disbursing officers and agents of the Army, under an "Army account of advances," not to exceed the total appropriation for the Army, the amount so advanced to be exclusively used to pay, upon proper vouchers, obligations lawfully payable under the respective appropriations.

That the amount so advanced be charged to the proper appropriations and returned to "Army account of advances" by pay and counterwarrant. The said charge, however, to particular appropriations shall be limited to the amount appropriated to each.

That the Auditor for the War Department shall declare the sums due from the several special appropriations upon complete vouchers, as heretofore, according to law; and he shall adjust the said liabilities with the "Army account of advances."

That any balances of existing Army appropriations now available for withdrawal from the Treasury, together with any unexpended balances now charged to disbursing officers or agents of the Army which, under existing law, are available for disbursement, shall at such time as may be designated by the Secretary of War, be transferred on the books of the Treasury Department to "Army account of advances" and shall be disbursed and accounted for as such. *Act of June 5, 1920 (41 Stat. 975), making appropriations for the support of the Army.*

303. Requisitions for public money.—Every requisition for an advance of money, before being acted on by the Secretary of the Treasury, shall be sent to the proper Auditor for action thereon as required by section twelve of this Act.

All warrants, when authorized by law and signed by the Secretary of the Treasury, shall be countersigned by the Comptroller of the Treasury, and all warrants for the payment of money shall be accompanied either by the Auditor's certificate, mentioned in section seven of this act, or by the requisition for advance of money, which certificate or requisition shall specify the particular appropriation to which the same should be charged, instead of being

specified on the warrant, as now provided by section thirty-six hundred and seventy-five of the Revised Statutes; and shall also go with the warrant to the Treasurer, who shall return the certificate or requisition to the proper Auditor, with the date and amount of the draft issued indorsed thereon. Requisitions for the payment of money on all audited accounts, or for covering money into the Treasury, shall not hereafter be required. And requisitions for advances of money shall not be countersigned by the Comptroller of the Treasury. * * * *Sec. 11, act of July 31, 1894 (28 Stat. 209).*

304. Lost checks.—That whenever any original check is lost, stolen, or destroyed disbursing officers and agents of the United States are authorized, within three years from the date of such check, to issue a duplicate check, under such regulations in regard to its issue and payment, and upon the execution of such bond, with sureties, to indemnify the United States, and proof of loss of original check, as the Secretary of the Treasury shall prescribe: * * * *R. S. 3646, as amended by act of Mar. 21, 1916 (39 Stat. 37).*

Notes of Decisions.

Indemnity bonds.—In case of the loss of an original check issued by a United States disbursing officer, the Secretary of the Treasury has no authority, under the provisions of R. S. 3646, to dispense with the giving of a bond as condition to the issuance of a duplicate check. (1913) 30 Op. Atty. Gen. 66.

305. Replacement of a lost check when a disbursing officer has ceased to hold office.—In case the disbursing officer or agent by whom such lost, destroyed, or stolen original check was issued is dead or no longer in the service of the United States it shall be the duty of the proper accounting officer, under such regulations as the Secretary of the Treasury may prescribe, to state an account in favor of the owner of such original check for the amount thereof and to charge such amount to the account of such officer or agent: * * * *R. S. 3647, as amended by act of Feb. 23, 1909 (35 Stat. 644).*

306. Checks outstanding three years or more.—At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts, or checks, issued by the Treasurer, or by any disbursing officer of any Department of the Government, upon the Treasurer or any assistant treasurer, or designated depositary of the United States, or upon any national bank designated as a depositary of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied, and unpaid, shall be deposited by the Treasurer, to be covered into the Treasury by warrant, and to be carried to the credit of the parties in whose favor such certificates, drafts, or checks were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated "outstanding liabilities." *R. S. 306.*

Notes of Decisions.

Claims on outstanding drafts not affected by limitations or lapse of time.—After a draft is issued and covered into the Treasury, the Government holds the fund in trust, and limitations as to the claim therefor does not run until demand. Ray v.

U. S. (D. C. 1892), 50 Fed. 166, 168; Wayne v. U. S. (1891), 26 Ct. Cl. 274; Russell v. U. S. (1902), 37 Ct. Cl. 113.

While it may be that this section and R. S. 307, 308, post, 307, 333, do not provide for the creation of an express trust, liability for which, according to general rules, continues until there is a direct repudiation thereof, yet they contain a continuing promise by the Government to hold the money thus covered into the Treasury for the benefit of the owner until such time as he shall call for it. This is a continuing promise, and one to which full force and efficacy should be given. U. S. v. Wardwell (1898), 172 U. S. 48, 43 L. Ed. 360, 19 Sup. Ct. 86, affirming Wardwell v. U. S. (1895), 32 Ct. Cl. 20.

The purpose of the provisions of act May 2, 1866, incorporated into R. S. 306-308, this section and, post, 307, 333, was to secure to each party who holds Government paper the amount thereof, to place it in the Treasury to his credit, and to prescribe a method by which whenever he wishes he can obtain it. No time is mentioned within which he must apply for a warrant or after which the money is forfeited to the Government. The ordinary rules for the maturity of negotiable paper do not control. There is no occasion for suit until after an application for a warrant is refused. When the contract created by the promise made in R. S. 308, post, 333, is broken, then a claim for the breach of such contract first accrues, and the limitation prescribed by R. S. 1069, incorporated into Jud. Code, 156, post, 453, begins to run. Id.

The indebtedness of the United States on balances stated in favor of parties on the books of the Treasury Department under R. S. 306–308, post, 307, 333, is not rendered stale by lapse of time in making application for payment. The only proof to be made as to them is the identity of the claimant or his right to represent the record creditor. Waddell v. U. S. (1890), 25 Ct. Cl. 323, 328.

Negotiability of outstanding draft.—A Treasury draft outstanding for more than three years, the appropriation to pay it covered into the Treasury, has ceased to be negotiable paper. Harris v. U. S. (1892), 27 Ct. Cl. 177.

Recovery on draft outstanding in hands of third person.—A claimant having an amount rightly due to her, standing to her credit on the books of the Treasury, is entitled to recover, though a draft more than three years outstanding for the same debt is in the hands of a third person. Harris v. U. S. (1892), 27 Ct. Cl. 177.

Payment of lost or stolen draft not postponed.—Where a Government check or draft is lost or stolen, the statutes do not require that payment must be postponed for three years or preclude a suit. Becker v. U. S. (1891), 26 Ct. Cl. 172.

307. Drafts outstanding three years or more. The certificate of the Register of the Treasury, stating that the amount of any draft issued by the Treasurer, to facilitate the payment of a warrant directed to him for payment, has remained outstanding and unpaid for three years or more, and has been deposited and covered into the Treasury in the manner prescribed by the preceding section, shall be, when attached to any such warrant, a sufficient voucher in satisfaction of any such warrant or part of any warrant, the same as if the drafts correctly indorsed and fully satisfied were attached to such warrant or part of warrant. And all such moneys mentioned in this and in the preceding section shall remain as a permanent appropriation for the redemption and payment of all such outstanding and unpaid certificates, drafts, and checks. *R. S. 307.*

In section three hundred and seven of the Revised Statutes the words "Secretary of the Treasury" are substituted for the words "Register of the Treasury." *Sec. 16, act of July 31, 1894 (28 Stat. 210), amending R. S. 307.*

Notes of Decisions.

Liabilities of sureties of officer. R. S. 1766, post, 1610, authorizing the salary of an officer in arrears to be withheld, and this section with R. S. 308, post, 333, in relation to the payment of warrants after three years from issuance, form no part of the contract with the officer's sureties. They were [illegible] to protect sureties, but to [illegible] the Government. U. S. v. Potter (C. C. 1879), Fed. Cas. No. 16,076.

308. Balances of disbursing officers' accounts remaining unchanged for three years.—The amounts, except such as are provided for in section three hundred and six, of the accounts of every kind of disbursing officer, which shall have remained unchanged, or which shall not have been increased by any new deposit thereto, nor decreased by drafts drawn thereon, for the space of three years, shall in like manner be covered into the Treasury, to the proper appropriation to which they belong; and the amounts thereof shall, on the certificate of the Treasurer that such amount has been deposited in the Treasury, be credited by the proper accounting officer of the Department of the Treasury on the books of the Department, to the officer in whose name it had stood on the books of any agency of the Treasury, if it appears that he is entitled to such credit. *R. S. 309.*

309. Annual reports as to balances unchanged for three years.—The Treasurer, each assistant treasurer, and each designated depositary of the United States, and the cashier of each of the national banks designated as such depositaries, shall, at the close of business on every thirtieth day of June, report to the Secretary of the Treasury the condition of every account standing, as in the preceding section specified, on the books of their respective offices, stating the name of each depositor, with his official designation, the total amount remaining on deposit to his credit, and the dates, respectively, of the last credit and the last debit made to each account. And each disbursing officer shall make a like return of all checks issued by him, and which may then have been outstanding and unpaid for three years and more, stating fully in such report the name of the payee, for what purpose each check was given, the office on which drawn, the number of the voucher received therefor, the date, number, and amount for which it was drawn, and, when known, the residence of the payee. *R. S. 310.*

310. Annual reports by auditors as to outstanding checks.—That hereafter at the termination of each fiscal year each Auditor of the Treasury shall report to the Secretary of the Treasury all checks issued by any disbursing officer of the Government as shown by his accounts rendered to such auditor, which shall then have been outstanding and unpaid for three years or more, stating fully in such report the name of the payee, for what purpose each check was given, the office on which drawn, the number of the voucher received therefor, the date, the number, and the amount for which it was drawn, and, when known, the residence of the payee. And such reports shall be in lieu of the returns required of disbursing officers by section three hundred and ten of the Revised Statutes. *Sec. 5, act of July 1, 1916 (39 Stat. 336), making appropriations for sundry civil expenses.*

311. Duties of the Auditor for the War Department:—The Auditors charged with the examination of the accounts of the Departments of War and of the Navy shall keep all accounts of the receipts and expenditures of the public money in regard to those Departments, and of all debts due to the United States on moneys advanced relative to those Departments; shall receive from the Second Comptroller the accounts which shall have been finally adjusted, and shall preserve such accounts, with their vouchers and certificates, and record all requisitions drawn by the Secretaries of those Departments, the examination of the accounts of which has been assigned to them. They shall annually, on the first Monday in November, severally report to the Secretary of the Treasury the application of the money appropriated for the Department of War and the Department of the Navy, and they shall make such reports on the

business assigned to them as the Secretaries of those Departments may deem necessary and require. *R. S. 283.*

So much of this section as required these accounts to be kept by the auditors was repealed by sec. 10, act of July 31, 1894 (28 Stat. 208), which established the Division of Bookkeeping and Warrants, and provided for keeping on the books of that division, all accounts of receipts and expenditures of public money except those relating to postal revenues and expenditures therefrom.

The office of Second Comptroller, mentioned in this section, was abolished, and its duties were transferred to the office of Comptroller, by sec. 4, act of July 31, 1894 (28 Stat. 208).

Notes of Decisions.

Final adjustment of account.—When an account has been examined, passed on, and the balance certified it is "adjusted" within the meaning of this section. U. S. v. Pinson (1880), 102 U. S. 548, 551, 26 L. Ed. 226.

313. Examination of accounts by the Auditor for the War Department.—Accounts shall be examined by the Auditors as follows: * * *

Second. The Auditor for the War Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of War and all bureaus and offices under his direction, all accounts relating to the military establishment, armories and arsenals, national cemeteries, fortifications, public buildings and grounds under the Chief of Engineers, rivers and harbors, the Military Academy, and to all other business within the jurisdiction of the Department of War, and certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate to the Secretary of War. * * * *Sec. 7, act of July 31, 1894 (28 Stat. 206).*

The Auditor for the War Department was to audit the accounts for the Isthmian Canal Commission, by a provision of act Feb. 3, 1905, sec. 1 (33 Stat. 647). And the accounts of the Panama Canal under act Aug. 24, 1912 (37 Stat. 560), were to continue to be audited by him, by a provision of act Oct. 22, 1913.

Payment of final judgments and awards rendered against the United States by the Court of Claims, and of final judgments rendered against the United States by the circuit and district courts, under appropriations by Congress, is to be made on settlements by the auditor for the department or branch of the public service having jurisdiction over the subject matter out of which the claims arose, by a provision of act Feb. 18, 1904 (33 Stat. 41).

The accounts of individual paymasters in the Army were required to be analyzed under the several heads of the appropriation, and recorded in detail by the Paymaster General, before they were forwarded to the Treasury Department for final audit, by a provision of act Mar. 2, 1905, post, 1594.

The settlement of accounts of deceased officers and enlisted men of the Army, and allowance of the amount found due, without administration, to the decedent's widow or heirs, were authorized by a provision of act June 30, 1906, sec. 1, post, 1833. See also A. W. 12, chap. 52, post.

The mode of stating balances to be certified for arrears of pay or for bounty to volunteers, and for commutation of rations to prisoners of war and to soldiers on furlough, was prescribed by a provision of act Mar. 4, 1907.

313. Access by the Auditor for the War Department to records.—All books, papers, and other matters relating to the office or accounts of disbursing officers of the Executive Departments, and commissions, boards, and establishments of the Government in the District of Columbia shall at all times be subject to inspection and examination by the Comptroller of the Treasury and the Auditor of the Treasury authorized to settle such accounts, or by the duly authorized agents of either of said officials. *Act of Feb. 19, 1897 (29 Stat. 550), making appropriations for legislative, executive and judicial expenses.*

314. Access to financial records in the District of Columbia.—All books, papers, and other matters relating to the accounts of officers of the Government in the District of Columbia shall at all times be subject to inspection and examination by the Comptroller of the Treasury and the Auditor of the Treasury authorized to settle such accounts, or by the duly authorized agents of either of said officials. *Sec. 5, act of Mar. 15, 1898 (30 Stat. 316), making appropriations for legislative, executive and judicial expenses.*

315. Balancing accounts.—The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of an Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided*, That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account. * * * *Sec. 8, act of July 31, 1894 (28 Stat. 207).*

Notes of Decisions.

Conclusiveness of decisions of Comptroller on revision of accounts.—The provision of this section that the finding of the comptroller on claims against the United States shall be final and conclusive as to the executive branch of the Government, does not render such finding conclusive on the courts but leaves the merits open for judicial determination. U. S. v. Gillmore (C. C. 1911), 189 Fed. 761.

A settlement having been made in 1906, it was too late to reopen it for a revision by the Comptroller of the Treasury upon application made several years thereafter. Hinkley & Powers v. U. S. (1913), 49 Ct. Cl. 148.

Claims to which applicable.—Where the claim of an Army officer for the loss of private property in the service, filed under act Mar. 3, 1885, was audited, allowed, and paid in the usual manner, the Government can not reclaim the money without showing that it was obtained by fraud or paid under a mistake of fact. This act does not authorize the comptroller to take up a claim and revise it of his own motion, ex parte, after it has been paid in the regular course of business, and thereby create a legal demand against the claimant for repayment of the money received, but applies only to claims which are unpaid, and therefore still pending. U. S. v. Olmsted (1902), 118 Fed. 433, 55 C. C. A. 249.

Decisions of comptroller on questions involving payments to be made.—This section makes it obligatory upon the Comptroller of the Treasury to render a decision upon any question involving a payment to be made by or under the head of any executive department, and contemplates the construction by him of statutes. (1895) 21 Op. Atty. Gen. 178, 181.

The Comptroller of the Treasury is charged with the duty of rendering decisions upon questions involving payments to be made by or under the head of an executive department, and his decision is final as to all executive officers. (1899), 22 Op. Atty. Gen. 581; (1901), 23 Op. Atty. Gen. 468.

The decision of the comptroller as to whether a retired Army officer advanced in rank and pay under the act of Apr. 23, 1904, may be paid at the advanced rate before the Senate has consented to the advancement, is conclusive. (1904), 25 Op. Atty. Gen. 185.

The authority conferred upon the Comptroller of the Treasury by this section to decide questions involving payments to be made from the Treasury is complete; but that act does not establish a rule which is universal and without exception. Congress did not, by that enactment, intend to shorten the reach of R. S. secs. 354, 356, post, 385, 386, or to repeal pro tanto those sections. (1904), 25 Op. Atty. Gen. 301.

316. Preservation of accounts. * * * The Auditors shall, under the direction of the Comptroller of the Treasury, preserve, with their vouchers and

certificates, all accounts which have been finally adjusted. * * * *Sec. 8, act of July 31, 1894 (28 Stat. 207).*

317. Construction of statutes by auditors.— * * * All decisions by Auditors making an original construction or modifying an existing construction of statutes shall be forthwith reported to the Comptroller of the Treasury, and items in any account affected by such decisions shall be suspended and payment thereof withheld until the Comptroller of the Treasury shall approve, disapprove, or modify such decisions and certify his actions to the Auditor. All decisions made by the Comptroller of the Treasury under this act shall be forthwith transmitted to the Auditor or Auditors whose duties are affected thereby. * * * *Sec. 8, act of July 31, 1894 (28 Stat. 207).*

318. Vacant.

319. Audit made away from the seat of Government during the World War.— That the Secretary of the Treasury is authorized during the war, whenever it shall appear that the public interests require that any of the accounts of the Military Establishment be audited at any place other than the seat of Government, to direct the Comptroller of the Treasury and the Auditor for the War Department to exercise, either in person or through assistants, the powers and perform the duties of their offices at any place or places away from the seat of Government in the manner that is or may be required by law at the seat of Government and in accordance with the provisions of this section. * * * *Sec. 12, act of Sept. 24, 1917 (40 Stat. 293).*

That the authority granted under this section shall terminate six months after the close of the war or at such earlier date as the Secretary of the Treasury may direct, and it shall be the duty of the comptroller and auditor to make such reports as the Secretary of the Treasury may require of the expenditures made and work done pursuant to this section, and such reports shall be transmitted to the Congress at such time as he may decide to be compatible with the public interest. *Sec. 12 (b), act of Sept. 24, 1917 (40 Stat. 295).*

That for the purposes of this Act the date of the termination of the war between the United States and the Imperial German Government shall be fixed by proclamation of the President of the United States. *Sec. 13, act of Sept. 24, 1917 (40 Stat. 295).*

320. Audit performed abroad in like manner as at the seat of Government.— That when the Secretary of the Treasury shall exercise the authority herein referred to, the powers and duties of the said comptroller and auditor, under and pursuant to the provisions of the Act of July thirty-first, eighteen hundred and ninety-four, and all other laws conferring jurisdiction upon those officers, shall be exercised and performed in the same manner as nearly as practicable and with the same effect away from the seat of Government as they are now exercised and performed and have effect at the seat of Government, and decisions authorized by law to be rendered by the comptroller at the request of disbursing officers may be rendered with the same effect by such assistants as may be authorized by him to perform that duty. *Sec. 12 (a), act of Sept. 24, 1917 (40 Stat. [illegible]).*

321. Balances of accounts audited abroad. That when pursuant to this section the said comptroller and auditor shall perform their duties at a place in a foreign country, the [illegible] relating to the settlement of accounts and claims of the Military Establishment shall be certified by the auditor to the [illegible] of Bookkeeping and Warrants of the Treasury Department as now provided for the certification of balances by said auditor in Washington, and the [illegible] so found due shall be final and conclusive upon all branches of the Government,

except that any person whose account has been settled or the commanding officer of the Army abroad, or the comptroller may obtain a revision of such settlement by the comptroller upon application therefor within three months, the decision to be likewise final and conclusive and the differences arising upon such revision to be certified to and stated by the auditor as now provided by law: * * * *Sec. 12 (b), act of Sept. 24, 1917 (40 Stat. 293).*

322. Payment of certificates of balances abroad.— * * * *Provided,* That certificates of balances due may be transmitted to and paid by the proper disbursing officer abroad instead of by warrant: * * * *Sec. 12 (b), act of Sept. 24, 1917 (40 Stat. 293).*

323. Reopening and review of a settlement made abroad.— * * * *Provided further,* That any person whose account has been settled, or the Secretary of War, may obtain a reopening and review of any settlement made pursuant to this section upon application to the Comptroller of the Treasury in Washington within one year after the close of the war, and the action of the comptroller thereon shall be final and conclusive in the same manner as herein provided in the case of a balance found due by the auditor. *Sec. 12 (b), act of Sept. 24, 1917 (40 Stat. 293).*

324. Preservation of accounts, etc., prepared abroad.—That the comptroller and auditor shall preserve the accounts, and the vouchers and papers connected therewith, and the files of their offices in the foreign country and transmit them to Washington within six months after the close of the war and at such earlier time as may be directed by the Secretary of the Treasury as to any or all accounts, vouchers, papers, and files. *Sec. 12 (c), act of Sept. 24, 1917 (40 Stat. 293).*

325. Examination of accounts abroad.—That it shall be the duty of all contracting, purchasing, and disbursing officers to allow any representative of the comptroller or auditor to examine all books, records, and papers in any way connected with the receipt, disbursement, or disposal of public money, and to render such accounts and at such times as may be required by the comptroller. No administrative examination by the War Department shall be required of accounts rendered and settled abroad, and the time within which these accounts shall be rendered by disbursing officers shall be prescribed by the comptroller, who shall have power to waive any delinquency as to time or form in the rendition of these accounts. * * * *Sec. 12 (e), act of Sept. 24, 1917 (40 Stat. 294).*

326. Filing contracts settled abroad.— * * * All contracts connected with accounts to be settled by the auditor abroad shall be filed in his office there. *Sec. 12 (e), act of Sept. 24, 1917 (40 Stat. 294.)*

327. Assistant comptroller and assistant auditor to serve abroad.—That the Secretary of the Treasury is authorized to appoint an assistant comptroller and an assistant auditor and to fix their compensation, and to designate from among the persons to be employed hereunder one or more to act in the absence or disability of such assistant comptroller and assistant auditor. * * * The assistant comptroller and assistant auditor shall have full power to perform in a foreign country all the duties with reference to the settlement there of the accounts of the Military Establishment that the comptroller and auditor now have at the seat of Government and in foreign countries under the provisions of this section, and shall perform such duties in accordance with the instructions received from and rules and regulations made by the comptroller and auditor. * * * *Sec. 12 (d), act of Sept. 24, 1917 (40 Stat. 294).*

328. **Administration of oaths to American citizens.**—That the comptroller and the auditor, and such persons as may be authorized in writing by either of them, may administer oaths to American citizens in respect to any matter within the jurisdiction of either of said officers and certify the official character, when shown, of any foreign officer whose jurat or certificate may be necessary on a paper to be filed with them. *Sec. 12 (4), act of Sept. 24, 1917 (40 Stat. 295).*

329. **Settlement of claims in the Department of the Treasury.**—All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury. *R. S. 236.*

Notes of Decisions

Necessity of settlement and adjustment of claims and accounts. No claim or demand can be paid on presentation at the Treasury, but until it has been audited and allowed by the accounting officers, and then only in pursuance of an appropriation made by law. Reeves v. U. S. (1886), 21 Ct. Cl. 243.

Under the requirement of act Mar. 3, 1817, sec. 2, re-enacted in this section, the Secretary of War could not be called on to order payment on a claim arising from a contract with the War Department, until a settlement of the account at the Treasury by the proper officer. (1832) 2 Op. Atty. Gen. 518.

Under the appropriation by act Sept. 22, 1850 (9 Stat. 485), for payment for Army transportation to land grant railroads, "to be adjusted in accordance with the decisions of the Supreme Court," etc., omitting, after the word "adjusted," the words "by the accounting officers," contained in previous similar appropriations, accounts for such transportation could be lawfully paid by an Army quartermaster without previous action thereon by the accounting officers of the Treasury. (1889) 19 Op. Atty. Gen. 264.

Previous action of heads of departments as to claims. The Secretary of the Treasury was not authorized, under this section, by a resolution of one House of Congress, to reexamine and audit a claim which under a special act relating thereto, had been examined and settled by the head of another department. (1889) 19 Op. Atty. Gen. 385.

Authority as to judgments against United States.—This section does not apply to judgments of the Court of Claims. U. S. v. Jones (1886), 7 Sup. Ct. 283, 284, 119 U. S. 477, 30 L. Ed. 440.

Authority as to conflicting claims.—The officers of the Treasury can not arbitrarily select between contending claimants. People's Trust Co. v. U. S. (1903) 38 Ct. Cl. 359.

Authority to set off claims.—The right of set-off, where the Government is both debtor and creditor, is founded upon this section, and exists independently of the special enactments of R. S. 1766, post, 1610, and act Mar. 3, 1875, post, 355. Taggart v. U. S. (1881), 17 Ct. Cl. 322, 327.

The Treasury has authority to set off an indebtedness due from a claimant to the Government against a judgment recovered by him. Labadie v. U. S. (1898), 33 Ct. Cl. 476.

The Treasury Department has power to protect the United States in judgment or claims where a set-off exists. The Henry (1900), 35 Ct. Cl. 393.

Methods of settlement of accounts.—The methods of settling accounts and claims against the Government stated and explained. McKnight v. U. S. (1877), 13 Ct. Cl. 292, 299-306.

330. **Report to Congress as to claims allowed.**—* * * That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration. * * * *Sec. 2, act of July 7, 1884 (23 Stat. 254).*

331. **Comptroller's decisions as to payments.**—* * * Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement. * * * *Sec. 8, act of July 31, 1894 (28 Stat. 208).*

See notes under 316, ante.

332. Settlement of a claim by an auditor.—The Comptroller of the Treasury, in any case where, in his opinion, the interests of the Government require it, shall direct any of the Auditors forthwith to audit and settle any particular account which such Auditor is authorized to audit and settle. *R. S. 271, as amended by sec. 6, act of July 31, 1894 (28 Stat. 206).*

See also notes to 312, ante.

Notes of Decisions.

Accounts previously settled.—This section does not apply to an account which the auditor has no authority to settle it having been previously allowed and paid under an act of Congress making such action a final determination of the claim. U. S. v. Olmsted (C. C. 1900), 106 Fed. 286, 288.

333. Payment of checks, etc., after three years.—The payee or the bona-fide holder of any draft or check the amount of which has been deposited and covered into the Treasury pursuant to the preceding sections, shall, on presenting the same to the proper officer of the Treasury, be entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor, according to the practice in other cases of authorized and liquidated claims against the United States. *R. S. 308.*

Notes of Decisions.

Limitation.—The limitation prescribed by R. S. 1069 does not begin to run until after refusal of an application for a warrant when, for the first time, a claim for breach of contract accrues. U. S. v. Wardwell (1898), 172 U. S. 48.

334. Claim for damages due to military operations.—* * * *Provided*, That hereafter the Secretary of War is authorized to consider, ascertain, adjust, and determine the amounts due on all claims for damages to and loss of private property when the amount of the claim does not exceed the sum of one thousand dollars, occasioned by heavy gun fire and target practice of troops, and for damages to vessels, wharves, and other private property, found to be due to maneuvers or other military operations for which the Government is responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. *Act of Aug. 24, 1912 (37 Stat. 586).*

For payment of claims for damages to and loss of private property incident to the training, practice, operation, or maintenance of the Army that have accrued, or may hereafter accrue, from time to time, to be immediately available and to remain available until expended * * *: *Provided*, That settlement of such claims shall be made by the Auditor for the War Department, upon the approval and recommendation of the Secretary of War, where the amount of damages has been ascertained by the War Department, and payment thereof will be accepted by the owners of the property in full satisfaction of such damages. *Act of June 5, 1920 (41 Stat. 965), making appropriations for the support of the Army: Claims for damages to and loss of private property.*

Notes of Decisions.

Taking of property.—Discharges of projectiles over part of plaintiff's land, held not to involve a taking of property. Peabody v. United States (1913), 231 U. S. 530; Portsmouth Harbor Land & Hotel Co. et al. v. United States (1918), 250 U. S. 1, affirming 53 Ct. Cl. 210.

335. Claims of the inhabitants of France and other European countries for damages to private property.—That claims of inhabitants of France or of any other European country not an enemy or ally of an enemy for damages caused by American military forces may be presented to any officer designated by the President, and when approved by such an officer shall be paid under regulations made by the Secretary of War. *Sec. 1, act of Apr. 18, 1918 (40 Stat. 532).*

That claims under this statute shall not be approved unless they would be payable according to the law or practice governing the military forces of the country in which they occur. *Sec. 2, act of Apr. 18, 1918 (40 Stat. 532).*

That hereafter appropriations for the incidental expenses of the Quartermaster Corps shall be available for paying the claims herein described. *Sec. 3, act of Apr. 18, 1918 (40 Stat. 532).*

That this statute does not supersede other modes of indemnity now in existence and does not diminish responsibility of any member of the military forces to the person injured or to the United States. *Sec. 4, act of Apr. 18, 1918 (40 Stat. 532).*

See post, 813, making provision for certain claims for damages resulting from the operation of aircraft at home and abroad.

336. Claims for personal property lost or destroyed.—That private property belonging to officers, enlisted men, and members of the Nurse Corps (female) of the Army, including all prescribed articles of equipment and clothing which they are required by law or regulations to own and use in the performance of their duties, and horses and equipment required by law or regulations to be provided by mounted officers, which since the 5th day of April, 1917, has been or shall hereafter be lost, damaged, or destroyed in the military service, shall be replaced, or the damage thereto, or its value recouped to the owner as hereinafter provided, when such loss, damage, or destruction has occurred or shall hereafter occur without fault or negligence on the part of the owner in any of the following circumstances:

First. When such private property so lost, damaged, or destroyed was shipped on board an unseaworthy vessel by order of an officer authorized to give such order or direct such shipment.

Second. When it appears that such private property was so lost, damaged, or destroyed in consequence of its owner having given his attention to the saving of human life or property belonging to the United States which was in danger at the same time and under similar circumstances, or while, at the time of such loss, damage, or destruction, the claimant was engaged in authorized military duties in connection therewith.

Third. When during travel under orders such private property, including the regulating allowance of baggage, transferred by a common carrier, or otherwise transported by the proper agent or agency of the United States Government, is lost, damaged, or destroyed; but replacement, recoupment, or commutation in these circumstances, where the property was or shall be transported by a common carrier, shall be limited to the extent of such loss, damage, or destruction over and above the amount recoverable from said carrier.

Fourth. When such private property is destroyed or captured by the enemy, or is destroyed to prevent its falling into the hands of the enemy, or is abandoned on account of lack of transportation or by reason of military emergency requiring its abandonment, or is otherwise lost in the field during campaign. *Sec. 1, act of Mar. 3, 1885 (23 Stat. 350), as amended by act of Mar. 4, 1921 (41 Stat. 1436).*

That except as to such property as by law or regulation is required to be possessed and used by officers, enlisted men, and members of the Army Nurse Corps (female), respectively, the liability of the Government under this Act shall be limited to damage to or loss of such sums of money or such articles of personal property as the Secretary of War shall decide or declare to be reasonable, useful, necessary, and proper for officers, enlisted men, or members of the Army Nurse Corps (female), respectively, as the case may be, to have in their possession while in quarters, or in the field, engaged in the public service in the line of duty. *Sec. 2, act of Mar. 3, 1885 (23 Stat. 350), as amended by act of Mar. 4, 1921 (41 Stat. 1437).*

That the Secretary of War is authorized and directed to examine into, ascertain, and determine the value of such property lost, destroyed, captured, or abandoned as specified in the foregoing paragraphs, or the amount of damage thereto, as the case may be; and the amount of such value or damage so ascertained and determined shall be paid by disbursing officers of the Army, or such property lost, destroyed, captured, or abandoned, or so damaged as to be unfit for service, may be replaced in kind from Government property on hand when the Secretary of War shall so direct. *Sec. 3, act of Mar. 3, 1885 (23 Stat. 350), as amended by act of Mar. 4, 1921 (41 Stat. 1437).*

That the tender of replacement or of commutation or the determination made by the Secretary of War upon a claim presented as provided for in the foregoing section, shall constitute a final determination of any claim cognizable under this chapter, and such claim shall not thereafter be reopened or considered. *Sec. 4, act of Mar. 3, 1885 (23 Stat. 350), as amended by act of Mar. 4, 1921 (41 Stat. 1437).*

That no claim arising under this Act shall be considered unless made within two years from the time that it accrued, except that when a claim accrues in time of war, or when war intervenes within two years after its accrual, such claim may be presented within two years after peace is established. *Sec. 5, act of Mar. 3, 1885 (23 Stat. 350), as amended by act of Mar. 4, 1921 (41 Stat. 1437).*

That for the payment of claims arising and established under this Act there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of $200,000. *Sec. 6, act of Mar. 3, 1885 (23 Stat. 350), as amended by act of Mar. 4, 1921 (41 Stat. 1437).*

That so much of the Act of March 28, 1918 (Fortieth Statutes, pages 479, 480), as makes provision for the presentation, adjustment, and payment of claims of officers and enlisted men for loss of private property destroyed in the military service be, and the same hereby is, repealed. *Sec. 7, act of Mar. 3, 1885 (23 Stat. 350), as amended by act of Mar. 4, 1921 (41 Stat. 1437).*

The words "regulating allowance of baggage," above, were probably intended for "regulation allowance of baggage."

Notes of Decisions.

See also notes to 338, post.

Extent and nature of jurisdiction conferred on Treasury and War Departments.— The proviso "that any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered," clearly confers exclusive and final jurisdiction on the Treasury Department, so that claims under this act are not within the jurisdiction of the Court of Claims. U. S. *v.* Babcock (1919), 250 U. S. 328, reversing the Court of Claims and the contrary doctrine laid down in Pursell *v.* U. S. (1911), 46 Ct. Cl. 509.

Whether the loss happened under the circumstances described in the statute, and comes within the provisions thereof, is a question for the determination of the proper

...ating officers of the Treasury, and so ... not appertain to the administration of War Department. (1890) 19 Op. Atty. ...93

...e duty of the Secretary of War in the ... of a claim under this act is limited to ... determination of whether the property ... the loss of which indemnity is claimed ... "reasonable, useful, necessary, and ... for the claimant. Id.

...mitation.—Claims under this act must ... been presented to the proper account... officers within two years from the ...urrence of the loss. Newcomer v. U. S. ...14), 51 Ct. Cl. 408; Goodman v. U. S. ...17), 52 Ct. Cl. 244.

...s of private property occurring May ...1899, aboard a transport bound from ...to Rico to New York which was wrecked, ...ugh the troops aboard were destined ... service in the Philippines after re...ing in New York, was not "in time of ..." within the meaning of the act of ...3, 1885. Goodman v. U. S. (1917), ...2 Ct. Cl. 244.

...s occurring during officer's leave of ab...ce. The absence of an officer properly ...ave at the time of the loss will not ex...de him from the relief given by the stat... if the loss was without fault or negli...ce on his part. Purssell v. U. S. (1911), ...6 Ct. Cl. 509.

...finality of award.—Where the claim of ... Army officer for the loss of private prop...y in the service was audited, allowed, ...d paid in the usual manner, the Gov...ment could not reclaim the money with...ut showing that it was obtained by fraud ...der a mistake of fact, notwithstand...g act July 31, 1894, providing that a re...w of an account by the Comptroller of ... Treasury may be obtained within a year ...r it has been settled by the auditor. ... v. Olmsted (1902), 118 Fed. 433, 55 ... A. 249.

...A payment made pursuant to this act ...not be recovered back, in the absence of ...stake or fraud, which is not shown by a ...pleading stating that, after payment of the ...im, the department disallowed the claim ...r the reason that the loss was not without ...lt of the claimant; this being but an ...pression of the reason assigned by the de...rtment for its action, and not an allega...n of the fact that the loss was not without his fault. U. S. v. Willcox (1902), 118 Fed. 720, 55 C. C. A. 513.

Where the claim of an Army officer against the Government for the value of personal property lost in the service, presented under this section, was allowed by the Auditor for the War Department, and paid, the Government can not recover the amount so paid from such officer upon a petition showing that the claim was subsequently revised by the comptroller and disallowed because of the insufficiency of the proofs, and that the auditor thereafter settled the claim, and charged the amount back to the officer, there being no allegation of fraud or mistake, or that the claim was not in fact one properly allowable under the statute; and especially where it is not shown that the officer was advised of the action taken after the payment was made. U. S. v. Olmsted (C. C. 1900), 106 Fed. 286.

Acceptance by claimant of amount allowed as satisfaction.—The acceptance by the claimant of the amount allowed by the accounting officers operates as a satisfaction of the claim. Purssell v. U. S. (1911), 46 Ct. Cl. 509.

Effect of act as limiting jurisdiction of Court of Claims.—This act has no application to the judiciary and is no limitation on the jurisdiction of the Court of Claims in cases for horses lost in the military service. Cox v. U. S. (1906), 41 Ct. Cl. 86.

Privately owned horses.—The term "private property" includes all articles carried by the persons enumerated into the military service which were indispensable to the conditions of that service and comprehends privately owned horses, inasmuch as they are not specifically excluded by the terms of the act. Andrews et al. v. U. S. (1917), 52 Ct. Cl. 373.

Statute construed; liability.—The act of 1885 is expressly limited to times of peace, but the term "in the military service" has a universally accepted legal meaning, and Congress clearly did not intend to make the Government an insurer of privately owned property *while* in the military service, but limited liability to the loss and destruction of such property directly caused *by* military service and in nowise attributable to the fault or negligence of the soldier. Id.

337. Claims for damage or loss of baggage shipped under orders.—* * * *And provided further*, That the provisions of the Act of March third, eighteen hundred and eighty-five (Twenty-third Statutes, page three hundred and fifty), entitled "An Act to provide for the settlement of the claims of officers and enlisted men of the Army for loss of private property destroyed in the military service of the United States," shall hereafter extend to cover loss of or damage to the ...llation allowance of baggage of officers and enlisted men sustained in ship-

ment under orders, to the extent of such loss or damage over and above the amount recoverable from the carrier furnishing the transportation. *Act of Mar. 4, 1915 (38 Stat. 1077).*

Act Mar. 3, 1885, mentioned in this section, is set forth ante, 330.

338. Claims for horses lost in battle, etc.—Any field, or staff, or other officer, mounted militiaman, volunteer, ranger, or cavalryman, engaged in the military service of the United States, who sustains damage without any fault or negligence on his part, while in the service, by the loss of a horse in battle, or by the loss of a horse wounded in battle, which dies of the wound, or which, being so wounded, is abandoned by order of his officer and lost, or who sustains damage by the loss of any horse by death or abandonment because of the unavoidable dangers of the sea, when on board a United States transport vessel, or because the United States fails to supply transportation for the horse, and the owner is compelled by the order of his commanding officer to embark and leave him, or in consequence of the United States failing to supply sufficient forage, or because the rider is dismounted and separated from his horse and ordered to do duty on foot at a station detached from his horse, or when the officer in the immediate command orders the horse turned out to graze in the woods, prairies, or commons, because the United States fails to supply sufficient forage, and the loss is consequent thereon, or for the loss of necessary equipage, in consequence of the loss of his horse, shall be allowed and paid the value thereof, not to exceed two hundred dollars. But any payment which is made to any one for the use and risk, or for forage, after the death, loss, or abandonment of his horse, shall be deducted from the value thereof, unless he satisfies the paymaster at the time he makes the payment, or thereafter shows, by proof, that he was remounted, in which case the deduction shall only extend to the time he was on foot. And any payment made to any person above mentioned, on account of clothing to which he is not entitled by law, shall be deducted from the value of his horse or accouterments. *R. S. 3482.*

A permanent appropriation to pay for horses and other property lost, etc., in the military service, under the provisions of this title, was made by R. S. 3689, post, 345.

The above section, by reason of the acts of Jan. 9, 1883 (22 Stat. 401), and Aug. 13, 1888 (25 Stat. 437), expired in 1891 (U. S. v. Babcock (1919), 250 U. S. 328; Griffis v. U. S. (1917), 52 Ct. Cl. 170, 198), but as the notes of decisions following are chiefly based on said section, the text has been printed for convenience of access.

Notes of Decisions.

History of legislation.—See Griffis v. U. S. (1916), 52 Ct. Cl. 1.

Construction, operation, and effect in general.—The statute regards the separation of a man from his horse by compelling him to do duty at another station as a proximate cause, and in such a case the court can not go behind that cause to inquire whether the separation was brought about by the soldier's neglect. Valdez v. U. S. (1880), 16 Ct. Cl. 550.

The statute casts all risks upon the Government where "the rider was dismounted and separated from his horse, and ordered to do duty at a station detached from his horse." In contemplation of the statute, the soldier is entitled to retain the care and custody of his own horse so long as he is held responsible for its loss. Id.

The purpose of this act, so far as it relates to officers or soldiers furnishing their own horses, was twofold: To enable the Government to hire horses at low rates; to apportion the risk between the owner and the employer. Id.

The obligations which the statutes cast upon the Government and upon the officer or soldier furnishing his own horse stated. Id.

In time of war and in conflicts with Indians, horses, if killed, or captured without negligence or undue carelessness on the part of their owners, will be paid for by the Government, under this section. Sibley v. U. S. (1914), 49 Ct. Cl. 242.

By the term "battle" the statute includes all the encounters which may occur between

the troops of contending armies. Powell v. U. S. (1865), 1 Ct. Cl. 400.

"Use" of a horse, in this act, does not mean the active employment of the animal in a military expedition. (1858) 9 Op. Atty. Gen. 151.

The word "mounted" does not necessarily imply that the soldier is either on his horse or with his horse. It indicates the general character of the corps or service. Id.

Under this act the fact of a payment having been made to a soldier as a mounted man after the loss of his horse is not conclusive evidence that he was remounted during the time for which he was paid. (1858) 9 Op. Atty. Gen. 185.

This act is a remedial statute, and should accordingly be construed so as to advance the remedy. (1861) 10 Op. Atty. Gen. 21.

Claims of officers and soldiers for horses lost in the military service, where their horses were in service simply as a part of the equipment belonging to and furnished by them, are allowable only under the provisions of the first section. (1874) 14 Op. Atty. Gen. 360.

The first and second sections of this act provide respectively for separate and distinct classes of claims. The two classes distinguished. Id.

A lieutenant went on an expedition up the Red River, leaving his horse and saddle behind with the regiment to which he belonged. During his absence the horse and saddle were, by order of the colonel of his regiment, taken and used in the military service without his knowledge and consent, and while so in such service were lost. Claim being made by him for the value of the property under this act, held, that the case fell within the second section, and not the first section, of that act. (1874) 14 Op. Atty. Gen. 367.

Effect of act.—Sec. 3482, Revised Statutes was intended to provide for losses to those engaged in actual military service in time of war. Griffis v. U. S. (1917), 52 Ct. Cl. 170.

Persons who may receive relief.—An officer who is not required by the Army regulations to be "mounted," but who is detailed on duty which, in the opinion of his commanding general, renders it "necessary and proper" for him to be mounted, may recover for horses lost in battle. (9 Stat. L. 414.) Powell v. U. S. (1865), 1 Ct. Cl. 400.

A deserter can not recover for his horse, captured by the enemy, under act Mar. 3, 1849 (9 Stat. 414), though his claim comes within the very letter of the statute. Tapia v. U. S. (1880), 16 Ct. Cl. 561.

The statutes in force which provide indemnity for officers' horses lost in certain circumstances apply to officers of the Regular Army as well as to volunteers. (1857) 8 Op. Atty. Gen. 293.

Under this act mounted volunteers are entitled to compensation for horses lost or destroyed by unavoidable accident while in the service of the United States. (1859) 9 Op. Atty. Gen. 334.

Equipment for which payment may be made.—The relief given to an officer by the statute can not be extended so as to include swords, pistols, or any other property than horses and horse equipage. Powell v. U. S. (1865), 1 Ct. Cl. 400.

The "equipage" referred to by the statute is horse equipage; and by the term "necessary equipage" is meant only the equipage prescribed by regulations. Id.

An officer may recover for more than one horse lost in the same battle; but the recovery is limited to the number which the Army regulations require him to keep. Id.

The statute makes no distinction between a soldier's horse and horse equipments. Where the loss was due to the same cause, the liability follows the same rule. Valdez v. U. S. (1880), 16 Ct. Cl. 550.

Requisite facts to authorize recovery.—To authorize a judgment it is necessary to prove: (1) That the claimant owned a horse which he took into the military service; (2) that the horse was lost; (3) that the loss resulted from an exigency or necessity of the military service; and (4) that the loss was without fault or negligence on the part of the claimant. Irby v. U. S. (1883), 18 Ct. Cl. 250.

Effect of acceptance of commutation instead of forage.—When soldiers furnish their own forage and receive commutation pay therefor, they are estopped from setting up, under this act, that the loss was "in consequence of the United States failing to supply sufficient forage." Valdez v. U. S. (1880), 16 Ct. Cl. 550.

If a soldier choses to accept commutation instead of forage, he can not recover compensation for the horse which he may starve by his mistaken economy. (1858) 9 Op. Atty. Gen. 151.

The receipt of commutation for forage is not conclusive evidence that the soldier had previously elected to take it; but it throws on him the burden of showing that he could not obtain forage in kind. (1859) 9 Op. Atty. Gen. 334.

Negligence or fault of owner or his agents.—Where it is not shown that the safety of the horse was properly provided for by the keeper, who was a representative and agent of the owner, and for whose conduct and acts he is responsible, the plaintiff is not entitled to recover. Sibley v. U. S. (1914), 49 Ct. Cl. 242.

339. Payment for lost horses.— * * * and payment in any case shall not be refused where the loss resulted from any exigency or necessity of the military service, unless it was caused by the fault or negligence of such officers or enlisted men. *Sec. 1, act of June 22, 1874 (18 Stat. 193), amending act of Mar. 3, 1849 (9 Stat. 414).*

The act of Mar. 3, 1849, was embodied in R. S. 3482, ante, 338.

By sec. 2, act of June 22, 1874, claims would not be considered if presented after Jan. 1, 1876.

Notes of Decisions.

Exigencies within this section.—Where a horse was killed on a Government transport it was an exigency within the statute; and where the horse was in charge of the agents of the Government and not of the owner it was not caused by his "fault or negligence." Hardie *v.* U. S. (1904), 39 Ct. Cl. 250.

See also notes to 338, ante.

340. Claims for property lost while in military service.—Every person who sustains damage by the capture or destruction by an enemy, or by the abandonment or destruction by the order of the commanding general, the commanding officer, or quartermaster, of any horse, mule, ox, wagon, cart, sleigh, harness, steamboat or other vessel, railroad-engine or railroad-car, while such property is in the military service, either by impressment or contract; or who sustains damage by the death or abandonment and loss of any horse, mule, or ox, while in the service, in consequence of the failure on the part of the United States to furnish the same with sufficient forage, or whose horse, mule, ox, wagon, cart, boat, sleigh, harness, vessel, railroad-engine, or railroad-car is lost or destroyed by unavoidable accident while such property is in the service, shall be allowed and paid the value thereof at the time when such property was taken into the service, except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner: *Provided*, It appears that such loss, capture, abandonment, destruction, or death was without any fault or negligence on the part of the owner of the property, and while the property was actually employed in the service of the United States. *R. S. 3483.*

Notes of Decisions.

Construction, operation, and effect in general.—Government held not liable for loss of vessel in military service. Reybold *v.* U. S. (1872), 15 Wall. 202, 206, 21 L. Ed. 57.

The cases in which contractors and owners of impressed property may recover examined. Powell *v.* U. S. (1865), 1 Ct. Cl. 400.

The term "war risk," in a policy wherein the Government is the insurer, can not be extended beyond "the acts of the public enemy" or "the casualties of war." The Government does not insure against its own acts. Bogert *v.* U. S. (1866), 2 Ct. Cl. 159.

Where property was in service by impressment or contract, and not merely by being a part of the equipment furnished by the officer or soldier, such claims are allowable under the provisions of this section, which contains no restrictions as to persons. (1874), 14 Op. Atty. Gen. 360.

Where the question is whether the boat was or was not in the military service by contract, the distinction between a contract which imports the letting of the boat for hire (locatio rei), and one importing merely the carriage of goods for hire (locatio operis mercium vehendarum), is material; contracts of the former kind only being within the statute. (1875), 14 Op. Atty. Gen. 536.

Proximate cause of loss.—It is the proximate cause of loss which determines the liability of the insurer, and not the remote. Hence, where the defendants during the war of the rebellion insure in the charter party of a schooner against the "war risk," and she is driven by a gale within range of the enemy's batteries, but is then at anchor and safe from the perils of the sea, after which the batteries open upon her and destroy her ground tackle, so

that she goes ashore and is captured, the acts of the enemy constitute the proximate cause of the loss, and the defendants are liable. Baker v. U. S. (1867), 3 Ct. Cl. 76.

Claims within this section.—One who contracted with the Government to transport from port to port, remote from any seat of war, stores and supplies not forming any portion of the stores or supplies of an advancing or retreating army, is not a person in the military service of the United States within this section and a petition setting attack and capture by hostile Indians without fault of contractor is not sufficient. Guttman v. U. S. (1873), 18 Wall. 84, 21 L. Ed. 816.

This section authorizes payment only for property lost in military service and does not apply to property lost by reason of delay by order of army officers to prevent its reaching the enemy. U. S. v. Irwin (1886), 127 U. S. 125, 8 Sup. Ct. 1033, 32 L. Ed. 99.

The United States held to be charterers of a vessel upon a contract of affreightment, and not liable for its loss. Shaw v. U. S. (1876), 93 U. S. 235, 239, 23 L. Ed. 880.

This act does not apply to the teams of an army contractor, since they are not in the service of the United States. Grant v. U. S. (1863), 1 Ct. Cl. 61.

Where a quartermaster, with the approval of his commanding general, detains a contractor's ice barge, but enters into an agreement to deliver her at a certain place within a fixed period "or pay a fair valuation for the same," the Government will be liable if the barge be not returned. Gerard v. U. S. (1867), 3 Ct. Cl. 89.

This section held not to apply to property of a contractor in military service, and while so used under the control and management of such contractor. Porter v. U. S. (1873), 9 Ct. Cl. 356.

Property intended for sale to the Mormons in Utah was seized by the Johnston expedition in 1857 to prevent its reaching the insurgents, and was subsequently used by the Army. Held, the owners were entitled to recover value. (1861) 10 Op. Atty. Gen. 21.

This section held to apply to the claim of an officer whose horse was impressed and lost in military service while such officer was absent on duty. (1874) 14 Op. Atty. Gen. 367.

A vessel chartered by quartermaster's department was used as transport in expedition against Port Royal, S. C., and in such service lost at sea without fault of owner and while under control of United States officers. Held, owners entitled to recover. (1879) 16 Op. Atty. Gen. 242.

What acts constitute impressment.—An order to the owners of a vessel to get her ready, under pain of impressment, to transport a cargo held not to make the Government owners for the voyage. Reed v. U. S. (1870), 11 Wall. 591, 601, 20 L. Ed. 220, reversing (1868) 4 Ct. Cl. 132.

Where a vessel, which has gone to a Southern port during the rebellion with a cargo for the Government, is compelled, under protest, by a quartermaster to proceed to another port, but is not seized nor taken from the possession of the master and crew, she is "impressed" into the military service and is not "appropriated" within the meaning of act July 4, 1864 (13 Stat. 381); so that an injury suffered by reason of the impressment is not "damage" done by the Army within the meaning of the last act. Kimball v. U. S. (1869), 5 Ct. Cl. 252.

Horses which constitute a part of the equipment of officers and soldiers, furnished by themselves, are not in the military service by "contract," much less by "impressment," within the meaning of the term as employed in this section. (1874) 14 Op. Atty. Gen. 360.

To make an impressment binding upon the Government it is essential that there be shown to have existed such an emergency as justified the officer in taking the property; but this, together with an actual taking, or what is equivalent thereto, being satisfactorily established by the claimant, nothing more remains to be proven by him under that head. (1875) 14 Op. Atty. Gen. 536.

A threat to seize a vessel unless certain troops and ammunition are received and transported, resulting in the compulsory submission of the master of the vessel, does not constitute an impressment. (1881) 17 Op. Atty. Gen. 90.

Voluntary navigation and control by owners of vessel.—An owner, navigating his vessel through his own master and crew, can not recover for her loss by fire, although the vessel was in the military service of the Government by impressment, and the loss was without fault or negligence on the part of the owners or their representatives. The voluntary navigation of the vessel by the owners, after impressment, changes the character of the transaction from impressment to contract, and retaining control of her navigation takes the case out of the statute. Shaw v. U. S. (1873), 9 Ct. Cl. 388.

In June, 1865, a steamboat was chartered by the Government to run on the Chattahoochee and Appalachicola Rivers, the management of the craft being left in charge of the owners. While under charter it was accidentally lost by fire. Held, that the boat was not in the military service within

the meaning of this section, and the United States incurred no liability for the loss. (1877) 15 Op. Atty. Gen. 205.

Assessment of damages.—The Government is an insurer of a steamboat impressed into its military service, and hence in the assessment of damages for her service a deduction should be made from ordinary rates. Russell *v.* U. S. (1869), 5 Ct. Cl. 121.

Use and service after damage to vessel.—Where payments have been made for the services of a steamboat after she has been incapacitated, and the defendants have become liable for her loss, but before her value has been fixed or paid under act Mar. 3, 1849 (9 Stat. 414), and the defendants do not ask that the payments be re-examined, the court will not disturb the transaction, nor treat the payments as a set-off. Reed *v.* U. S. (1868), 4 Ct. Cl. 132. And see Reed *v.* U. S. (1870), 11 Wall. 591, 601, 20 L. Ed. 220.

Where a vessel is taken from the owners and impressed into the military service and suffers injuries while navigated by Government officers, the owners may recover for her use and service during the period of her repairs. Dozier *v.* U. S. (1873), 9 Ct. Cl. 342.

Damages or expense incurred after damage to vessel.—Under act Mar. 3, 1849 (9 Stat. 414), the United States stand in the relation of insurers of a boat taken for military purposes, and fulfill that obligation by paying for her value when destroyed or lost in their service; and that payment relates back to the commencement of the accident by which the boat is finally destroyed, and they are not liable for damages in the meantime. Reed *v.* U. S. (1868), 4 Ct. Cl. 132. And see Reed *v.* U. S. (1870) 11 Wall. 591, 601, 20 L. Ed. 220.

The United States is not liable for a per diem compensation of a steamboat taken for military purposes after the owners abandoned the boat and made their protest to cover their insurance. Id.

Lighterage in floating grounded vessel.—Where a boat, impressed into the military service, grounds, by reason of being overladen by a quartermaster, the United States is liable for the lighterage paid by the owner in getting her afloat. Russell *v.* U. S. (1869), 5 Ct. Cl. 121.

Right of insurer to subrogation.—Where a vessel which has been impressed into the military service is lost, and the insurers pay the owner the amount of certain policies on the vessel, they may maintain an action in the name of the owner, under act Mar. 3, 1849 (9 Stat. 414), and act Mar. 3, 1863 (12 Stat. 743). Shaw *v.* U. S. (1872), 8 Ct. Cl. 488.

The insurers and underwriters are entitled to be subrogated to the rights of the owners to the extent of the loss paid. (1870) 13 Op. Atty Gen. 182.

Authority of Secretary of War to require judicial determination.—Where a vessel was lost while in the military service of the Government, and it appeared that the owner had a just legal claim on the insurers for the loss, the Secretary of War was advised not to entertain an application for indemnity from the Government until the liability of the insurance company should be judicially determined. (1862) 10 Op. Atty. Gen. 267.

Where a claim against the United States for the value of property lost in the military service, filed under the provisions of this act, had been adjusted by the accounting officers of the Treasury, and the amount found due the claimant certified to the Secretary of War for the issue of a requisition for payment, held, that it was competent to the Secretary of War, if it should appear that this claim belonged to the class described in the seventh section of act June 25, 1868, to withhold his requisition and cause the claim to be transmitted to the Court of Claims for adjudication, notwithstanding the amount found due thereon had been certified to him as aforesaid. (1869) 13 Op. Atty. Gen. 164.

Jurisdiction of Court of Claims.—Whether property was impressed into the military service is a jurisdictional question, which may be inquired into in any judicial proceeding based upon a judgment or award of the Third Auditor. Porter *v.* U. S. (1885), 20 Ct. Cl. 307.

Act July 4, 1864, "to restrict the jurisdiction of the Court of Claims," does not repeal this act. (1868) 12 Op. Atty. Gen. 362.

Burden of proof and sufficiency of evidence.—When the evidence of ownership is incomplete a party can not recover for property taken or destroyed by the Government. Wiggins *v.* U. S. (1866), 2 Ct. Cl. 345.

In a steamboat claim under this section, the burden of proof rests on the claimant, and before he can become entitled to compensation for the loss of his property he must prove everything made essential by the act—the ownership, the military service, the destruction, the unavoidable character of the accident, and the entire absence of fault or negligence on his part. (1871), 13 Op. Atty. Gen. 381.

To bring a claim for the loss of a steamboat within this section, it must be shown: First, that the boat was in the military service either by impress-

cost or contract; second, that the loss occurred while the boat was actually employed in such service; third, that it was caused by an unavoidable accident, and not through any fault or negligence on the part of the owner; fourth, that the case is not one wherein the risk was agreed to be incurred by the owner. (1875) 14 Op. Atty. Gen. 536.

Proof of loyalty. It is not the duty of the accounting offices of the Treasury to require of claimants proof of loyalty. (1877) 15 Op. Atty. Gen. 652.

Jurisdiction and authority of Third Auditor and awards made by him.—An award made by the Third Auditor in favor of the owner of a vessel taken by the Government under a contract must be deemed to be an award on the contract, and not a "judgment" under these acts. Bogert v. U. S. (1866), 2 Ct. Cl. 130.

If an award by the Third Auditor for a vessel destroyed in the military service of the United States under this act is a "statutory judgment" which may be set up as an estoppel, it is in the nature of a record, and can not be proved by parol. Bogert v. U. S. (1867), 3 Ct. Cl. 18.

The Third Auditor has exclusive jurisdiction over the accounts and claims for horses and other property destroyed in the military service, under act of Jan. 18, 1837. (1842) 4 Op. Atty. Gen. 16.

The act of Congress does not confer upon the auditor a general power of revision over all the accounts of the claimant, and over all payments allowed to him for forage, for other horses than the one dead, lost, or abandoned. (1858) 9 Op. Atty. Gen. 151.

The Third Auditor, in adjusting, under this act, a claim for the value of a horse lost in the service of the United States, has the right to go behind the settlement of the paymaster after the second comptroller's approval thereof. Id.

A claim for the value of a vessel seized jure belli at New Orleans, upon the capture of that city by the United States naval forces, turned over to the Army, and afterwards captured by the rebels, is not within the jurisdiction conferred upon the Third Auditor by this act. (1865) 11 Op. Atty. Gen. 378.

The Third Auditor and Second Comptroller have no power, since the passage of act of Feb. 21, 1867, to settle a claim for the value of a barge owned by residents of New Orleans, which was lost in 1864, in the Mississippi River, while under impressment by the military authorities. (1868) 12 Op. Atty. Gen. 362.

This act placed all claims presented under it within the exclusive jurisdiction of the Third Auditor. It made him the sole tribunal and his awards, called judgments, final. (1882) 17 Op. Atty. Gen. 352.

341. Claims for horses lost by capture.—The two preceding sections shall extend to all cases of the loss of horses by any officer, non-commissioned officer, or private in the military service of the United States, while in the line of his duty in such service, by capture by the enemy, whenever it shall appear that such officer, non-commissioned officer, or private was ordered by his superior officer to surrender to the enemy, and such capture was made in pursuance of such surrender. *R. S. 3484.*

The two preceding sections mentioned in this act were R. S. 3482, 3483, ante, pp. 240.

342. Claims for condemned horses and equipage.—Whenever any horse is condemned by a board of officers, on account of his unfitness for service, in consequence of the Government failing to supply forage, such horse and his equipage shall be allowed and paid for: *Provided*, It shall be proven, by satisfactory evidence, whether oral or written, that the condemned horse and the equipage were turned over to a quartermaster of the Army, whether any receipt therefor was given and produced, or not. *R. S. 3485.*

343. Payment to guardian for horse, etc., lost by minor in military service.—When any minor, engaged in the military service of the United States, and provided with a horse or equipments, or with military accouterments, by his parent or guardian, dies, without paying for the property, and the same is lost, captured, destroyed, or abandoned, in the manner before mentioned, such parent or guardian shall be allowed pay therefor, on making satisfactory proof, as in other cases, and the further proof that he is entitled thereto by having furnished the same. *R. S. 3486.*

344. Payment to civilian for loss of horse, etc., furnished to a person in military service.—When any person other than a minor, engaged in the military service, is provided with a horse or equipments, or with military accouterments, by any person, being the owner thereof, who takes the risk of such horse, equipments, or military accouterments, on himself, and the same is lost, captured, destroyed, or abandoned, in the manner before mentioned, such owner shall be allowed pay therefor, on making satisfactory proof, as in other cases, and the further proof that he is entitled thereto, by having furnished the same, and having taken the risk on himself. *R. S. 3487.*

345. Fund for payment for lost military property.—There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same respectively; and such appropriations shall be deemed permanent annual appropriations. * * *

Horses and other property lost in military service:

To pay for horses, mules, oxen, wagons, carts, sleighs, harness, steamboats, and other vessels, railroad-engines and railroad-cars, killed, lost, captured, destroyed, or abandoned while in the military service under the provisions of Title, "DEBTS DUE BY OR TO THE UNITED STATES." *R. S. 3689.*

346. Claims for arms and ammunition taken from civilians.—That the sum of $7,800, or so much thereof as may be necessary, is hereby appropriated, to be immediately available and to remain available until June 30, 1920, for payment of claims on account of loss of firearms and ammunition taken by the United States troops from civilians in the State of Colorado during the labor strike troubles which occurred in the calendar year 1914: *Provided*, That settlement of such claims shall be made by the Auditor for the War Department upon the approval and recommendation of the Secretary of War, where the amount of the loss has been ascertained by the War Department, and payment thereof will be accepted by the owners of the property in full satisfaction of such claims. *Act of Oct. 22, 1919 (41 Stat. 295).*

347. Claims for pay of accountable line officers.—The Second Auditor shall audit and settle the accounts of line officers of the Army, to the extent of the pay due them for their services as such, notwithstanding the inability of any such line officer to account for property intrusted to his possession, or to make his monthly reports or returns, if such Auditor shall be satisfied by the affidavit of the officer or otherwise that the inability was caused by the officer's having been a prisoner in the hands of the enemy, or by any accident or casualty of war. *R. S. 278.*

The designation of the Second Auditor was changed to Auditor for the War Department by sec. 3, act of July 31, 1894.

348. Claims of volunteers who served during Civil War or Spanish War.—No claim for arrears of pay, bounty, or other allowances growing out of the service of Volunteers who served in the Army of the United States during the Civil War shall be received or considered by the accounting officers of the Treasury unless filed in the office of the Auditor for the War Department on or before December thirty-first, nineteen hundred and twelve: * * *

No claim for arrears of pay, bounty, or other allowances growing out of the service of Volunteers who served in the Army of the United States during the War with Spain shall be received or considered by the accounting officers of the Treasury unless filed in the office of the Auditor for the War Department on or before December thirty-first, nineteen hundred and fourteen. *Act of Dec. 22, 1911 (37 Stat. 49).*

349. Attorneys' fees for collecting arrears of pay.—* * * *Provided*, That in the settlement of claims of officers, soldiers, sailors, and marines, or their representatives, and all other claims for pay and allowances within the jurisdiction of the Auditor for the War Department or the Auditor for the Navy Department, presented and filed hereafter in which it is the present practice to make deductions of attorneys' fees from the amount found due, no deductions of fees for attorneys or agents shall hereafter be made, but the draft, check, or warrant for the full amount found due shall be delivered to the payee in person or sent to his bona fide post-office address (residence or place of business). *Act of June 6, 1900 (31 Stat. 637).*

* * * *Provided*, That hereafter no agent or attorney shall demand or accept, for his services in connection with the prosecution of claims for arrears of pay, bounty, or other allowances due on account of the services during the Civil War of an officer or enlisted man of the Regular or Volunteer Armies of the United States, filed after the passage of this Act, any fee for any services rendered in connection therewith. Whoever shall violate this provision upon conviction shall be punished by a fine of not exceeding five hundred dollars or imprisonment for a period not exceeding six months, or both, and shall be disbarred from practice before the Treasury Department. *Act of Dec. 22, 1911 (37 Stat. 79).*

350. Evidence of honorable discharge to be returned.—In all cases where it has become necessary for any officer or enlisted man of the Army to file his evidence of honorable discharge from the military service of the United States, to secure the settlement of his accounts, the accounting officer with whom it has been filed shall, upon application by said officer or enlisted man, deliver to him such evidence of honorable discharge; but his accounts shall first be duly settled, and the fact, date, and amount of such settlement shall be clearly written across the face of such evidence of honorable discharge, and attested by the signature of the accounting officer before it is delivered. *R. S. 282.*

351. Claims under exhausted or lapsed appropriations.— * * * And it shall be the duty of the several accounting officers of the Treasury to continue to receive, examine, and consider the justice and validity of all claims under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of said section that may be brought before them within a period of five years. And the Secretary of the Treasury shall report the amount due each claimant, at the commencement of each session, to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration: *Provided*, That nothing in this act shall be construed to authorize the re-examination and payment of any claim or account which has been once examined and rejected, unless reopened in accordance with existing law. *Sec. 4, act of June 14, 1878 (20 Stat. 130).*

See notes to act June 20, 1874, sec. 5, ante, 231.

352. Revision of settlement.— * * * Any person accepting payment under a settlement by an Auditor shall be thereby precluded from obtaining a review of such settlement as to any items upon which payment is accepted; but nothing in this act shall prevent an Auditor from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. When suspended items are finally settled a revision may be had as in the case of the original settlement. Action upon any account or business shall not be delayed awaiting applications for revision: *Provided*, That the Secretary of the Treasury shall make regulations fixing the time which shall

expire before a warrant is issued in payment of an account certified as provided in sections seven and eight of this act. * * * *Sec. 8, act of July 31, 1894* (*28 Stat. 207*).

353. Assignments of claims; Powers of attorney.—All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. *R. S. 3477.*

Notes of Decisions.

Nature and purpose of act.—The sole object of the statute is to protect the Government, not the claimant, and the statute would utterly fail in its sole object if powers of attorney and assignments were irrevocable and enforceable by the courts. Milliken *v.* Barrow (C. C. 1895), 65 Fed. 888, 892; affirmed (1896), 74 Fed. 612, 20 C. C. A. 559. See 16 Ct. Cl. 238.

This section was intended solely for the protection of the Government and its officers during the adjustment of claims, and, after allowance, the protection may be invoked or waived, as such officers in their judgment deem proper. McGowan *v.* Parish (1915) 237 U. S. 285, 294; Lay *v.* Lay (1918), 248 U. S. 24.

Construction and validity of act.—The provision in that section making void "all powers of attorney, orders, or other authorities for receiving payment" of any claim upon the United States, or any part or share thereof, is not limited to powers of attorney, etc., relating to claims which are to be paid by Treasury warrant, but extends to those which relate to claims otherwise payable. (1879) 16 Op. Atty. Gen. 261.

The word "assigns" in the said acts of 1894 (28 Stat. 342) and 1896 (29 Stat. 208) is intended to point out the party or parties who took over by formal assignment all rights to or interest in a contract, or such measure of rights and interest as carve out a complete share in the undertaking itself, with all its risks and incidents. The assignee recognized must take in accordance with the method and formalities provided by this section. (1898) 22 Op. Atty. Gen. 156.

Operation and effect—In general.—The transfer of a portion of a claim by means of a bill of exchange is in violation and evasion of this section and void. Peirce *v.* U. S. (1865), 1 Ct. Cl. 270; judgment affirmed. The Floyd Acceptances (1868), 7 Wall. 666, 19 L. Ed. 169.

The practical effect of the law as interpreted is that assignments of claims against the Government, whatever be the consideration, are mere naked powers of attorney, revocable at pleasure, in no case obligatory upon the Government. Lopez *v.* U. S. (1889), 24 Ct. Cl. 84.

As between the parties to it, an assignment of a claim against the Government for property taken during the Civil War, or of the right to a fund appropriated by Congress to satisfy a judgment therefor, is not made void by R. S. 3477. Lay *v.* Lay (1918), 248 U. S. 24.

Under this section assignments of claims against United States Government, unless made in accordance with statute, held void. Porter *v.* Title Guaranty & Surety Co. (1912), 121 P. 548, 21 Idaho, 312.

Creditors of bankrupts.—Where petitioner furnished automobile parts to bankrupt, to be used in filling a contract with Government under an agreement that all warrants received by bankrupt under its contract should be indorsed by it as agent and delivered to petitioner agreement held void and such warrants received by trustee inure to benefits of general creditors. In re Hudford Co. (C. C. A. 1919), 257 Fed. 722.

A creditor, who sold boilers to the bank not with the understanding that they were to be used in a vessel being built under contract for the United States, held to have no lien upon the boilers, nor upon the contractor its proceeds, in view of this section, making void the assignment of any interest in Government contracts. In re Waters-Colver Co (D. C. 1913), 206 Fed. 845.

Acts of officers as affecting operation of act.—Under this section and R. S. sec. 3737, post, 777, a person having a contract with the United States can not transfer or assign any part of the money coming to him thereunder so as to affect any one but himself, and the acceptance by a disbursing agent of the United States of an order upon such fund has no validity against third persons. Greenville Sav. Bank v. Lawrence (1913), 76 Fed. 545, 22 C. C. A. 646, affirming decree Lawrence v. U. S. (C. C. 1896), 71 Fed. 228.

No officer of the Government can do any act which will take assignments and powers of attorney out of the statute. Hitchcock v. U. S. (1892), 27 Ct. Cl. 185.

Necessity of strict compliance.—Assignment of claim against the United States held void as between assignor and assignee as well as between all other parties, for failure to comply absolutely with this section. Manhattan Commercial Co. v. Paul (1916), 111 N. E. 76, 216 N. Y. 481.

Assignments or powers of attorney in consideration of services in collecting claims.—A contract by a claimant, employing an attorney to prosecute a claim against the United States in the Court of Claims on a contingent fee of 50 per cent of the amount recovered, and stipulating that the fee shall be a lien on any draft issued by the Government in payment of the claim, is not an assignment of a claim against the United States within the meaning of R. S. 3737, post 777, of this section. Roberts v. Conmal (1895), 24 App. D. C. 551.

Subcontracts let by contractor.—That a contractor for doing certain work for the Government may make subcontracts, in the execution of the work undertaken, is nowhere forbidden; and neither this section nor R. S. 3737, post, 777, applies to such case. Manning v. Ellicott (1896), 9 App. D. C. 71.

Assignment of claims after issuance of draft in payment thereof. When it is settled by the decree of court of competent jurisdiction that the holder of certain treasury drafts has no right or title to them nor to the warrants or claims which they represent, and that such claims have been duly assigned to the present claimant and that the drafts have never been indorsed by the payees, a prima facie right of recovery is established, though the drafts be still outstanding. Kinney v. U. S. (1884), 19 Ct. Cl. 671.

Semble a claim against the Government may be duly assigned, though the treasury draft drawn therefor never reached the claimant and at the time of the assignment was in the hands of a third person. Id.

Payment to a trustee by agreement between parties.—There being a question as to the assignment of a contract with reference to the improvement of the harbor at Brunswick, Ga., under the river and harbor acts of 1894 (28 Stat. 342), and 1896 (27 Stat. 208), all parties may execute an agreement in the nature of a trust to embody a release to the United States as to a present payment and an agreement to release as to future payments, and providing for payment to a trustee for disbursement. (1898) 22 Op. Atty. Gen. 156.

Custom and usage as affecting assignments.—No proof of a custom can be received to show that claims against the United States, such as the so-called Montana militia vouchers, can be transferred by mere delivery. Creighton v. Black (1876), 2 Mont. 354.

Effect of payments or delivery of warrants to assignees or attorneys in fact made in disregard of act.—Where a contractor with the Quartermaster's Department failed to perform certain work, and an arrangement was effected whereby his bondsmen should take charge of and complete the work, the contractor executing and delivering to them a power of attorney, by which they were authorized to receive and receipt for the money due on the contract, advised, that the Department may recognize this power of attorney, and that payment to said bondsmen upon their receipted vouchers thereunder will discharge the Government. (1889) 19 Op. Atty. Gen. 239; (1893) 20 Op. Atty. Gen. 643.

This section is for the protection of the Government, and under it the Government has no concern in the disposition of a warrant after placing it in the hands of one authorized to receive it by the claimant. Farmers' Nat. Bank v. Robinson (1898), 53 Pac. 762, 59 Kans. 777.

Claims within purview of statute In general. Every claim against the United States, however raised, of whatever nature it may be, and wherever and whenever presented, is embraced in this statute. U. S. v. Gillis (1877), 95 U. S. 407, 413, 24 L. Ed. 503.

A voluntary assignment of naked claims against the Government for the purpose of suit or in view of litigation or otherwise can not be countenanced, and this statute embraces every claim or right to demand

money from the United States, however arising, of whatsoever nature, and whenever and wherever prosecuted. Emmons *v.* U. S. (C. C. 1911) 189 Fed. 414.

The provisions of this section do not apply to undisputed claims, or any claim about which no question is made as to its validity or extent. (1883) 17 Op. Atty. Gen. 545.

An assignment of an indebtedness admittedly due by the United States is not prohibited by this section. (1894) 21 Op. Atty. Gen. 65, approving (1881) 17 Op. Atty. Gen. 545.

This section applies only to such claims as require allowance by some accounting officer, an ascertainment of the amounts due thereon, and the issuance of a warrant for their payment. (1899) 22 Op. Atty. Gen. 637.

An assignment of a claim against the United States for work unperformed, with power to certain trustees to prosecute the unfinished work, and to collect moneys that may thereafter become due, confers no rights on the assignee, as against the United States, in view of this section. American Surety Co. *v.* U. S. (1898), 24 South. 388, 76 Miss. 289.

Claims pending before courts or commissions.—A commission called together, in pursuance of treaty stipulations or otherwise, to settle and adjust disputed claims, with a view to their ultimate payment and satisfaction, is, for that purpose, a quasi court; and there is nothing illegal, immoral, or against public policy in an agreement by an attorney at law to present and prosecute a claim before it, either at a fixed compensation, or for a reasonable percentage upon the amount recovered, and such agreement is not within this section, as it does not constitute a lien on funds. Wright *v.* Tebbitts (1875), 91 U. S. 252, 253, 23 L. Ed. 320.

This section applies to suits in the Court of Claims established by act 1855, incorporated into R. S. 1059. Emmons *v.* U. S. (C. C. 1891), 48 Fed. 43, 44.

Claims not payable by warrant.—The only cases where assignments of any claim on the United States or any part thereof are recognized is where a warrant has already been issued, and, where there are any cases where the claim can not be paid by a warrant, they do not come within the exception, but are affected by the general language. Hager *v.* Swayne (1893), 13 Sup. Ct. 841, 843, 149 U. S. 242, 37 L. Ed. 719.

Moneys due on contracts.—Under this section and R. S. 3737, post, 777, an assignment by a public contractor of a claim against the United States for money accruing on a building contract was void, both as against the United States, the contractor's surety, the laborers, and materialmen. Henningsen *v.* U. S. Fidelity & Guaranty Co. (1906), 143 Fed. 810, 74 C. C. A. 484; decree affirmed, (1908), 28 Sup. Ct. 389, 208 U. S. 404, 52 L. Ed. 547.

Claims for rent.—Where a demand for rent due from the United States is assigned as security before the claim has been allowed, the assignee may assert his right against persons named in warrants subsequently issued by the Treasury therefor, and against a mortgagee of the premises not entitled to the rents, notwithstanding this section, as the object of the section is merely to prevent frauds on the Treasury. Freedman's Sav. & Trust Co. *v.* Shepherd (1888), 8 Sup. Ct. 1250, 1256, 127 U. S. 494, 32 L. Ed. 163.

Pay accounts of Army officers.—This section does not forbid the transfer or assignment of their pay accounts by Army officers after the same become due. Such accounts may be lawfully transferred or assigned when due, the regulations of the Army relating to this subject (par. 1349, art. XLV, Regulations of 1863) being complied with. (1877) 15 Op. Atty. Gen. 271. (Present provision is found in par. 1258, Army Regulations of 1913.)

Vouchers.—The sale of a quartermaster's voucher by a contractor to a third person works a transfer of his claim against the Government, or of so much of it as may be represented by the voucher. But such vouchers are not in any sense negotiable paper, and the purchaser will take them subject to all the equities that may exist against the contractor. Nevertheless they are evidences of indebtedness sufficient in themselves to support prima facie an action. Lawrence *v.* U. S. (1872), 8 Ct. Cl. 252.

The assignment of a voucher is void Harris *v.* U. S. (1892), 27 Ct. Cl. 177.

An approved account or voucher for transportation performed for the Navy Department by F. & C., contractors, was issued by the chief of the Bureau of Steam Engineering in favor of and delivered to H. & Son, who were brokers for F. & C. The latter claim that the amount appropriated by act June 14, 1878, to pay for the transportation, should be paid to them, and not to H. & Son. Held, that the account or voucher issued as aforesaid is not a negotiable paper; that a transfer or assignment thereof would be void under this section; that the appropriation was made for the purpose of paying F. & C., and not any alleged claim of H. & Son; and that the Navy Department may treat such approved account or voucher as a nullity, and issue an approved account in favor of F. & C. and transmit it to them directly. (1878) 16 Op. Atty. Gen. 191.

ight of assignor to repudiate assign-
t.—Powers of attorney to collect claims
a the United States, and voluntary as-
ments of such claims, are revocable at
i prior to the payment of the claims by
G vernment. Milliken v. Barrow (C.
1896) 82 Fed. 888, 891, affirmed (1896)
Fed 612, 20 C. C. A. 559.
There an assignment of a claim against
Government is void under this section,
assignor may repudiate the assignment
ny time before actual payment, and
g an action in his own name. Belt's
ns v. U. S. (1879), 15 Ct. Cl. 92.
L having a contract with the Engineer
artment for dredging in the Occoquan
., by the terms of which the compensa-
named therein was to be paid to him
m time to time, gave to I. a power of at
ey (declared in the instrument to be
vocable), "to demand, receive, and re-
t for, to the proper disbursing officer of
United States, all moneys, warrants,
fts, vouchers, and checks that may be
e due and payable to me (S.) from the
ed States for work," etc. Subsequently
notified the engineer officer in charge that
revoked the power of attorney. Held,
t by force of this section said power of
orney was without legal effect with re-
t to the claim of the contractor against
United States for his compensation;
he might at any time revoke it, and
n revoked it is not for the officers of
United States to consider whether the
ocation was rightful or wrongful. (1879)
p. Atty. Gen. 261.
power of attorney given to collect a
m against the Government, with an
reement that the donee of the power shall
ive "a sum equal to 50 per cent of the
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wer coupled with an interest, and is rev-
ble, and, such power having been given
firm, one of the members of which has
d died, whereby the firm became dis-
ved, such power can not be executed by
surviving members, and power should
not be recognized. (1890) 19 Op. Atty.
Gen. 483.

Rights of assignee under invalid assignment against persons receiving fund.—This section is intended only to protect the Government, and does not affect the rights of an assignee of a fund due and to become due a government contractor, as against one who subsequently receives such fund with notice of the prior assignment. York v. Conde (1892), 66 Hun, 316, 20 N. Y. Supp. 961.

Assignments specifically describing a claim against the United States may pass it, or portions of it, to those who pay a value for it, and the first in order of time is first in right. Appeal of Mann (1852), 18 Pa. (6 Harris) 249.

Effect as between parties to assignment.—Under this section all assignments of claims on the United States are void in law and equity, and can not be enforced between the parties. Wood's Ex'rs v. Dialogue (Pa. 1881), 3 Leg. Int. 260.

This section was enacted to protect the Government, and not the parties to the assignment, so that an assignment of shipbuilding contracts with the Federal Government, with power to collect the payments to become due thereunder, being valid between the parties, was not made invalid by the statute, where the Government voluntarily deposited the money in court to be disposed of by the parties upon completion of the contracts. S. H. Hawes & Co. v. Wm. R. Trigg Co. (1909), 65 S. E. 538, 110 Va. 165.

Right of set-off as affected by assignment.—The right of set off is not affected by an assignment of the claim. U. S. v. Harris (1897), 77 Fed. 821, 23 C. C. A. 483.

Effect of assignment as to rights of a surety.—The equity of a surety of a contractor held superior to an assignment. Henningsen v. United States Fidelity & Guaranty Co. (1908), 28 Sup. Ct. 389, 208 U. S. 404, 52 L. Ed. 547; Id (1906), 143 Fed. 810, 813, 74 C. C. A. 484.

34. Stamp tax not imposed on claim papers.—* * * This subdivision shall not apply to any papers necessary to be used for the collection of claims from the United States or from any State for pensions, back pay, bounty, or for property lost in the military or naval service, * * * *Par. 12, sec. 1107, act of Nov. 21, 1919 (40 Stat. 1157).*

35. Set-off.—That when any final judgment recovered against the United States or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set off, and discharges his judgment or an

amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff, or claimant, denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment, or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amounts so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary with six per cent interest, thereon for the time it has been withheld from the plaintiff. *Act of Mar. 3, 1875 (18 Stat. 481).*

Notes of Decisions.

Operation and effect in general.—The salary of a judge appointed under authority of an act of Congress, which has also fixed his compensation and appropriated money for its payment, is not a claim against the Government, but is a demand fixed by law; an unadjudicated cross-claim on behalf of the Government can not be asserted against it. Smith v. Jackson (C. C. A. 1917), 241 Fed. 747; affirmed (1918), 246 U. S. 388.

The authority to settle claims due to and from the United States by setting one off against the other, as provided in this section, is thereby conferred exclusively on the Secretary of the Treasury, and not on any court. U. S. v. Griswold (D. C. 1887), 30 Fed. 604.

The right of set-off where the Government is both debtor and creditor is established and provided for by R. S. 1766, post 1610, and by this act, but it exists independently of those enactments and is founded upon R. S. 236, ante, 329. Taggart v. U. S. (1881), 17 Ct. Cl. 322.

It is the duty of the accounting officers in proper cases to set off the demand of the United States against the moneys due its debtor. George Howes & Co. v. U. S. (1889), 24 Ct. Cl. 170. See also Schooner Henry v. U. S. (1900), 35 Ct. Cl. 393.

The Treasury has authority to set off an indebtedness due from a claimant to the Government against a judgment recovered by him. Labadie v. U. S. (1898), 33 Ct. Cl. 476.

Nature of remedy.—This act does not create a lien on the money due to the claimant in favor of the Government. U. S. v. Ennis (C. C. 1904), 132 Fed. 133.

Set-off differs from a lien, inasmuch as the former belongs exclusively to the remedy, and is merely a right to insist, if the party thinks proper to do so, when sued by his creditor, on a counter demand, which can only be enforced through the medium of judicial proceedings; whilst the latter is, in effect, a substitute for a suit. (1834) 2 Op. Atty. Gen. 663.

Right of executive officers to reexamine judgment or set off debits litigated in the suit.—This statute gives the accounting officers of the Government no authority to reexamine the judgment, but provides a way of payment and satisfaction if the creditor shall at the time of the presentation of his judgment be a debtor of the United States for anything except what is included in the judgment, which is conclusive as to everything it embraces. U. S. v. Jones (1886), 7 Sup. Ct. 283, 285, 119 U. S. 477, 30 L. Ed. 440.

This act gave the accounting officers of the United States no authority to reexamine the judgment, but merely to offset it with another claim, and hence the Treasury had no appellate jurisdiction, but that the same was vested in the United States Supreme Court. Id.

Where the Government, as defendant, has sought to use an independent demand against the claimant by way of set-off, the Secretary of the Treasury can not afterward use it to reduce a judgment recovered by the claimant; but where the Government did not set up in the suit its independent cross-demand, the Secretary may assert it as a set-off against the judgment in the manner provided by this act. In the former case his action would be an unconstitutional assumption of judicial power; in the latter, constitutional and legal. Bonnafon v. U. S. (1878), 14 Ct. Cl. 484.

Conclusiveness of set-off acquiesced in by creditor.—Where a judgment creditor of the Government elects to allow a cross-de-

man[illegible] or set-off asserted by the Secretary of the Treasury in the manner provided by this act, he can not afterwards maintain an action on his judgment for the balance so [illegible]. Bowman v. U. S. (1878), 14 Ct. Cl. 484.

Failure to withhold money due contractor as affecting sureties on contractor's bond. The failure of the Treasury Department to withhold any part of a payment due to a Government contractor on account of a claim of the United States against him for a prior breach of the contract as authorized and required by this act, does not release the sureties on the contractor's bond from liability for such claim. U. S. v. Ennis (C. C. 1904), 132 Fed. 153.

Necessity of suit or action to enforce or preserve right of set-off.—A judgment against the United States can neither be enforced by process nor transferred so as to prevent the Government from setting off against it any cross-demand against the judgment plaintiff, especially in view of this act, expressly requiring such set-off. Hence there is no necessity nor ground for the issuance of a preliminary injunction or restraining order by a court of equity, in a suit by the United States to set off cross judgments, to prevent the transfer of his judgment by the defendant. Teller v. U. S. (1901), 113 Fed. 463, 51 C. C. A. 297.

Amount to be withheld.—If there be due the claimant any sum over and above that which is necessary to make good the debt, it ought not to be retained, but should be paid to him, or to his lawful assignee. (1844) 4 Op. Atty. Gen. 316.

Debts and claims to set-off in general.—Where a disbursing agent of the Government is in apparent default in respect to the moneys intrusted to him, and there be sufficient due him from the Government to make good the deficiency, it is proper thus to satisfy the claim for such dues. (1844) 4 Op. Atty. Gen. 316.

Where the same person is contractor for two articles under separate contracts, and fulfills one and fails in the other, and presents his account to the Treasury for settlement, the accounting officer may set off, in the adjustment, such amount as may be due from him to the Government upon his claim against it. (1845) 4 Op. Atty. Gen. 380.

Where a contractor for supplies for the Navy, who was bound in separate contracts to furnish sugar and tea in stipulated quantities during a fiscal year, made default in respect to the sugar, but furnished the tea by causing it to be shipped to the naval storekeeper by a firm in New York, to whom the contractor indorsed over bills for the same made out in his name, payment of which has been refused on account of the contractor's defalcation on the contract for sugar, held, that the sale of the tea was made by the firm to the contractor, and not to the Government, and that the amount due therefor may be withheld and set off as against the damages sustained by the Government on account of the nonfulfillment of the other contract. (1847) 4 Op. Atty. Gen. 551.

356. Reopening settled accounts.—Nothing in this Act shall be construed to authorize the re-examination and payment of any claim or account which has heretofore been disallowed or settled. *Sec. 23, act of July 31, 1894 (28 Stat. 211).*

357. Recovery by the auditors of debts due to the United States. • • • The Auditors, under the direction of the Comptroller of the Treasury, shall superintend the recovery of all debts finally certified by them, respectively, to be due to the United States. • • • *Sec. 5, act of July 31, 1894 (28 Stat. 206).*

358. Priority of debts. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. *R. S. 3466.*

359. Liability of executors, etc. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for

which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid. *R. S. 3467.*

360. Priority of sureties.—Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon. *R. S. 3468.*

361. Compromise of claims.—Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws. *R. S., 3469.*

362. Notice of deficiency in accounts.—That thereafter, whenever any deficiency shall be discovered in the accounts of any official of the United States, or of any officer disbursing or chargeable with public money, it shall be the duty of the accounting officers making such discovery to at once notify the head of the Department having control over the affairs of said officer of the nature and amount of said deficiency, and it shall be the immediate duty of said head of Department to at once notify all obligors upon the bond or bonds of such official of the nature of such deficiency and the amount thereof. Said notification shall be deemed sufficient if mailed at the post-office in the city of Washington, District of Columbia, addressed to said sureties respectively, and directed to the respective post-offices where said obligors may reside, if known; but a failure to give or mail such notice shall not discharge the surety or sureties upon such bond. *Sec. 1, act of Aug. 8, 1888 (25 Stat. 387).*

363. Recovery from an accountable officer.—Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account, the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per centum per annum, from the time of receiving the money until it shall be repaid into the Treasury. *R. S. 3624.*

The First Comptroller of the Treasury was designated Comptroller of the Treasury by the Dockery Act of July 31, 1894, sec. 4.

Notes of Decisions.

Liability of officer.—Where money of the United States had been received by one public agent from another public agent, whether received in an official or private capacity, but received to the use of the United States, the United States may main-

tain an action against the receiver therefor. U. S. v. Buford (1830), 3 Pet. 12, 29, 7 L. Ed. 585.

The United States can not recover, as paid under mistake of law, money paid as salary to one who was, at least de facto, an officer. Badeau v. U. S. (1889), 9 Sup. Ct. 573, 130 U. S. 439, 32 L. Ed. 997.

Defendant was acting paymaster in the Army at the Rock Island Arsenal. The pay rolls were made up by a clerk appointed by the commanding officer, and, after being approved by such officer, were delivered to defendant for payment. His requests for disbursements on account of such payments were allowed by the department. But it was subsequently discovered that the clerk, in making up the pay rolls, had entered after the names of certain workmen, as due them for wages, larger sums than were actually due, and by some means had secured for himself the excess payments. After such discovery, and the trial and conviction of the clerk, defendant's accounts were, after 10 years' delay, restated, and suit was brought against him to recover the amount of the alleged shortage thereby shown. He was ignorant of the frauds, and received no benefit from the same. The evidence did not show with any certainty whether the clerk abstracted the money from the pay envelopes before it had been disbursed by defendant, or secured it after its disbursement in accordance with the pay rolls as approved, through collusion with the workmen or otherwise. Held, that the case was insufficient to charge defendant with liability. U. S. v. Butler (C. C. 1902), 114 Fed. 582.

A public officer, who receives money in advance for the contingencies of his office, is a receiver of public money within this act. U. S. v. Lee (C. C. 1824), Fed. Cas. No. 15,585.

Prima facie case.—In an action against an Army officer charged with accountability for supplies, the certificate of an auditor of the Treasury Department held to make a prima facie case. U. S. v. Da Perow (D. C. 1913), 208 Fed. 895.

Notice of action.—A requirement of notice to account as a prerequisite to suit against a defaulter contained in the act of 1795 held to have been abrogated. Smith v. U. S. (1831), 5 Pet. 292, 299, 8 L. Ed. 130.

Claims by officers.—No claim of a public officer for a credit can be admitted on a trial unless presented to and disallowed by the accounting officers of the Treasury. U. S. v. Duval (D. C. 1833), Fed. Cas. No. 15,013.

Liability for interest.—The Government is entitled to interest on bonds given in liquidation of an account against an officer. U. S. v. Zantzinger (C. C. 1813), Fed. Cas. No. 16785.

Sureties are not answerable for interest beyond the penalty of the bond, except such as accrued after notice of a fault of the principal. U. S. v. Hills (C. C. 1879), Fed. Cas. No. 15369.

The rule applied that in an action by the United States against a disbursing officer to recover public funds which were abstracted from defendant's possession without his knowledge and from which he received no benefit, where no demand is proved interest is not recoverable prior to the date of the writ. U. S. v. Butler (C. C. 1902), 114 Fed. 582.

364. Transcripts from the records of the Treasury Department admitted as evidence.—When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the Department, or, when the the suit involves the accounts of the War or Navy Department, certified by the Auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register, or by such Auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court. *Provided*, That where suit is brought upon a bond or other sealed instrument, and the defendant pleads "non est factum," or makes his motion to the court, verifying such plea or mo-

tion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit. *R. S. 886.*

The transcripts from the books and proceedings of the Department of the Treasury and the copies of bonds, contracts and other papers provided for in section eight hundred and eighty-six of the Revised Statutes shall hereafter be certified by the Secretary or an Assistant Secretary of the Treasury under the seal of the Department. *Sec. 17, act of July 31, 1894 (28 Stat. 210), as amended by sec. 10, act of Mar. 2, 1895 (28 Stat. 809).*

Notes of Decisions.

Construction and operation of statute.—The provision in this section relating to the admission of authenticated copies of bonds, contracts, and other papers, is not restricted to suits commenced under the authority given by this section, but applies to all cases where the evidence is required. U. S. *v.* Lent (C. C. 1825), Fed. Cas. No. 15,593.

This section applies only to suits against persons accountable for public moneys as such and is inapplicable to an action for moneys alleged to have been paid to defendant by the mistake of a Government disbursing officer. U. S. *v.* Radowitz (C. C. 1879), Fed. Cas. No. 16112.

"Person accountable for public money."—A public officer who receives money in advance for the contingencies of his office is a receiver of public money within the meaning of this section. U. S. *v.* Lee (C. C. 1824), Fed. Cas No. 15585.

Admissibility of transcript, in general.—The copy may be strictly accurate, yet if the seal be not affixed or the certificate be defective the paper can not be received as evidence. Smith *v.* U. S. (1831), 5 Pet. 292, 300, 8 L. Ed. 130.

Under the act of March 3, 1797 (similar to this section) bills of exchange and orders for money on the Treasury are made evidence without proof of the handwriting of the drawer. U. S. *v.* Jones (1834), 8 Pet. 375, 382, 8 L. Ed. 979.)

Where, in an action by the United States, a Treasury transcript is produced in evidence by the Government defendant is entitled to the credits given to him in the account, and in claiming those credits he does not waive any objection to the items on the debit side of the account. U. S. *v.* Jones (1834), 33 U. S. (8 Pet.) 387, 8 L. Ed. 983.

A Treasury account which contains credits as well as debits is evidence as well for defendant as the Government when used by the latter; and unless there can be an abandonment of the suit by the Government it has no right to withdraw from the jury any part of the credits relied on by defendant. Id.

A Treasury transcript was admissible in evidence in a suit by the United States against its debtor, though authenticated copies of the receipts which the debtor had given for money did not accompany the transcript. Bruce *v.* U. S. (1854), 17 How. 437, 439, 15 L. Ed. 129.

In a suit upon a disbursing officer's bond transcripts from the books and proceedings of the Treasury Department, certified as required by R. S., sec. 886, were competent evidence, the transcripts, considered as a whole, showing the full account and not mere balances. Moses *v.* U. S. (1897), 17 Sup. Ct. 682, 692, 166 U. S. 571, 41 L. Ed. 1119.

Copies of accounts and papers in the office of the Quartermaster General, certified by the Third Auditor of the Treasury, whose official character is certified to by the Secretary of the Treasury, are admissible in evidence. Thompson *v.* Smith (C. C. 1869), Fed. Cas. No. 13,976.

Requisites and sufficiency of certified account.—In an action by the United States on a bond defendant was entitled to a certified statement of his credits as allowed by the accounting officers, and had a right to claim benefit of them, and the Government had no right to withdraw credits fairly allowed. U. S. *v.* Jones (1834), 8 Pet. 375, 384, 8 L. Ed. 979.

Every transcript of accounts from the Treasury which contains items of payments made to others on the authority of the person charged should have annexed to it a duly certified copy of the instrument which authorizes such payments. Id.

When Treasury transcripts are offered in evidence, although they are not evidence of the indebtedness of the defendant as to money which came into his hands in the course of duty, yet they are so when they arise out of the official transactions of a collector with the Treasury, and are sub-

special copies of his returns. These transcripts need not contain the particular items of each return, and it is sufficient if they state the aggregate amount, and refer to an abstract containing the items. Hoyt v. U. S. (1850), 10 How. 109, 132, 13 L. Ed. 346.

It is not necessary that every account with the delinquent officer and all of every account shall be transcribed as evidence of debts against the delinquent officer; but a statement from the books of the Treasury, duly authenticated to be a copy, may be given in evidence, though a garbled or mutilated statement is not evidence, and the account presented must be complete in itself and give both sides of the account as the same stands on the books. U. S. v. Ames (1873), 19 Wall. 198, 212, 22 L. Ed. 41.

The transcript from the books and proceedings of the Treasury Department must be a transcript of the entire account as it stands on the books, and must include debits as well as credits. Harvey v. U. S. (1899), 97 Fed. 452, 38 C. C. A. 267.

This section contemplates the certification only of a bookkeeper's plain statement of account; and a statement made in a certified copy of a postmaster's account, after showing that a charge was made against him, that it was on account of money paid by him to a laborer "for which no service was performed," is not admissible in evidence against him. Nagle v. U. S. (1905), 145 Fed. 302, 76 C. C. A. 181.

An account duly authenticated from the Treasury Department is not per se evidence of a balance due on a former account, or of items transferred from the account of another person, or of items recharged. U. S. v. Dana (C. C. 1833), Fed. Cas. No. 15,545.

A transcript from the Treasury, which contains sums charged in gross as balances, is not evidence as to such balances. The original items must be stated. U. S. v. Edwards (C. C. 1839), Fed. Cas. No. 15,026; Same v. Hilliard (C. C. 1843), Id. 15,368.

In an action on a bond of a disbursing officer, the sureties may prove that a disputed item of credit claimed has been presented to and disallowed by the proper accounting officers, though the Treasury transcript does not show such fact. U. S. v. Barney (C. C. 1857), Fed. Cas. No. 14,870.

A disbursing officer's accounts may, under some circumstances and in reference to certain matters, be restated by the Treasury, and when so restated may be used to make a prima facie case against him. U. S. v. Baker (C. C. 1902), 114 Fed. 582.

A certified statement of a balance due, and a report thereof to the comptroller, is not such a transcript from the books and proceedings of the Treasury as may be given in evidence under this section. U. S. v. Patterson (D. C. 1829), Fed. Cas. No. 16,008.

The auditor's report of a balance due from a person accountable for public money is not evidence in an action for the debt. Id.

The Government, in an action on the bond of a disbursing agent, conditioned on his accounting for public moneys coming into his hands, and on his not presenting any fraudulent claim, based on the failure of the officer to account for public moneys in his hands, and not based on the fact that he made material misrepresentations as to claims presented for payment, need only prove that there were public funds in the agent's hands in the amount alleged, and that he had failed to pay them over to the Government, which fact might be established by the certified transcript of his account with the Government, as shown by the books of the Treasury Department, made legal evidence by this section. Ewing v. U. S. (Ariz. 1907), 89 Pac. 593.

In an action by the United States on the bond of an alleged delinquent disbursing officer, a duly certified and authenticated transcript from the Treasury Department of the accounts of the disbursing officer, offered in evidence by the United States under this section, is not inadmissible because it fails to include all of the transactions of such official with the United States during his term of service, especially where it is the practice of the accounting officials to keep an account with each disbursing officer for each appropriation made by Congress which is disbursed by him; but only the transactions connected with the appropriations for which such official is alleged to be in default need be shown by such transcript. Goff v. U. S. (1903), 22 App. D. C. 512.

Necessity and sufficiency of certificate.—It is the seal which authenticates the transcript. Smith v. U. S. (1831), 5 Pet. 292, 300, 8 L. Ed. 130.

The account of a delinquent public officer, accountable for public money, as finally adjusted by the proper officers, is not admissible as evidence under this section, where the certificate states that the transcript to which it is annexed is a copy of the original on file; but the certificate should be of such a character as to give the court as well as the parties an assurance that the transcript offered as evidence exhibits any of the final adjustment of the accounts of the delinquent officer as shown not by mere copies of original papers on the files, but upon the books and records of the department. U. S. v. Pinson (1880), 102 U. S. 548, 551, 26 L. Ed. 226.

A certificate attached to transcripts from the books and proceedings of the Treasury Department, by an auditor, authenticated by the seal of the Treasury Department, certifying that they are such transcripts, and that the papers annexed thereto are true copies of the originals on file, and of the whole of such originals, is a full compliance with this section. Moses *v.* U. S. (1897), 17 Sup. Ct. 682, 692, 166 U. S. 571, 41 L. Ed. 1119.

A register of the Treasury Department is not authorized to certify to copies of papers on file in his office. Bleecker *v.* Bond (C. C. 1819), Fed. Cas. No. 1534.

In an action upon an official bond, if the execution thereof is denied, it can not be proved by a copy certified by the Secretary of the Treasury, under R. S. 882, but a copy certified by the Register of the Treasury under the seal of the department, under this section, is sufficient proof of such execution; it being declared to have the same force as the original when duly authenticated or proved in court. U. S. *v.* Humason (C. C. 1881), 8 Fed. 71.

In a suit on the bond of a defaulting Federal officer, transcripts of the Government records, showing a statement of the account of such officer, to be admissible in evidence must be certified to or authenticated as required by this section. Ewing *v.* U. S. (1894), 3 App. D. C. 353.

Based on personal knowledge.—The officers of the Treasury can not certify facts which do not come within their own knowledge. U. S. *v.* Jones (1834), 8 Pet. 375, 380, 8 L. Ed. 979.

Probative effect of transcript.—An account stated in the Treasury Department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under an act of Congress, and such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books, and where moneys come into the hands of an individual, not through the officers of the Treasury, the books of the Treasury do not exhibit the facts, and the claim must be established, not by the Treasury statement, but by the evidence on which that statement was made. U. S. *v.* Buford (1830), 3 Pet. 12, 29, 7 L. Ed. 585.

An account stated at the Treasury Department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of Congress, but such a statement can only be regarded as establishing items for money disbursed through the ordinary channels of the department, where the transactions are shown by its books. U. S. *v.* Jones (1834), 8 Pet. 375, 381, 8 L. Ed. 979.

Treasury settlements are only prima facie evidence of the correctness of the balance certified, but it is as competent for the accounting officers to correct mistakes and restate the balance as it is for the judge to change his decree during the term in which it was entered. Soule *v.* U. S. (1879), 100 U. S. 8, 11, 25 L. Ed. 536.

In a suit brought in the case of a delinquent naval officer, a transcript of the books of the Treasury Department, certified by the Fourth Auditor, and with a certificate annexed, signed by the Secretary of the Treasury, and sealed with the department seal, attesting the official character of the said auditor, is sufficient for all purposes of evidence. U. S. *v.* Bell (1884), 4 Sup. Ct. 498, 499, 111 U. S. 477, 28 L. Ed. 477.

A transcript from the Treasury books charging the balance of a former settlement is not per se evidence warranting a verdict for such balance. U. S. *v.* Laub (C. C. 1836), Fed. Cas. No. 15,568.

The transcript of the books and proceedings of the Treasury Department in relation to the accounts of persons accountable for public money, is prima facie evidence of the facts stated therein, so far as the same are authorized by law. U. S. *v.* Eggleston (C. C. 1877), Fed. Cas. No. 15,027.

Transcripts from the books of the United States Treasury are competent evidence in trials of suits against officers of the United States, brought on their accounts: but they are evidence only, and it is in the discretion of the courts and juries to give them what weight they may deem proper in the trials in which the transcripts are used. U. S. *v.* Ralston (C. C. 1883), 17 Fed. 895.

Though certified copies of the books and accounts of the Treasury Department are by statute made evidence in favor of the Government in actions against alleged delinquents, they are not conclusive, and, if a reply is made thereto, the case is to be decided on all the evidence. U. S. *v.* Young (C. C. 1890), 44 Fed. 168.

The effect of this provision is to require that these transcripts shall be admitted as competent evidence in a trial, to be allowed such weight as the court and jury shall in each cause deem to be due to them. The Rhode Island (D. C. 1883), 17 Fed. 554.

In an action by the United States against an Army officer charged with accountability for supplies, the certificate of the appropriate auditor of the Treasury Department, properly authenticated in accordance with this section showing property unaccounted for by defendant, when introduced in evidence makes a prima facie case for the

Government both as to the property and its [illegible], properly charged at its cost to the Government. U. S. v. Du Perow (D. C. [illegible]) 206 Fed. 895.

Under this section the transcript does not necessarily make a prima facie case in favor of the Government. Dennis v. U. S. (1904), 52 Pac. 353, 5 Ariz. 318.

Impeachment.—A defendant, sued by the Government, may impeach evidence received under this section, and, under proper circumstances of alleged fraud, the court in its discretion may require the production of the original instrument. U. S. v. Jones (1834), 8 Pet. 375, 382, 8 L. Ed. 979.

Certificate.—A copy of a bond given by a public officer, certified under seal of the Treasury Department by an acting secretary of the Treasury, is admissible in evidence in a suit by the United States on such bond, under this section. Laffan v. U. S. (1903), 122 Fed. 333, 58 C. C. A. 495.

365. Distress warrant issued against delinquent officer.—Whenever any collector of the revenue, receiver of public money, or other officer who has received the public money before it is paid into the Treasury of the United States, fails to render his account, or pay over the same in the manner or within the time required by law, it shall be the duty of the First Comptroller of the Treasury to cause to be stated the account of such officer, exhibiting truly the amount due to the United States, and to certify the same to the Solicitor of the Treasury, who shall issue a warrant of distress against the delinquent officer and his sureties directed to the marshal of the district in which such officer and his sureties reside. Where the officer and his sureties reside in different districts, or where they, or either of them, reside in a district other than that in which the estate of either may be, which it is intended to take and sell, then such warrant shall be directed to the marshals of such districts, respectively. *R. S. 3625.*

* * * Section thirty-six hundred and twenty-five of the Revised Statutes is amended by substituting the words "proper Auditor" for the words "First or Second Comptroller of the Treasury" * * * *Sec. 4, act of July 31, 1894 (28 Stat. 206), amending R. S. 3625.*

Notes of Decisions.

Validity and operation of statute in general.—Congress has authority to provide for the collection from its officers of public revenues of which they are in default of payment by the issuance of a warrant of distress, by the Solicitor of the Treasury directing a levy on the property of such officer in default and his sureties. Murray's Lessee v. Hoboken Land & Improvement Co. (1855), 59 U. S. (18 How.) 272.

The auditing of the accounts of a collector of customs, the ascertainment of the balance due, and the issuance of a warrant of distress under act May 15, 1820, are not judicial acts, and the act is not invalid as vesting judicial acts in executive officers of the Government. Id.

The summary proceedings authorized by the act were designed to secure the interests of the Government, in cases where the ordinary process of law would be inadequate; to provide for such emergencies the Treasury Department is vested with extraordinary powers and to guard against the abuse of which the remedy by injunction is provided. U. S. v. Nourse (1832), 6 Pet. 470, 492, 8 L. Ed. 467.

Summary proceedings, being statutory, in derogation of common law, must conform strictly to the statute, and the record must affirmatively show a compliance therewith. U. S. v. Ingate (C. C. 1891), 48 Fed. 251.

This law does not contemplate any appeal to the President, and the decision of the Comptroller is conclusive upon the executive branch of the Government. (1832) 2 Op. Atty. Gen. 507.

Persons to whom applicable.—This and the following sections relating to the same matter can not be construed to apply only to persons who are officers of the Government at the time the warrant is issued so as to exclude from their operation officers found delinquent at the close of their terms. U. S. v. Dillin (1909), 168 Fed. 813, 816, 94 C. C. A. 337. See, also, Ex parte Dillin (C. C. 1908), 160 Fed. 751.

This act does not apply to a mere acting purser in the Navy. Ex parte Randolph (C. C. 1833), Fed. Cas. No. 11,558.

Issuance of warrant.—That one is under indictment for embezzlement as an officer of the United States and has given bail

does not exempt him from imprisonment on a Treasury distress warrant, where he is in the custody of the marshal of the same court, which can order his production for trial on the indictment at any time, and where neither the court nor the prosecuting officers object. U. S. v. Dillon (1909), 168 Fed. 813, 94 C. C. A. 337.

Effect of warrant.—A levy on real estate under a distress warrant issued by the Solicitor of the Treasury against a collector of the customs from whom a balance of account has been found to be due by accounting officers of the Treasury, and the marshal's return that he has so levied, are prima facie evidence of the regularity of the levy. Murray v. Hoboken Land & Imp. Co. (1855), 59 U. S. (18 How.) 272, 15 L. Ed. 372.

A warrant issued under this section does not deprive an officer of his liberty or property without due process of law. Id.; U. S. v. Dillin (1909), 168 Fed. 813, 94 C. C. A. 337, reversing judgment Ex parte Dillin (C. C. 1908), 160 Fed. 751.

A warrant of distress has the effect of a judgment. Armstrong v. U. S. (D. C. 1833), Fed. Cas. No. 548.

Bonds.—This act substituted, by implication, the new official bond called for by the act for the former bond, and discharged the sureties on the latter, as to subsequent transactions. U. S. v. Maurice (C. C. 1823), Fed. Cas. No. 15,747.

Power of Secretary of Treasury.—This act makes it the duty of the agent of the Treasury, appointed thereunder, to instruct district attorneys when, against whom, and for what amount to institute suits, when to press the collection, and when to indulge, when, and under what circumstances of additional security, to renew the debts, what substitution, what commutations, what partial payments, what compromises to accept, when to acquiesce in the decisions of the courts below, and when to appeal, always leaving to the learning of the law officer (district attorney) the direction of all measures merely technical and professional. (1823) 1 Op. Atty. Gen. 612, 613.

Proceedings on injunction.—The proceedings to be had on an injunction against further proceedings upon a warrant of distress issued from the Treasury Department should be the same as in other cases, except that no answer is necessary on the part of the United States. (1824) 1 Op. Atty. Gen. 694.

366. Distress warrants may be issued against any disbursing officer and surety.—All the provisions relating to the issuing of a warrant of distress against a delinquent officer shall extend to every officer of the Government charged with the disbursement of the public money, and to their sureties, in the same manner and to the same extent as if they were herein described and enumerated. *R. S. 3634.*

367. Contents of distress warrants.—The warrant of distress shall specify the amount with which such delinquent is chargeable, and the sums, if any, which have been paid. *R. S. 3626.*

Notes of Decisions.

Validity.—The act of which this section is a part is constitutional. Murray's Lessee v. Hoboken Land and Improvement Co. (1855), 18 How. 272, 276, 15 L. Ed. 372.

Persons to whom applicable.—See notes under 365, ante.

This section and those subsequent, which provide that, when an officer fails to render his account or pay over money as required by law, a distress warrant shall issue against the delinquent officer and his sureties, which shall be levied on his property, and if not sufficient on the person of such officer, who may be committed to prison, applies to officers who are found delinquent at the close of their terms, as well as to persons actually in office. U. S. v. Dillin (1909), 168 Fed. 813, 94 C. C. A. 337, reversing judgment Ex parte Dillin (C. C. 1908), 160 Fed. 751.

Effect of warrant.—See notes under 365, ante.

368. Distress warrants to be obtained by the Solicitor of the Treasury.—Whenever any officer employed in the civil, military, or naval service of the Government, to disburse the public money appropriated for those branches of the public service, respectively, fails to render his accounts, or to pay over, in the manner and in the times required by law, or by the regulations of the Department to which he is accountable, any sum of money remaining in his hands,

shall be the duty of the First or Second Comptroller of the Treasury, as the case may be, who shall be charged with the revision of the accounts of such officer, to cause to be stated and certified the account of such delinquent officer to the Solicitor of the Treasury, who is hereby authorized and required immediately to proceed against such delinquent officer, in the manner directed in the preceding sections. *R. S. 3633.*

* * * Section Thirty-six hundred and thirty-three of the Revised Statutes is repealed by substituting the words "proper Auditor" for the words "First or Second Comptroller of the Treasury." *Sec. 4, act of July 31, 1894* (28 *Stat.* 207) *amending R. S. 3633.*

Notes of Decisions.

Conclusiveness of account.—After the Auditor has settled the account of a public officer it is not competent for him to open and revise it, and to institute proceedings upon the restated account. Ex parte Randolph (C. C. 1833), Fed. Cas. No. 11,558.

A bill in equity will lie to surcharge and falsify. Id.

369. Postponement of proceedings by warrant of distress.—With the approval of the Secretary of the Treasury, the institution of proceedings by a warrant of distress may be postponed, for a reasonable time, in cases where, in his opinion, the public interest will sustain no injury by such postponement. *R. S. 3635.*

370. Execution of a distress warrant against an officer.—The marshal authorized to execute any warrant of distress shall, by himself or by his deputy, proceed to levy and collect the sum remaining due, by distress and sale of the goods and chattels of such delinquent officer; having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two more public places in the town and county where the goods or chattels were taken, or in the town or county where the owner of such goods or chattels may reside. If the goods and chattels be not sufficient to satisfy the warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law. *R. S. 3637.*

371. Execution of a distress warrant against a surety.—If the delinquent officer absconds, or if goods and chattels belonging to him can not be found sufficient to satisfy the warrant, the marshal or his deputy shall proceed, notwithstanding the commitment of the delinquent officer, to levy and collect the sum which remains due by such delinquent, by the distress and sale of the goods and chattels of his sureties; having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town or county where the goods or chattels were taken, or in the town or county where the owner resides. *R. S. 3638.*

372. Amount of levy to be a lien.—The amount due by any delinquent officer is declared to be a lien upon the lands, tenements, and hereditaments, of such officer and his sureties, from the date of a levy in pursuance of the warrant of distress issued against him or them, and a record thereof made in the office of the clerk of the district court of the proper district, until the same is discharged according to law. *R. S. 3639.*

373. Sale of property to satisfy distress warrant. For want of goods and chattels of a delinquent officer or his sureties, sufficient to satisfy any warrant of distress issued pursuant to the foregoing provisions, the lands, tenements, and hereditaments of such officer and his sureties, or so much thereof as may be necessary for that purpose, after being advertised for at least three weeks

in not less than three public places in the county or district where such real estate is situate, before the time of sale, shall be sold by the marshal of such district or his deputy. *R. S. 3630.*

374. Disposal of surplus moneys.—All moneys which may remain of the proceeds of sales, after satisfying the warrant of distress, and paying the reasonable costs and charges of the sale, shall be returned to such delinquent officer or surety, as the case may be. *R. S. 3632.*

375. Relief through United States district court.—Any person who considers himself aggrieved by any warrant of distress issued under the foregoing provisions may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. But no injunction shall issue till the party applying for it gives bond, with sufficient security, in a sum to be prescribed by the judge, for the performance of such judgment as may be awarded against him; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of the warrant. And the same proceedings shall be had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if, upon dissolving the injunction, it appears to the satisfaction of the judge that the application for the injunction was merely for delay, the judge may add to the lawful interest assessed on all sums found due against the complainant such damages as, with such lawful interest, shall not exceed the rate of ten per centum a year. Such injunction may be granted or dissolved by the district judge either in or out of court. *R. S. 3636.*

Notes of Decisions.

Power conferred.—This section confers a power upon the court and not upon the judge as an individual. Porter *v.* U. S. (C. C.), Fed. Cas. No. 11,200.

Conclusiveness of decision.—The decision of a district judge granting an injunction is final and bars further action by the Government. U. S. *v.* Nourse (1835), 9 Pet. 8, 9, 9 L. Ed. 31.

376. Relief through circuit justice or judge.—When the district judge refuses to grant an injunction to stay proceedings on a distress-warrant, as aforesaid, or dissolves such injunction after it is granted, any person who considers himself aggrieved by the decision in the premises may lay before the circuit justice, or circuit judge of the circuit within which such district lies, a copy of the proceeding had before the district judge; and thereupon the circuit justice or circuit judge may grant an injunction, or permit an appeal, as the case may be, if, in his opinion, the equity of the case requires it. The same proceedings, subject to the same conditions, shall be had upon such injunction in the circuit court as are prescribed in the district court. *R. S. 3637.*

Circuit courts were abolished and their powers transferred to district courts by secs. 289–291, Judicial Code of Mar. 3, 1911 (36 Stat. 1167).

Notes of Decisions.

Appeal.—No appeal lies by the Government from a decree of a district judge awarding an injunction. U. S. *v.* Nourse (1832), 6 Pet. 470, 490, 8 L. Ed. 467.

No appeal by the Government from the decree of the district judge is authorized by the act, and the general law giving appeals does not embrace the case. The law

is the same where an appeal is taken from the judge of the circuit court and an appeal taken then to the Supreme Court; and where an appeal is taken to the Supreme Court from a district judge having the powers of a Circuit Court. The act gives the district judge a special jurisdiction, which he may exercise at his discretion, while holding the district court, or at any other time. Ordinarily, as district judge, he has no chancery powers, but in proceeding under this statute he is governed by the rules of chancery, which apply to injunctions, except as to the answer of the Government. U. S. *v.* Cox (1837), 11 Pet. 162, 9 L. Ed. 671.

377. **Rights of the United States not impaired.**—Nothing contained in the provisions of this Title relating to distress-warrants shall be construed to take away or impair any right or remedy which the United States might have, by law, for the recovery of taxes, debts, or demands. *R. S. 3638.*

378. **National quarantine.**—That the Secretary of the Treasury shall have the control, direction, and management of all quarantine stations, grounds, and anchorages established by authority of the United States, and as soon as practicable after the approval of this Act shall select and designate such suitable places for them and establish the same at such points on or near the coast line of the United States or the border of the United States and a foreign country, as in his judgment are best suited for the same and necessary to prevent the introduction of yellow fever into the United States, and, in his discretion, he may also establish at the group of islands known as the Dry Tortugas, at the western end of the Florida reef, and at such other point or points on or near the coast line of the United States (not to exceed four in the aggregate) as he deems necessary, quarantine grounds, stations, and anchorages, whereat or whereto infected vessels bound for any port in the United States may be detained or sent for the purpose of being disinfected, having their cargoes disinfected and discharged, if necessary, and their sick treated in hospitals until all danger of infection or contagion from such vessels, their cargoes, passengers, or crews has been removed. *Sec. 1, act of June 19, 1906 (34 Stat. 299).*

379. **Regulations to be observed by vessels.**—That any vessel, or any officer of any vessel, or other person other than State health or quarantine officers, entering within the limits of any quarantine grounds and anchorages, or any quarantine station and anchorage, or departing therefrom, in disregard of the quarantine rules and regulations or without the permission of the officer in charge of such quarantine ground and anchorage, or of such quarantine station and anchorage, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than three hundred dollars or by imprisonment for not more than one year, or both, in the discretion of the court. That any master or owner of any vessel violating any provision of this Act, or any provision of an Act entitled "An Act granting additional powers and imposing additional duties on the Marine-Hospital Service," approved February fifteenth, eighteen hundred and ninety-three, or violating any rule or regulation made in accordance with this Act or said Act of February fifteenth, eighteen hundred and ninety-three, relating to the inspection of vessels, or to the prevention of the introduction of contagious or infectious diseases into the United States, or any master, owner, or agent of any vessel making a false statement relative to the sanitary condition of such vessel or its contents, or as to the health of any passenger or person thereon shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars or imprisonment for not more than one year, or both, in the discretion of the court. *Sec. 4, act of June 3, 1906 (34 Stat. 399).*

380. State health laws to be observed by United States officers, etc.—The quarantines and other restraints established by the health-laws of any State, respecting any vessels arriving in, or bound to, any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States, by the masters and crews of the several revenue-cutters, and by the military officers commanding in any fort or station upon the sea-coast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health-laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the Secretary of the Treasury. But nothing in this Title shall enable any State to collect a duty of tonnage or impost without the consent of Congress. *R. S. 4792.*

Notes of Decisions.

Nature of quarantine.—Quarantine is not actus Dei, but an ordinary incident of travel, to be contemplated by one undergoing a voyage. (1897), 21 Op. Atty. Gen. 575.

Extent of power of States.—This act does not imply an acknowledgment that a State might rightfully regulate commerce with foreign nations or amongst the States; for they do not imply that such laws are an exercise of such power, or enacted with a view to it. Gibbons *v.* Ogden (1824), 9 Wheat. 1, 205, 6 L. Ed. 23.

Congress by this section confirmed the powers of the States to regulate the matter of protecting public health, as to themselves seemed best. Bartlett *v.* Lockwood (1896), 16 Sup. Ct. 334, 335, 160 U. S. 357, 40 L. Ed. 455.

In enforcing its quarantine regulations a State may detain immigrants from non-infected places who have traveled with others from infected localities. Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Milner (C. C. 1893), 57 Fed. 276.

The right of the several States to establish and enforce quarantine regulations is not limited by any existing treaty between the United States and Norway and Sweden. Id.

Local health officers can not lawfully prevent inspectors of customs from landing at quarantine stations in the discharge of their duties; but the latter, while visiting and remaining at such stations, should observe all reasonable regulations in the interest of public health. (1884), 18 Op. Atty. Gen. 15.

No local health regulation which denies to inspectors of customs ample opportunities for then and there protecting the public revenue is reasonable. Id.

Expenses of quarantine.—The costs and charges of quarantine inspection under State laws may lawfully be imposed upon the carrier which brings the suspected passengers into the country, as being incident to the business in which it is engaged. Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Milner (C. C. 1893), 57 Fed. 276.

The United States can not be charged with the expenses of an epidemic merely because an official of the Government upon the request of a suffering community was dispatched to the scene; his services and statements there being merely advisory. McClenny *v.* U. S. (1910), 45 Ct. Cl. 305.

Collection of duties.—An impost means any tax or tribute imposed by authority and applies as well to a tax on persons as to a tax on merchandise. Passenger Cases (1849), 7 How. 283, 407, 12 L. Ed. 702.

State statutes imposing taxes on alien passengers are void. Id.

The power to establish quarantine laws rests with the States, but a State may not, to defray the expenses of her quarantine regulations, impose a tonnage tax on vessels owned in foreign ports and entering her harbors in pursuit of commerce. Peete *v.* Morgan (1873), 19 Wall. 581, 583, 22 L. Ed. 201.

A fee required by State quarantine laws for examination of vessels is a compensation for services rendered to the vessel, and is not a tonnage tax. Morgan's L. & T. R. & S. S. Co. *v.* State Board of Health (1886), 6 Sup. Ct. 1114, 1118, 118 U. S. 455, 30 L. Ed. 237.

381. Suppression of communicable diseases.—That the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed, respectively, to utilize jointly the personnel and facilities of the Medical Department of the Army, the Medical Department of the Navy, and the Public Health Service, so far as possible, in aiding to combat and suppress the said diseases. *Sec. 2, Joint Res. 42, Oct. 1, 1918 (40 Stat. 1008).*

To enable the President, in case only of threatened or actual epidemic of cholera, typhus fever, yellow fever, smallpox, bubonic plague, Chinese plague or black death, trachoma, influenza, or infantile paralysis, to aid State and local boards, or otherwise, in his discretion, in preventing and suppressing the spread of the same, and in such emergency in the execution of any quarantine laws which may be then in force, $355,000: *Provided*, That a detailed report of the expenditures hereunder shall annually hereafter be submitted to Congress. *Act of June 5, 1920 (41 Stat. 885), making appropriations for sundry civil expenses.*

For the purpose of securing a reserve for duty in time of national emergency, Pub. Res. 42, Oct. 27, 1918 (40 Stat. 1012), directs that there shall be organized a reserve of the Public Health Service, but commission in said reserve shall not exempt the holder from military service.

382. Division of Venereal Diseases.—That there is hereby established in the Bureau of the Public Health Service a Division of Venereal Diseases, to be under the charge of a commissioned medical officer of the United States Public Health Service detailed by the Surgeon General of the Public Health Service, which officer while thus serving shall be an Assistant Surgeon General of the Public Health Service, subject to the provisions of law applicable to assistant surgeons general in charge of administrative divisions in the District of Columbia of the Bureau of the Public Health Service. There shall be in such division such assistants, clerks, investigators, and other employees as may be necessary for the performance of its duties and as may be provided for by law. *Sec. 3, chap. XV, act of July 9, 1918 (40 Stat. 886), making appropriations for the support of the Army.*

That the duties of the Division of Venereal Diseases shall be in accordance with rules and regulations prescribed by the Secretary of the Treasury (1) to study and investigate the cause, treatment, and prevention of venereal diseases; (2) to cooperate with State boards or departments of health for the prevention and control of such diseases within the States; and (3) to control and prevent the spread of these diseases in interstate traffic: *Provided*, That nothing in this chapter shall be construed as limiting the functions and activities of other departments or bureaus in the prevention, control, and treatment of venereal diseases and in the expenditure of moneys therefor. *Sec. 4, chap. XV, act of July 9, 1918 (40 Stat. 886–887).*

CHAPTER 5.

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383. Employment of legal services.—No head of a Department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same. *R. S. 189.*

Notes of Decisions.

Purpose and effect of act creating Department of Justice.—The provisions of act June 22, 1870, establishing the Department of Justice, which were incorporated into this and other sections of the Revised Statutes, indicate that Congress intended to gather into that department, under the supervision and control of the Attorney General, all the litigation and all the law business in which the United States are interested, and which previously had been scattered among different public officers, departments, and branches of the Government, and to break up the practice of frequently employing unofficial attorneys in the public service. Perry v. U. S. (1893), 28 Ct. Cl. 483, 489.

Employment of counsel by particular departments.—Under the provisions of act June 22, 1870, sec. 17, incorporated into this section, the head of the Navy Department is not at liberty to employ counsel to conduct proceedings before a naval court-martial, but should call upon the Department of Justice to furnish an officer for the service. (1871) 13 Op. Atty. Gen. 514; (1872), 14 Op. Atty. Gen. 13.

The Secretary of War has no authority to employ counsel to appear in court on behalf of the military authorities in habeas corpus cases. (1871), 13 Op. Atty. Gen. 580, 583.

Special counsel, other than officers of the Department of Justice, may be employed by the Attorney General, at the request of the Secretary of the Navy, to assist the judge advocate in a trial by a naval court-martial. (1885), 18 Op. Atty. Gen. 135, 137.

The Secretary of the Navy is not authorized in view of this section to employ special counsel in foreign countries to institute suits in behalf of the United States for the recovery of damages caused to a war vessel of the United States, but should refer the matter to the Department of Justice for attention. (1895) 21 Op. Atty. Gen. 195.

384. Legal service for executive departments.—The officers of the Department of Justice, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of Departments, and the heads of Bureaus and other officers in the Departments, to discharge their respective duties; and shall, on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court and in the Court of Claims, in which the United States, or any officer thereof, as such officer, is a party or may be interested; and no fees shall be allowed or paid to any other attorney or counselor at law for any service herein required of the officers of the Department of Justice, except in the cases provided by section three hundred and sixty-three. *R. S. 361.*

R. S. 363 provided that, "The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings."

Notes of Decisions.

Questions to be submitted by Interior Department to Attorneys designated.—For the greater part of the heads of bureaus and other officers of the departments in the discharge of their duties, provision is made for assistance from the officers of the Department of Justice, under the direction of the Attorney General. An Assistant Attorney General and law clerks having accordingly been assigned to the Department of the Interior, the Commissioner of Patents should submit questions to them. (1893) 20 Op. Atty. Gen. 666.

Advice to Solicitor of Treasury.— Where a question has been submitted by the Secretary to the Solicitor of the Treasury for advice thereon, the latter is not entitled to call upon the Attorney General for his views on such question. (1884) 18 Op. Atty. Gen. 59.

The Solicitor should, in such case, return his advice directly to the Secretary, who may, if he choose, require an opinion from the Attorney General upon the same question. Id.

385. Opinions of the Attorney-General.—The Attorney-General shall give his advice and opinion upon questions law, whenever required by the President. *R. S. 354.*

Section three hundred and fifty-four is amended by inserting after the word "questions" in the second line, the word "of." *Act of Feb. 27, 1877 (19 Stat. 241), amending R. S. 354.*

Notes of Decisions.

Power of President to call for opinion.— The President's right to call for an opinion from the Attorney General is not limited to questions of law. Art. 2, sec. 2, cl. 1, of the Constitution provides that he "may require the opinion of the principal officer of each of the executive departments upon any subject relating to the duties of their respective offices." (1901) 23 Op. Atty. Gen. 30.

Conclusiveness of opinion.—If a question is presented to the Attorney General in accordance with law by the President, and the Attorney General is of opinion that the nature of the question is general and important in other directions than disbursements and therefore conceives that it is proper for him to deliver his opinion, the opinion is final and authoritative under the law, and should be so treated by the accounting officers, even if the question involves a payment to be made. (1904) 25 Op. Atty. Gen. 304.

President acting through Attorney General.—A telegram, signed with the surname of the Attorney General, purporting to state the decision of the President on an application by a convicted prisoner for a commutation of sentence, is sufficient notice of the President's action, which, as the court will take judicial notice, may properly be taken in such matters through the Department of Justice. Perovich v. Perry (1909), 167 Fed. 789, 93 C. C. A. 209.

386. Opinions rendered to the head of a department.—The head of any Executive Department may require the opinion of the Attorney-General on any questions of law arising in the administration of his Department. *R. S. 356.*

Notes of Decisions.

In general.— The Attorney General is not authorized to give an official opinion in any case except on the call of the President or some one of the heads of departments. (1818) 1 Op. Atty. Gen. 211, 253; (1841) 4 Op. Atty. Gen. 59; (1893) 20 Op. Atty. Gen. 666.

The Attorney General can not properly attempt to frame a definition of statutory language to cover all future cases. (1893) 20 Op. Atty. Gen. 640; (1894) 21 Op. Atty. Gen. 106, 109.

The Attorney General must give his opinion on questions referred to him by the heads of the departments, touching matters concerning the department, not on questions in which the United States have no interest. (1830) 2 Op. Atty. Gen. 311.

He is not required to give opinions, except in cases that fall within the scope of his duties as marked out by law. (1832) 2 Op. Atty. Gen. 531.

He has no authority to settle questions of fact, nor to give advice on questions

of law, except for the assistance of the officer calling for his opinion on points stated. He takes the facts as they are stated to him, and predicates his opinion thereon. (1838) 3 Op. Atty. Gen. 300.

The Attorney General declines to authorize an investigation to be made in order that an official opinion may thereafter be rendered by him based on the result of such investigation. (1893) 20 Op. Atty. Gen. 640.

An expression in an opinion of the Attorney General which is merely obiter does not have the force and effect of an official opinion. (1894) 21 Op. Atty. Gen. 25.

Guidance of department.—The head of a department can not require the Attorney General's opinion as to his powers to do an act unless it is his intention to be guided thereby. (1836) 3 Op. Atty. Gen. 39; (1893) 20 Op. Atty. Gen. 609, 648; (1894) 20 Op. Atty. Gen. 724, 728; (1895) 21 Op. Atty. Gen. 174.

Mode of submission, stating facts and propositions of law.—Where a question of law arises upon facts submitted to the Attorney General, such facts must be agreed and stated as facts established. (1867) 12 Op. Atty. Gen. 206.

Where different statements of facts appear in any case that has been submitted by the head of a department to the Attorney General, the latter will not undertake to reconcile the differences between them but in giving an opinion upon the questions presented will consider only such facts as are set forth or admitted by the head of the department. (1872) 14 Op. Atty. Gen. 45.

Where the question presented was very indefinite and vague, and partook of a speculative character, it was deemed inadvisable by the Attorney General to give his official opinion thereon. (1873) 14 Op. Atty. Gen. 191.

Where an official opinion from the Attorney General is desired on questions of law arising on any case, the request should be accompanied with a statement of the material facts of the case, and also the precise questions on which advice is wanted. (1874) 14 Op. Atty. Gen. 367.

The Attorney General can not investigate the papers and records for the purpose of ascertaining the facts upon which the question arises. (1881) 17 Op. Atty. Gen. 172; (1888) 19 Op. Atty. Gen. 115; (1891) 20 Op. Atty. Gen. 270; (1893) 20 Op. Atty. Gen. 640; (1895) 21 Op. Atty. Gen. 220; (1894) 20 Op. Atty Gen. 742; (1898) 22 Op. Atty. Gen. 156; (1899) 22 Op. Atty. Gen. 342; (1899) 22 Op. Atty. Gen. 498; (1910) 28 Op. Atty. Gen. 218.

The Attorney General declines to express an opinion in a matter where no statement of facts and no question of law is submitted, but where numerous papers are referred with a request for an opinion in view of all the facts presented. (1886) 19 Op. Atty. Gen. 396.

The Department of Justice has uniformly declined to find the facts involved in a request for an opinion. At least this has been the rule ever since the year 1820. The facts must be stated by the Department asking for the opinion. (See 1 Op. Atty. Gen. 346; 3 Op. Atty. Gen. 309; 5 Op. Atty. Gen. 626; 10 Op. Atty. Gen. 267; 12 Op. Atty. Gen. 206.) (1889) 19 Op. Atty. Gen. 465, 466.

The Attorney General can not give an official opinion, except upon a question of law which has already actually arisen and is submitted upon a definite statement of facts, not leaving it to him to draw inferences of fact from correspondence or documents. (1893) 20 Op. Atty. Gen. 614.

The laws of a foreign country are not known to the Attorney General, but are facts to be proved by competent evidence. (1894) 21 Op. Atty. Gen. 80.

The Attorney General can not be called upon for an opinion unless specific questions of law are formulated which relate to an existing question calling for the action of the department requesting it. (1895) 21 Op. Atty. Gen. 201.

The Attorney General waives the settled practice of the department requiring a statement of the points upon which an opinion is asked for the reason that it is desired for guidance of the head of an executive department in the discharge of official duties, where both public and private interests are involved requiring prompt action. (1897) 21 Op. Atty. Gen. 480.

The Attorney General is not permitted by statute or precedent to respond to a request for an opinion which appears to present but a moot case and does not show what the facts are, or that the case has presently arisen in the administration of the department. (1897) 21 Op. Atty. Gen. 506; (1898) 22 Op. Atty. Gen. 85.

In the absence of facts presenting a case actually or presently arising and pending in the administration of a department, calling for action, which can not be determined by the Attorney General without usurping judicial functions, his official opinion can not be required. (1897) 21 Op. Atty. Gen. 583.

In a certain case involving governmental transactions where there were no disputed facts, the Attorney General deemed it proper to gather the various circumstances from the papers presented and to waive the customary rule of the department requiring a definite statement of the facts upon which

an opinion is requested. (1899) 22 Op. Atty. Gen. 477.

Questions by others than heads of departments.—Subordinate officers of the Government who desire an official opinion of the Attorney General must seek it through the head of the department to which they are accountable. (1818) 1 Op. Atty. Gen. 211.

The Attorney General will only give an official opinion in a matter concerning a department at the request of the head of the department, and not at the request of a subordinate officer thereof. (1862) 10 Op. Atty. Gen. 458; (1891) 20 Op. Atty. Gen. 251, 279.

Questions involving payment of money from Treasury.—A question affecting all the executive departments is answered by the Attorney General, as it falls within the exception to the rule that his opinion should not be rendered upon questions which, under sec. 8 of the act of July 31, 1894, can be referred to the comptroller for decision, except in matters of great importance, inasmuch as a conflict of precedents might arise. (1895) 21 Op. Atty. Gen. 181.

The Attorney General may properly render an opinion upon a question involving the disbursement or expenditure of public moneys when the question is one of general and great importance, and especially when the comptroller, in advance of a decision by himself, requests that the matter be referred to the Attorney General for opinion and states that he will be guided thereby. (1895) 21 Op. Atty. Gen. 224; (1896) 21 Op. Atty. Gen. 402; (1901) 23 Op. Atty. Gen. 271; (1905) 26 Op. Atty. Gen. 666.

Questions of law. [illegible] rule of the Attorney General in declining to give an opinion in a case where it is doubtful whether a question of law is raised in the administration of the duties of [illegible] disregarded in [illegible] where [illegible] that proper cases [illegible] were pending [illegible] the department [illegible] 579.

Questions of fact. [illegible] of the Attorney General [illegible] on questions of [illegible] exceptions [illegible] tions [illegible] (1879) [illegible]

The Attorney [illegible] to render [illegible] of fact [illegible] [17 S. p. 264].

Questions of mixed law and fact. The Attorney [illegible] opinion [illegible] or [illegible] wrongful [illegible] made as to that is a question of mixed law and fact which only a court can determine. (1893) 20 Op. Atty. Gen. 324.

The Attorney General can not be asked to exercise appellate jurisdiction upon mixed questions of fact and law. (1894) 20 Op. Atty. Gen. 711; (1892) 22 Op. Atty. Gen. 342.

Questions of administrative policy or practice. No appeal lies from the decision of the Commissioner of Pensions or other officer of the Government to the Attorney General. (1854) 6 Op. Atty. Gen. 289.

The opinions of the Attorney General are advisory only. He has no control over the action of the head of department at whose request and to whom an opinion is given, nor could he with propriety express any judgment concerning the disposition of the matter to which the opinion relates, that being something wholly within the administrative sphere of such head of department. (1855) 17 Op. Atty. Gen. 332.

The Attorney General declined to give an opinion as to whether the so-called eight-hour law is applicable to certain contracts for public works. (1892) 20 Op. Atty. Gen. 463, 465, 500; (1910) 28 Op. Atty. Gen. 534.

The nature of the evidence required from applicants for leave and sufficiency of reasons for extending or limiting hours of labor are matters within the discretion of the Secretary as to which the Attorney General can not advise. (1891) 20 Op. Atty. Gen. 728.

The Attorney General declines to express an opinion upon the question whether proceedings by court-martial would [illegible] [illegible] [illegible]

Conclusiveness of opinion.—Although the acts prescribing the duties of Attorneys General do not declare the effect of their advice, it has been the practice of the departments to heed it. It has been found greatly advantageous, if not absolutely necessary, to have uniformity of action upon analogous questions and cases; and that result is more likely to be attained under the guidance of a single department constituted for the purpose than by a disregard of its opinions and advice. (1849) 5 Op. Atty Gen. 97.

In giving his advice and opinion on questions of law to the President and heads of departments, the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive, not only as respects the action of public officers in administrative matters, who are thus relieved from the responsibility which would otherwise attach to their acts, but also in many questions of private right. (1854) 6 Op. Atty. Gen. 326.

Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice. Id.

The opinion of the Attorney General for the time being is in terms advisory to the secretary who calls for it; but it is obligatory as the law of the case, unless, on appeal by such Secretary to the common superior of himself and the Attorney General, namely, the President of the United States, it be by the latter overruled. (1856) 7 Op. Atty. Gen. 692.

A question once fully considered and answered by one Attorney General cannot with propriety be reconsidered by his successor, unless in some extraordinary case. (1865) 11 Op. Atty. Gen. 189; (1894) 21 Op. Atty. Gen. 24; (1895) 21 Op. Atty. Gen. 264; (1902) 24 Op. Atty. Gen. 53.

Official opinions of the Attorney General should be followed by other departments. (1893) 20 Op. Atty. Gen. 648; (1894) 20 Op. Atty. Gen. 719.

When the Comptroller of the Treasury waives his right to determine a matter involving disbursements within the scope of his authority under the law and requests or suggests a ruling by the Attorney General, the Attorney General's opinion should be controlling upon the accounting officers of the Treasury and should be followed by them unless contrary to some authoritative judicial decision. (1904) 25 Op. Atty. Gen. 301.

Where a question is presented to the Attorney General in accordance with law for decision, and he is of opinion that the nature of the question is general and important in other respects than disbursement, and therefore conceives that it is proper for him to deliver his opinion, it is final and authoritative under the law and should be so treated by the accounting officers of the Treasury, even though the question involves a payment to be made from the Treasury. Id.

387. Questions of law to be sent to the Attorney General.—Whenever a question of law arises in the administration of the Department of War or the Department of the Navy, the cognizance of which is not given by statute to some other officer from whom the head of the Department may require advice, it shall be sent to the Attorney-General, to be by him referred to the proper officer in his Department, or otherwise disposed of as he may deem proper. *R. S. 357.*

Notes of Decisions.

Advice to War Department.—The Attorney General can not pass upon the question as to whether a bridge is an "unreasonable" obstruction, and its maintenance a violation of law, as its determination involves an examination of all the facts, circumstances, and equities surrounding the case. (1890) 19 Op. Atty. Gen. 676.

The question of unreasonableness must be determined in the first instance by the Secretary of War, whose decision is probably subject to review by the courts. Id.

A question of the legality of a provision of long standing in contracts of the War Department determined, as presented, in general terms, though a strict regard to the rule of the Department of Justice which forbids the expression of an official opinion upon any question of law which has not arisen in an existing case and presented upon a definite statement of facts, might warrant a refusal of an opinion thereon. (1895) 21 Op. Atty. Gen. 207.

The Attorney General will not give an opinion upon a question proposed by the Secretary of War, where no occasion has arisen for his official action. (1896) 21 Op. Atty. Gen. 457.

The question as to whether a retired army officer is eligible to hold certain diplomatic or consular appointments without affecting his position on the retired list, with rank and pay, is one of private concern only, and not a subject with which the United States can be interested until some action has been taken by such officer. (1897) 21 Op. Atty. Gen. 510.

Although the Attorney General can not determine, without considering questions of fact, whether or not a bar in Flushing Creek, formed opposite the mouth of a sewer and offering an obstruction in navigation, is such a case as comes within the exception provided in sec. 6 of the act of Aug. 17, 1894 (28 Stat. 363), the Secretary of War is not precluded from taking such action inviting the attention of the town authorities of Flushing to the matter, as may be advisable. (1897) 21 Op. Atty. Gen. 594.

The Attorney General declines to express an opinion upon the question whether proceedings by court-martial would bar proceedings in the civil courts for an assault or other crime involved in the offense of hazing, for the reason that it would be of no assistance to those officers in the proper discharge of their duties, and should such action be taken, the matter would be one peculiarly for the consideration of his department. (1905) 25 Op. Atty. Gen. 543.

The Attorney General can not properly advise the Secretary of War as to whether he should withhold the execution of the conveyance to an individual of certain real estate in Washington, D. C., authorized by sec. 21 of the act of June 30, 1906 (34 Stat. 787), until Congress shall have an opportunity to further consider the matter, as that is a question of propriety and expediency rather than of law. (1908) 26 Op. Atty. Gen. 578.

388. Publication of the opinions of the Attorney General. – The Attorney General shall from time to time cause to be edited, and printed at the Government Printing-Office, an edition of one thousand copies of such of the opinions of the law-officers herein authorized to be given as he may deem valuable for preservation in volumes, which shall be, as to size, quality of paper, printing, and binding, of uniform style and appearance, as nearly as practicable, with volume eight of such opinions, published, by Robert Farnham, in the year eighteen hundred and sixty-eight. Each volume shall contain proper head notes, a complete and full index, and such foot-notes as the Attorney General may approve. Such volumes shall be distributed in such manner as the Attorney-General may from time to time prescribe. *R. S. 353.*

389. Counsel to investigate claims. Whenever any head of a Department or Bureau having made application pursuant to section one hundred and eighty-four, for a subpœna to procure the attendance of a witness to be examined, is of opinion that the interests of the United States require the attendance of counsel at the examination, or require legal investigation of any claim pending in his Department or Bureau, he shall give notice thereof to the Attorney-General, and of all facts necessary to enable the Attorney General to furnish proper professional service in attending such examination, or making such investigation, and it shall be the duty of the Attorney General to provide for such service. *R. S. 187.*

Whenever the head of a Department or Bureau gives the Attorney General due notice that the interests of the United States require the service of counsel upon the examination of witnesses touching any claim or upon the legal investigation of any claim, pending in such Department or Bureau, the Attorney-General shall provide for such service. *R. S. 365.*

R. S. 184, [illegible] is set forth, post, 447.

390. Counsel to represent United States in the Court of Claims. The Attorney-General, or his assistants under his direction, shall appear for the defense and protection of the interests of the United States in all cases which may be transmitted to the Court of Claims under the provisions of this chapter, with the same power to control cases in the Court of Claims, file defenses for fraud practised or attempted to be practised by claimants, and other defenses, in like manner

as he is required to defend the United States in said court. *Sec. 185, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1142).*

391. Prosecution of crimes.—The district attorneys, marshals, and deputy marshals, the commissioners appointed by the circuit and territorial courts, with power to arrest, imprison, or bail offenders, and every other officer who is especially empowered by the President, are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of chapter seven of the Title "CRIMES," and to cause such persons to be arrested, and imprisoned or bailed, for trial before the court of the United States or the territorial court having cognizance of the offense. *R. S. 1982.*

The office of circuit court commissioner, under R. S. 627, was abolished, and the office of United States commissioner substituted therefor, by sec. 19, act of May 28, 1896 (29 Stat. 184), amended by sec. 1, act of Mar. 2, 1901 (31 Stat. 956). The United States commissioners so created were given all the powers and required to perform all the duties of the former circuit court commissioners.

Chapter 7 of the Title "Crimes," of the Revised Statutes, referred to above, related to crimes against the elective franchise and civil rights of citizens. Most of its provisions were incorporated in chapters 3, 6, and 10 of the Criminal Code, and were repealed by sec. 341 of said code.

Notes of Decisions.

Purpose of act.—Act May 31, 1870, was designed not to punish abuse of authority by State officers, but to forbid the execution of State laws, which the act makes void. U. S. *v.* Jackson (C. C. 1874), Fed. Cas. No. 15,459.

392. Civil rights.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. *Constitution of the United States, fifth amendment.*

Notes of Decisions.

I. Construction and operation in general.
II. Necessity for presentment or indictment.
III. Former jeopardy.
IV. Self crimination.
V. Due process of law.
VI. Compensation for taking property.

I. Construction and Operation in General.

Nature and scope in general.—This amendment is a limitation upon the Federal Government and has no reference to State action. Baron *v.* City of Baltimore (1883), 32 U. S. (7 Pet.) 243, 8 L. Ed. 672. [C. S. p. 14,322].

The purpose of this amendment and amendment 6 was to secure a fair and impartial trial by jury in criminal cases and to secure to one accused of an offense against the United States the same mode of trial that had been previously established and practiced in the courts of the several States. U. S. *v.* Reid (1851), 12 How. 361, 364, 13 L. Ed. 1023.

Constitutional provisions for the security of person or property should be liberally construed. Boyd *v.* U. S. (1886), 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746.

This amendment relates to the prosecution of an accused person which is technically criminal in its nature. U. S. *v.* Zucker (1896), 16 Sup. Ct. 641, 643, 161 U. S. 475, 40 L. Ed. 777.

This amendment does not grant privileges or immunities to the individual as a citizen of the United States, but secures them to all persons as against the Federal Government, entirely irrespective of such citizenship. Maxwell *v.* Dow (1900), 20 Sup. Ct. 448, 176 U. S. 581, 44 L. Ed. 597.

This amendment is not limited in its application to citizens, but applies generally to all persons within the jurisdiction of the United States. Yick Wo v. Hopkins (1886), 118 U. S. 356; Colyer v. Skeffington (D. C. 1920), 265 Fed. 17.

The fundamental guaranties of life, liberty, and property made by the Federal Constitution have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. Neely v. Henkel (1901), 21 Sup. Ct. 302, 307, 180 U. S. 109, 45 L. Ed. 448.

This amendment only announces and reaffirms the ancient principles of the common law, and prevents them from being unjustly invaded by the power of the Federal Government. North Carolina v. Vanderford (C. C. 1888), 35 Fed. 283.

This amendment applies to proceedings in the United States courts. Ex parte Brown (D. C. 1905), 140 Fed. 461.

Under this amendment the people through the grand jury system initiate criminal prosecutions, and it was adopted as a safeguard against arbitrary or oppressive action. U. S. v. Wells (D. C. 1905), 163 Fed. 313.

Provisions of this amendment for the protection of persons charged with crime held not applicable to proceedings for extradition to a foreign country. Ex parte La Mantia (D. C. 1913), 206 Fed. 330.

The provision in Fourteenth Amendment that no State shall make any law abridging the privileges and immunities of citizens of the United States, does not extend the operation of this amendment to the States. State v. Atkinson (1893), 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877; Id. (1894), 41 S. C. 351, 19 S. E. 701.

Applicability to District of Columbia. The jurisdiction of Congress in respect to the District of Columbia, in matters municipal as well as in those of exclusive, and not controlled by the provisions of the Fourteenth Amendment, [illegible] the exercise of such [illegible] subject to the provisions of this amendment. Wight v. Davidson, 181 U. S. 371, 21 Sup. Ct. 616, 621, 45 L. Ed. 900.

Applicability to Territories. When a Territory is [illegible] in matters [illegible] of this amendment [illegible] (1904), 27 Sup. Ct. 324, 197 U. S. 516, 49 L. Ed. 862.

II. Necessity for Presentment or Indictment.

Scope of provision. The provision that "no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury," does not apply to the United States, but restrains the power of the General Government only. Williams v. Hart (C. C. 1901), 110 Fed. 166. [C. S. p. 14,323].

Territorial enactments.—The guaranty of a trial on presentment or indictment of one charged with an infamous crime, constitutes a substantial right under the laws of Congress and the laws of Oklahoma Territory, and any State law which operates as a denial of such right alters the situation of accused to his disadvantage and is ex post facto as to such offense. Garnsey v. State (Okl. 1910), 112 Pac. 24.

Sufficiency of presentment or indictment.—The indictment referred to is the presentment to the proper court under oath by a grand jury duly impaneled of a charge describing an offense against the law. Ex parte Bain (1887), 7 Sup. Ct. 781, 121 U. S. 1, 30 L. Ed. 849; U. S. v. Munday (D. C. 1914), 211 Fed. 536.

In case of an infamous crime, required to be charged by indictment, the indictment is a necessary requisite to give the court jurisdiction. Garnsey v. State (Okl. 1910), 112 Pac. 24.

Amendment of indictment. When an indictment is filed no change can be made in the body of the instrument by order of the court or by the prosecuting attorney without a resubmission to the grand jury, and the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. Ex parte Bain (1887), 7 Sup. Ct. 781, 784, 121 U. S. 1, 30 L. Ed. 849.

Waiver of right. One can not waive his constitutional right to be tried by indictment or presentment. Ex parte McClusky (C. C. 1889), 40 Fed. 71.

The provision requiring an indictment by a grand jury does not give a citizen or a temporary subject the right to claim the guaranty when tried before a consul or tribunal in accordance with a treaty, for offenses committed in a foreign [illegible] nor does the fact that the offense is committed on an American vessel give the right to insist on the [illegible] Territories of United States. Ross v. McIntyre, 11 Sup. Ct. 897, 140 U. S. [illegible] Where an [illegible] improvement, but the [illegible] Mackenzie (C. C. 1870), [illegible] No. 1,711.

Where an [illegible] a penalty [illegible] crime [illegible] an offender may be proceeded against [illegible] person of [illegible] Vaughan (C. C. 1804), Fed. Cas. No. 16,627.

[illegible] crime [illegible] imprisonment in a state prison or pen-

tentiary with or without hard labor is an infamous crime. Ex parte Wilson (1885), 5 Sup. Ct. 935, 114 U. S. 417, 29 L. Ed. 89 [C. S. p. 14,325].

In determining whether a crime is infamous, the inquiry is whether it "is one for which the statute authorizes the court to award an infamous punishment, not whether the punishment uitimately awarded is an infamous one." U. S. v. Thompson (D. C. 1912), 202 Fed. 346; U. S. v. Evans (1906), 28 App. D. C. 264; Palmer v. Lenovitz (1910), 35 App. D. C. 303.

The amendment did not have special reference to the particular crimes which theretofere had been known at common law as capital and infamous; but it was intended for all offenses which might thereafter be made capital or infamous by the legislation of Congress. U. S. v. Brady (D. C. 1881), 3 Cr. Law Mag. 69.

To make a penalty infamous it must pronounce against the offender a degradation from his civil rights as a citizen, and in the absence of such forfeiture the crime is not legally infamous unless it is so expressly pronounced. U. S. v. Cross (D. C. 1873), 1 McArthur, 149.

An offense punishable by imprisonment not exceeding one year without hard labor is not infamous. U. S. v. Cobb (D. C. 1890), 43 Fed. 570.

It is not the law that no crime is infamous within the meaning of this amendment that has not been so declared by Congress. Ex parte Wilson (1885), 5 Sup. Ct. 935, 114 U. S. 417, 29 L. Ed. 89.

Jurisdiction of military courts.—Military commissions organized in a State invaded and not engaged in rebellion in which the Federal courts were open and in the unobstructed exercise of their judicial functions had no jurisdiction to try a citizen who was neither a resident of a rebellious State or prisoner of war nor a person in the military or naval service, and Congress could not invest them with such power. Ex parte Milligan (1866), 4 Wall. 2, 119, 18 L. Ed. 281.

This amendment expressly excepts "cases arising in the land or naval forces," and leaves such cases subject to the rules for the government and regulation of those forces which, by the eighth section of the first article of the Constitution, Congress is empowered to make. Courts-martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, can not be controlled or revised by the civil courts. Congress has never conferred upon civil officers or magistrates or private citizens any power over offenders punishable only in a military tribunal. Kurtz v. Moffitt (1885), 6 Sup. Ct. 148, 152, 115 U. S. 487, 29 L. Ed. 458.

This provision is no authority for the contention that the district court has no jurisdiction to indict and try a person charged with having forged an obligation of the United States with intent to defraud, which is made an offense against the United States by R. S. sec. 5414, although such person was at the time an officer of the Army, and the alleged offense was committed at a military post and with intent to defraud an enlisted soldier, where accused has since been discharged from the Army without any action against him having been taken by the military authorities. Neall v. U. S. (1902), 118 Fed. 699, 701, 56 C. C. A. 31.

Articles of War can not take the place of or supersede the criminal or civil laws without violating this amendment. In re Kelly (C. C. 1895), 71 Fed. 545, 553.

Offenses triable by court-martial.—Act March 3, 1873, providing that prisoners under confinement in military prisons undergoing sentences of court-martial shall be liable to trial and punishment by court-martial for offenses committed during said confinement, is not in conflict with this amendment. In re Craig (C. C. 1895), 70 Fed. 969; ex parte Wildman (D. C. 1876), Fed. Cas. No. 17,653a.

Congress may provide for the trial and punishment of military and naval offenses in the manner practiced by civilized nations. Dynes v. Hoover (1857), 20 How. 65, 78, 15 L. Ed. 838.

A soldier who while standing guard over a jail attempts to kill a prisoner confined therein may be tried by court-martial, it being a case "arising in the land or naval forces," and the exception as to "actual service in time of war or public danger" relating only to the militia. Ex parte Mason (1881), 105 U. S. 696, 700, 26 L. Ed. 1213.

The provision that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces," in effect says that offenses in those forces shall be dealt with according to military law. Runkle v. U. S. (1884), 19 Ct. Cl. 396.

Conscription act March 3, 1863, making a man subject to military laws, and liable to punishment as a deserter, as soon as he is drafted, and before he is mustered into service, is not repugnant to the amendment. Knoedler v. Lane (1863), 45 Pa. St. (9 Wright) 238, 5 Phila. 485.

Cases arising in the militia.—The clause "when in actual service in time of war" has no reference to the Regular Army or the Navy, but refers only to the Militia. Ex parte Mason (1881), 105 U. S. 696, 26

L. Ed. 1213; Johnson v. Sayre (1895), 15 Sup. Ct. 773, 775, 158 U. S. 109, 39 L. Ed. 914; In re Boxart (C. C. 1873), Fed. Cas. No. 1,570; U. S. v. Mackenzie (D. C.), Fed. Cas. No. 15,313.

III. Former Jeopardy.

Limitation to Federal action.—The provision that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb, applies only to offenses against, and trials under, the laws of the United States. Barron v. City of Baltimore (1833), 32 U. S. (7 Pet.) 243, 8 L. Ed. 672, [U. S. p. 14,328].

Jeopardy.—The common-law principle of double jeopardy is included in this article. In re Lange (1873), 18 Wall. 163, 170, 21 L. Ed. 872.

The term "jeopardy" can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereon. U. S. v. Haskell (C. C. 1820), Fed. Cas. No. 15,321.

The jeopardy of the law means real peril, originally of life or limb, and always of substantial punishment or penalty. (1906) 25 Op. Atty. Gen. 623.

In construing this provision resort should be had to the common law, since such provisions are a mere recognition of a maxim of the common law. State v. Duvall (1914), 65 So. 904, 135 La. 710.

"Limb."—The term "limb" is a typical expression for punishment. State v. Chevers (1852), 7 La. Ann. 40.

Applicability to Philippine Islands. By the Bill of Rights enacted by Congress for the Philippine Islands (act July 1, 1902, sec. 5, 32 Stat. 693), guaranties equivalent to the "twice in jeopardy" clause of this amendment were extended to the Philippine Islands. Serra v. Mortiga (1907), 27 Sup. Ct. 343, 345, 204 U. S. 470, 51 L. Ed. 571.

One acquitted by a military court of competent jurisdiction of the crime of homicide as defined by Pen. Code P. I. art. 404, can not be tried a second time in a civil court of those Islands for the same offense. Grafton v. U. S. (1907), 27 S. Ct. 749, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640.

Prosecutions to which amendment applies. It is not necessary to [illegible] other cases besides [illegible] are [illegible] of this amendment. It is only clearly the spirit of the [illegible] a second prosecution for the same crime, so far as the common law [illegible] protection. Ex parte Lange (1873), 85 U. S. (18 Wall.) 163, 21 L. Ed. 872.

The provision that no person shall be subject for the same offense to be twice [illegible] put in jeopardy of life or limb, applies to misdemeanors as well as treason and felony. Berkowitz v. U. S. (1899), 93 Fed. 452, 35 C. C. A. 379.

Times at which jeopardy attaches. Act Mar. 2, 1907, allowing the United States a writ of error in certain instances in criminal cases, is not in violation of this provision; the point of jeopardy not having been reached in the cases provided for. Taylor v. U. S. (1907), 28 Sup. Ct. 53, 55, 207 U. S. 120, 52 L. Ed. 130.

Where at the time set for hearing a motion to punish defendant for contempt for violation of an injunction, ex parte affidavits taken by petitioners were suppressed on defendant's motion, and the hearing was continued for the taking of testimony, such proceeding did not put defendant in jeopardy nor constitute a bar to a subsequent hearing. New Jersey Patent Co. v. Martin (C. C. 1911), 186 Fed. 513.

One is in jeopardy when put on trial before a court of competent jurisdiction on an indictment sufficient to sustain a conviction, and a jury has been impaneled and sworn to try him, and a formal judgment of acquittal after a trial regularly conducted is rendered. Nordlinger v. U. S. (1904), 24 App. D. C. 406, 70 L. R. A. 227.

The provision has reference only to the trial and verdict; and no person can claim its protection, unless he has once been tried by a lawful jury, upon a good indictment, and been acquitted or convicted. Taylor v. State (1872), 35 Tex. 97.

Identity of offenses. The act of Congress has made the judgments of the Supreme Court of the District of Columbia conclusive as to the question whether under the circumstances of the case a prisoner has or has not for the same offense been twice put in jeopardy of life or limb. Ex parte Bigelow (1888), 5 Sup. Ct. 542, 113 U. S. 328, 28 L. Ed. 1005.

Whether a conviction or acquittal under one indictment is a bar to a subsequent conviction or sentence under another depend[s], not on whether defendant has been tried for the same act, but whether he has been put in jeopardy for the identical offense. Ryan v. U. S. (C. C. A. 1914), 216 Fed. 13.

Sufficiency of facts charged in second prosecution to sustain former [illegible]. [illegible] of the identity of the [illegible] whether [illegible] necessary [illegible] [illegible] Fed. [illegible] Nielsen v. U. S. (1901), 24 App. D. C. 407, 64 L. R. A. 27, [illegible] Brown (1905), 28 Pa. Super. Ct. 206,

Commonwealth *v.* Shoener (1906), 30 Pa. Super Ct. 321; judgment affirmed (1906), 64 A. 890, 216 Pa. 71.

Offenses against State and Federal laws in the same act.—A conviction in the circuit court of the United States for a crime of which that court has no jurisdiction is not a bar to a prosecution in a State court. Blyew *v.* Commonwealth (1891), 91 Ky. 200, 15 S. W. 356; Commonwealth *v.* Peters (1847), 53 Mass. (12 Metc.) 387.

An acquittal of murder after a regular trial in a State court having full jurisdiction in the premises is a bar to so much of an indictment for conspiring criminally in violation of R. S. secs. 5508, 5509, as seeks by charging defendants with the commission of such murder, to enforce the provision of sec. 5509, that if, in carrying out such conspiracy, an offense against the State has been committed, the punishment provided for by the State for such offense shall be imposed. U. S. *v.* Mason (1909), 29 Sup. Ct. 480, 213 U. S. 115, 53 L. Ed. 725.

A. and B. were indicted in the United States court for the crime of manslaughter, committed in killing an Indian on the Umatilla Reservation, and pleaded to the indictment a former acquittal, from which plea it appeared that they had been indicted and tried in the State court for the murder of said Indian, and acquitted. Held, on demurrer to the plea, that the crime of which the defendants were acquitted in the State court was not the same as that charged in the indictment in the United States court, the defendants being guilty of two crimes—one against the State, and the other against the United States—and therefore the plea was bad. U. S. *v.* Barnhart (C. C. 1884), 22 Fed. 285.

While the finding of a court of military inquiry, acquitting the prisoner, charged with killing a military prisoner to prevent his escape, of all blame, is not a legal bar to a prosecution in the civil courts, it is entitled to weight as an expression of the views of the military court of the necessity of using a musket to prevent the escape of the deceased. U. S. *v.* Clark (C. C. 1887), 31 Fed. 710.

An acquittal by a military court-martial is no bar to a prosecution for the same act by the proper State civil authorities. In re Fair (C. C. 1900), 100 Fed. 149.

The conviction and punishment of a defendant for violation of a state law is not technically a bar to his conviction and punishment under a Federal law for the same act; but, in the absence of extraordinary circumstances, where the offenses are substantially the same, such double punishment should not be inflicted. U. S. *v.* Palan (C. C. 1909), 167 Fed. 991.

Where petitioner was convicted and served a term for breaking and entering a building used as a post office on December 12, 1904, with intent to commit larceny therein, and on his discharge was immediately arrested on an indictment in the State court, charging that on the same day he unlawfully, etc., entered the private office of A. and did feloniously take, steal, and carry away therefrom $700 in money, $800 in postage stamps, and other valuable papers and checks of the value of $37, the property of A., but there was nothing to indicate that such property was or might be the property of the Government, there was no such similarity of offenses as to entitle accused to release. Ex parte Roach (D. C. 1908), 166 Fed. 344.

That accused was prosecuted and convicted under R. S. sec. 5478, imposing a penalty for forcibly breaking and entering a post office with intent to commit larceny therein, would not justify a plea of former conviction to bar a subsequent prosecution by State authorities for burglary under an indictment charging the same facts. State *v.* Moore (Iowa, 1909), 121 N. W. 1052.

A statute of Massachusetts providing for the punishment of an act which is also punishable under the statutes of the United States is not unconstitutional on the ground that it makes a person liable to be punished twice for the same offense, since an acquittal or conviction in one jurisdiction is a bar to a trial for the same crime in the other. Commonwealth *v.* Fuller (1844), 49 Mass. (8 Metc.), 313, 41 Am. Dec. 509.

An acquittal by a general court-martial, established pursuant to law, for punishing offenses when committed by persons in the service of the United States, can not be pleaded in bar to an indictment for murder, under the laws of this State. State *v.* Rankin (1867), 44 Tenn. (4 Cold.) 145.

A party may be subjected to a different and double punishment for the same act as two different offenses, when it is in violation of the laws of the United States and also of the State. This is not a violation of the Constitution of the United States by placing a party in jeopardy twice for the same act. Id.

Lesser offenses included in greater.—An acquittal of homicide, as defined in Pen. Code P. I. art. 404, is a bar to a subsequent conviction of the same offense arising out of the same facts, under an information charging the higher crime of assassination, as defined by article 403, since, if not guilty of the lesser crime, the accused could not, for the same acts, be guilty of the offense of

higher grade. Grafton v. U. S. (1907), 27 Sup. Ct. 749, 752, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640.

A conviction of assault and battery will not bar a subsequent indictment for murder where the person afterwards dies from the injuries. Hopkins v. U. S. (1896), 4 App. D. C. 430.

Different offenses in same transaction.—Since indictable statutory offenses may be punished as such while the offenders may still be subjected to punishment for the same acts as contempts, R. S. sec. 102, making it a misdemeanor punishable by indictment to refuse to give testimony before either house of Congress, is not invalid, as putting the witness twice in jeopardy for the same offense, though the refusal may still be punished as a contempt. In re Chapman (1897), 17 Sup. Ct. 677, 166 U. S. 661, 41 L. Ed. 1154.

A person is not twice put in jeopardy, by a sentence of an Army court-martial imposing both fine and imprisonment upon an Army officer convicted of two charges of violating the sixtieth article of war, one of which charges a conspiracy to defraud the United States and the other the causing of false and fraudulent claims to be made against the United States, even if the punishment prescribed by such article for violations of its provisions is confined to fine, or imprisonment in the alternative, as such charges are separate and distinct offenses although they related to and grew out of one transaction. Carter v. McClaughry (1902) 22 Sup. Ct. 181, 183 U. S. 365, 46 L. Ed. 236, affirming order C. C. (1900), 105 Fed. 614.

Punishment of dismissal from the Army imposed by sentence of an Army court-martial for conduct unbecoming an officer and a gentleman, under the sixty-first article of war, is not illegal on the theory that, as by such sentence fine, and imprisonment are also imposed for conspiracy to defraud the United States and causing false and fraudulent claims to be presented against the United States, in violation of the sixtieth article of war, a third punishment is inflicted where but two offenses were committed, since conduct unbecoming an officer and a gentleman is not the same offense as conspiring to defraud, or the causing of false and fraudulent claims to be made, charging to be guilty of the latter not being guilty of the former. Id.

An indictment under R. S. sec. 5440 charging a defendant with conspiring to utter as true false papers to procure certificates in violation of R. S. sec. 4, charges an offense different from that under the latter section, and a conspiracy in the indictment for such conspiracy is not a bar to a subsequent prosecution for the offense of uttering, etc. Berkowitz v. U. S. (1899), 93 Fed. 452, 35 C. C. A. 379.

The words "same offense" are not synonymous with the words "same act," and, since more than one offense may be committed by a single act, this amendment does not shield the perpetrator from punishment for other offenses when he has been convicted or acquitted of one, though it exempts him from a second prosecution for the identical offense. In re Stubbs (C. C. 1905), 133 Fed. 1012.

Particular offenses. That defendant had been acquitted of passing a counterfeit note was no bar to his subsequent prosecution for passing another counterfeit note. U. S. v. Randenbush (1834), 8 Pet. 288, 289, 8 L. Ed. 948.

A plea of former jeopardy to an indictment for murder can not be based upon the fact that, upon the trial of two consolidated indictments for two other murders committed by defendant on the same day as the one charged in the indictment in question, he was found not guilty on the issue of insanity, which is the defense set up to such indictment. Hotema v. U. S. (1902), 22 Sup. Ct. 895, 186 U. S. 413, 46 L. Ed. 1225.

An acquittal upon the charge of having received the compensation forbidden by R. S. sec. 1782, from a special agent, described in the indictment as an officer and employee of a corporation, will not sustain a plea in bar of a prosecution upon the charge of having received such compensation from the corporation, where the accused declined to plead further after his demurrer to the answer, alleging that the two offenses are not, in legal effect identical, was overruled. Burton v. U. S. (1906), 26 Sup. Ct. 688, 697, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 392.

A person acquitted of a crime can not be tried for it and for the crime of perjury committed by him in the course of a trial for perjury, and although he may be prosecuted for perjury for false swearing on the trial of which the testimony was not material, the evidence must be material to the matter in issue and not be merely collateral. Dunbar v. U. S. (1904), 24 Sup. Ct. 810, 156 U. S. 185, 39 L. Ed. 390, affirming order C. C. A. (1894), 62 Fed. 342, 10 C. C. A. 342.

One may be convicted of perjury for testifying falsely in his own behalf in the case in which he was put on trial for the offense for which he was indicted, although he was not guilty. Ex parte Hudgings (1912), 32 Sup. Ct. 824, 223 U. S. 362, 56 L. Ed. 467, 38 L. R. A. (N. S.) 787.

An order [illegible] offering an order with intent to defraud

John L. is no bar to an indictment for forging the same order with intent to defraud William L. U. S. *v.* Book (C. C. 1822), Fed. Cas. No. 14,624.

A plea of autrefois convict to an indictment for receiving stolen goods is sustained by evidence of a previous conviction for stealing such goods. U. S. *v.* Harmison (D. C. 1876), Fed. Cas. No. 15,308.

Validity of prosecution in general.—The submission of an indictment by the Government attorney to the grand jury, and the examination of witnesses before them, do not amount to the institution of a prosecution. Post *v.* U. S. (1896), 161 U. S. 583, 16 Sup. Ct. 611, 40 L. Ed. 816.

A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing. Ball *v.* U. S. (1896), 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300.

Where a verdict is so imperfect that no judgment can be given upon it, though it has been recorded, defendant has not been in jeopardy, and a new trial will be granted. U. S. *v.* Watkins (C. C. 1829) Fed. Cas. No. 16,649.

A prior conviction and nol. pros. upon a sufficient indictment at common law, though insufficient under the statute, is a bar to a subsequent prosecution on a new indictment, sufficient under the statute, for the same offense. Fletcher *v.* U. S. (C. C. 1844), Fed. Cas. No. 4,868; Id. (C. C. 1844), Fed. Cas. No. 4,869.

Defendant is not put in jeopardy where the jury are impaneled and sworn before he has been arraigned or has pleaded to the indictment, and after he has been arraigned and has pleaded a new jury may be impaneled and sworn. U. S. *v.* Riley (C. C. 1864), Fed. Cas. No. 16,164.

A conviction upon a void proceeding or indictment, when the penalty has not been inflicted, will not operate as a bar to a subsequent indictment for the same offense. U. S. *v.* Jones (C. C. 1887), 31 Fed. 725.

The prisoner having sued for, and obtained, a decision of the circuit court of the United States that the indictment was void, can not, on a second trial, urge that decision as error in order to escape its effect, on the plea of former jeopardy. Id.

Conclusion of first prosecution.—The court has power in criminal, as in civil, cases, to grant a new trial; but the new trial can only be granted in favor of the prisoner, and not to his prejudice. Case of Fries (C. C. 1799), Fed. Cas. No. 5,126.

Independent of the express prohibition of the Constitution, there can be no new trial in a capital case after a regular trial had upon a good indictment. U. S. *v.* Gilbert (C. C. 1834), Fed. Cas. No. 15,204.

Quære, if Congress may invest the Federal courts with power to grant new trials in all criminal cases, capital or otherwise. Id.

A former conviction can not be pleaded in bar unless it has been followed by judgment. U. S. *v.* Herbert (C. C. 1836), Fed. Cas. No. 15,354.

In order to sustain a plea of autrefois acquit or autrefois convict, it must appear that the former proceedings on which the plea is based have been concluded. U. S. *v.* Martin (D. C. 1880), 28 Fed. 812.

The fact that there is an appeal pending does not deprive defendant of the protection of the judgment pleaded in bar, where such judgment is otherwise sufficient. U. S. *v.* Olsen (D. C. 1893), 57 Fed. 579.

The overruling of a demurrer filed by a defendant cited for contempt, and the continuance of the cause for trial on the merits before another judge, will not support a plea of former jeopardy, when by the substitution of the United States as plaintiff the cause is converted into a criminal proceeding. U. S. *v.* Huff (D. C. 1913), 206 Fed. 700.

The pendency of a prior indictment, to which a plea of not guilty has been entered, and upon which issue has been joined, is no bar to an arraignment and trial upon a second indictment for the same offense, though the court is required to take care that defendant is not exposed to the jeopardy of two trials. U. S. *v.* Neverson (Sup. Ct., D. C. 1880), 1 Mackey, 152.

Dismissal or nolle prosequi.—A nolle prosequi, without defendant's consent, after the jury has been sworn, is equivalent to an acquittal, and may be so pleaded. U. S. *v.* Farring (C. C. 1834), Fed. Cas. No. 15,075. See, also, U. S. *v.* Maxwell (C. C. 1809), Fed. Cas. No. 15,749.

After the jury are impaneled, and witnesses sworn, the entry of a nolle prosequi because the evidence is not sufficient to convict is equivalent to an acquittal. U. S. *v.* Shoemaker (C. C. 1840), Fed. Cas. No. 16,279.

The prosecuting attorney has a right, with leave of the court, to enter a nolle prosequi on a bill of indictment, and it constitutes no bar to a subsequent indictment for the same offense. Id.

The dismissal of an indictment before submission to the jury, but after they were sworn, on the ground that it did not charge a crime, will not support a plea of autrefois acquit or of former jeopardy to a second indictment for the same offense attempted to be charged in the first; the court in the first proceeding never having

had jurisdiction of the offense. U. S. v. Rogoff (C. C. 1908), 163 Fed. 311.

Discharge of jury without verdict.—The discharge of a jury who have disagreed constitutes no bar to a further prosecution of one accused of a crime. U. S. v. Perez (1824), 22 U. S. (9 Wheat.), 579, 6 L. Ed. 165; Robertson v. Baldwin (1897), 17 Sup. Ct. 326, 329, 165 U. S. 275, 41 L. Ed. 715; Kelly v. U. S. (C. C. 1885), 27 Fed. 616; U. S. v. Workman (D. C. 1807), Fed. Cas. No. 16,764.

The discharge of a jury in a criminal case without rendering a verdict rests in the sound discretion of the court, to be exercised whenever it is satisfied from statements of the jurors that they can not reach an agreement, and such discharge constitutes no legal bar to a second trial of the accused. Logan v. U. S. (1892), 12 Sup. Ct. 617, 628, 144 U. S. 263, 36 L. Ed. 429; U. S. v. Jim Lee (D. C. 1903), 123 Fed. 741.

A discharge of a jury in a capital or other case, after a trial has commenced, can not be pleaded as matter of autrefois acquit, being matter of judicial discretion. U. S. v. Perez (1824), 22 U. S. (9 Wheat.), 579, 6 L. Ed. 165.

Where on a trial in a criminal case, after evidence was given for the State, an affidavit was produced that a juror had falsely sworn that he had no acquaintance with the accused, and a letter commenting on this affidavit was published in a newspaper and read by members of the jury, the court properly dismissed the jury and a new trial was not barred on the ground of former jeopardy. Simmons v. U. S. (1891), 12 Sup. Ct. 171, 172, 142 U. S. 148, 35 L. Ed. 968.

Defendant is not twice put in jeopardy by reason of the court's discharging the jury after trial has begun and ordering trial by another jury. Thompson v. U. S. (1894), 15 Sup. Ct. 73, 74, 155 U. S. 271, 39 L. Ed. 146.

In a capital case the jury may be discharged without the consent of the prisoner where one of the jurors is insane, and the prisoner may be again brought to trial. U. S. v. Haskell (C. C. 1823), Fed. Cas. No. 15,321.

A jury sworn in a capital case may be discharged by the court under any sudden and urgent necessity, and such discharge is no bar to another trial. U. S. v. Shoemaker (C. C. 1850), Fed. Cas. No. 16,279.

A prisoner tried for felony, before a jury regularly empaneled, which fails to agree, and who is discharged by the court without his consent, and without any necessity, is not put in jeopardy, and may be tried for the same offense. Ex parte Glenn (C. C. 1901), 111 Fed. 257, order reversed, Moss v. Glenn, 23 Sup. Ct. 851, 189 U. S. 506, 47 L. Ed. 921.

The fact that a prisoner made no objection to the discharge of the jury, but remained silent, is not a consent to such discharge. Ex parte Glenn (C. C. 1901), 111 Fed. 257; order reversed, Moss v. Glenn (1903), 23 Sup. Ct. 851, 189 U. S. 506, 47 L. Ed. 921.

The discharge of a jury will be considered equivalent to an acquittal where it did not appear by the minutes of the court that the grounds of postponement—the illness of the district attorney and the absence of witnesses—were matters of surprise, nor that defendant consented thereto. U. S. v. Watson (D. C. 1868), Fed. Cas. No. 16,651. But, see U. S. v. Gilbert (C. C. 1834), Fed. Cas. No. 15,204; Same v. Morris (C. C. 1851), Fed. Cas. No. 15,815.

Where two or more distinct offenses are joined in one indictment, or two or more indictments therefor are consolidated, and the jury find a verdict as to one or more of the charges, but fail to agree as to the remainder, they may be discharged, and defendant thereafter tried on those charges on which they failed to agree. Ex parte Hibbs (D. C. 1886), 26 Fed. 421.

Where, after a person has pleaded not guilty, and been put on trial for a felony, and evidence has been introduced by the State, the judge adjourns the case to take up the trial of another set for that day, and on the adjournment day, on the ground that he is unwell, discharges the jury without the prisoner's consent, the discharge is equivalent to an acquittal; and he can not be again tried for the same offense. Ex parte Birch (D. C. 1890), 42 Fed. 587.

Acquittal. When an acquittal in a criminal prosecution in behalf of the Government is pleaded or offered in evidence by the same defendant in an action against him by an individual the rule of autrefois acquit does not apply. It is otherwise, however, when the party suing as last mentioned is the Government. Coffey v. U. S. (1886), 6 Sup. Ct. 437, 116 U. S. 436, 29 L. Ed. 684.

A verdict of acquittal is not deprived of its effect as such by a subsequent proposition to the foreman of the jury, made in open court and the order discharging the jury was made on the same day. Ball v. U. S. (1896), 16 Sup. Ct. 1192, 163 U. S. 662, 41 L. Ed. 300.

An acquittal before a court having no jurisdiction to try, is void, is no bar to a subsequent prosecution for the same offense. Id.

The prohibition is not against being twice punished, but against being twice in jeopardy; and a trial which is void, whether completed or not, is equally put in jeopardy. Id.

The effect of a verdict of acquittal of a joint defendant as barring his subsequent trial for the same offense can not be altered by the subsequent reversal of a judgment of guilty against the other defendant. Id.

A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder and not objected to before the verdict as insufficient in that respect is a bar to a second indictment for the same killing. Id.

A plea of former jeopardy to an indictment for murder can not be based upon the fact that upon the trial of two consolidated indictments for two other murders committed by defendant on the same day as the one charged he was found not guilty on the issue of insanity, which defense is set up to the indictment. Hotema *v.* U. S. (1902), 22 Sup. Ct. 895, 899, 186 U. S. 413, 46 L. Ed. 1225.

One acquitted by a military court of competent jurisdiction of the crime of homicide as defined by Pen. Code P. I. art. 404, can not be tried a second time in a civil court of those islands for the same offense. Grafton *v.* U. S. (1907), 27 Sup. Ct. 749, 753, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640.

A sworn statement by a defendant that he was on a certain date arraigned and acquitted on an indictment specified in the statement in the same court in which the second trial occurs and that the "offense to which he is now called upon to defend the facts and circumstances is * * * the same offense of which he was heretofore acquitted," is properly to be treated as a plea of former acquittal. Berkowitz *v.* U. S. (1899), 93 Fed. 452, 35 C. C. A. 379.

The acquittal of defendants on one of two indictments consolidated for the purpose of trial is not a bar to a conviction on the other where the offenses charged are distinct in point of law, although the same facts may have been relied on to a great extent in each case. Thomas *v.* U. S. (1907), 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720.

No person can be tried a second time for the same offense after a trial by a competent and regular jury upon a good indictment whether there be a verdict of acquittal or conviction. U. S. *v.* Gibert (C. C. 1834), Fed. Cas. No. 15,204.

While the finding of a court of military inquiry acquitting the prisoner charged with killing a military prisoner to prevent his escape, of all blame, is not a legal bar to a prosecution in the civil courts, it is entitled to weight as an expression of the views of the military court of the necessity of using a musket to prevent the escape of the deceased. U. S. *v.* Clark (C. C. 1887), 31 Fed. 710.

An acquittal before a court-martial can not be pleaded in defense of an indictment in a court of law even though the offense charged in either case be substantially the same. U. S. *v.* Cashiel (D. C. 1863), Fed. Cas. No. 14,744.

On a joint indictment against several the acquittal of some of defendants does not prevent the conviction of two shown to have conspired. U. S. *v.* Rindskopf (D. C. 1874), Fed. Cas. No. 16,165.

The acquittal of a defendant upon an indictment for selling liquor is a conclusive adjudication in his favor on the subsequent trial for perjury in swearing that he did not so sell, and the Government could not show that his oath was false. U. S. *v.* Butler (D. C. 1889), 38 Fed. 498.

A verdict of acquittal erroneously directed by the trial court in a prosecution for larceny on the ground of a variance between the indictment and the proof, in that the stolen articles described in the indictment as pianos were shown in the testimony to be autolectras, or auto-electric pianos, will support a plea of former acquittal to a subsequent indictment for the same offense, wherein the articles are given the latter description. Nordlinger *v.* U. S. (1904), 24 App. D. C. 406, 70 L. R. A. 227.

Conviction.—This prohibition is not against being twice punished, but against being twice in jeopardy, and the accused, whether convicted or acquitted, is equally put in jeopardy. Ball *v.* U. S. (1896), 16 Sup. Ct. 1192, 1194, 163 U. S. 662, 41 L. Ed. 300; U. S. *v.* Gibert (C. C. 1834), Fed. Cas. No. 15,204.

The fact that there is an appeal pending does not deprive defendant of the protection of a former conviction and judgment pleaded in bar, where such judgment is otherwise sufficient. U. S. *v.* Olsen (D. C. 1893), 57 Fed. 579.

A person tried on an indictment which charges the same offense in different counts, where the jury return a verdict of guilty as to one of the counts, the verdict being silent as to the other count, is not in jeopardy as to the count concerning which the jury were silent, so as to prevent his being tried thereunder on a new trial granted on motion of defendant. Brown *v.* U. S. (1899), 52 S. W. 56, 2 Ind. T. 582.

Conviction of lower offense as acquittal of higher.—A verdict finding a defendant guilty of a lesser offense than that charged in the information is in legal effect an acquittal of such offense, and after a reversal the same court is without jurisdiction to again place the defendant on

trial for such offense under the same information, though no plea of former jeopardy is filed. In re Bennett (D. C. 1877), 84 Fed. 324.

Where a person is tried upon an indictment charging murder in the first degree, and the jury returns a verdict against him for murder in the second degree, which is reversed on appeal on his application, on the subsequent trial he can not again be tried for murder in the first degree, and for no higher offense than that of murder in the second degree. U. S. v. Owens (1905), 2 Alaska, 480.

Verdict set aside or judgment arrested. — If the verdict was set aside upon defendant's motion, a second trial may be had. Ball v. U. S. (1896), 16 Sup. Ct. 1192, 163 U. S. 662, 41 L. Ed. 300. [C. S. p. 11325.]

Where, during the trial, a juror becomes disqualified, and the court adjudges a mistrial, a plea of former jeopardy is not good on a second trial, even though all parties were willing to proceed with 11 jurors. Gardes v. U. S. (1898), 87 Fed. 172, 30 C. C. A. 596; certiorari denied (1898), 19 Sup. Ct. 884, 171 U. S. 689, 43 L. Ed. 1179.

After a conviction of a capital offense, it is in the discretion of the court to grant a new trial on the application of the prisoner; it being competent for the prisoner himself, by such application, to waive the benefit of that clause in the constitution which provides that no man shall be put twice in jeopardy of life or limb for the same offense. U. S. v. Harding (C. C. 1846), Fed. Cas. No. 15,301.

Judgment reversed. — A person convicted of a lesser grade of homicide than that charged in the indictment, who obtains a reversal of the judgment upon appeal, is not placed twice in jeopardy by a second trial for murder under the same indictment. Brantley v. Georgia (1909), 30 Sup. Ct. 544, 216 U. S. 284, 54 L. Ed. 768.

The plea of former jeopardy can not be interposed to a second trial of the same case, made necessary by the reversal of a former judgment of conviction on a writ of error sued out by the defendant. Stewart v. U. S. (1911), 31 App. D. C. 47, 167 C. C. A. 151.

If a demurrer to a plea of former conviction is sustained, [illegible] A motion to vacate the verdict, the effect of which is to set aside and hold for naught the proceedings in U. S. v. Van Vliet (D. C. 1884), 23 Fed. 611.

IV. Self-incrimination.

Nature of privilege in general. — The amendment to the United States Constitution providing that no person shall be compelled, in any criminal case, to be a witness against himself, declares a principle of natural justice and of the civil rights of freemen, forbidding every species of compulsion or force exercised against a party or a witness for the purpose of obtaining his testimony, which has been practiced in the European countries from which our jurisprudence is largely derived, and which, in some of them, has been carried to the most barbarous excesses. Statutory requirements for the production of books or papers, relating to private affairs or offenses of the owner, stand on the same footing as requirements that he shall himself be a witness against himself. The privilege protects not only from the disclosure of facts which would form the basis of criminal charges, but also from the disclosure of facts which would furnase a link in a chain of evidence by which such charges may be established. Edelstein v. U. S. (1909), 169 Fed. 650, 652, 70 C. C. A. 328, 9

L. R. A. (N. S.) 236, certiorari denied (1907), 27 Sup. Ct. 791, 205 U. S. 543, 51 L. Ed. 922.

On the trial of a criminal case in a Federal court, it was error for the court to comment on the failure of defendant to produce certain letters, which witnesses had testified were written to him, as in derogation of his constitutional right not to furnish evidence against himself. Hibbard v. U. S. (1909), 172 Fed. 66, 96 C. C. A. 554, 18 Ann. Cas. 1040.

If any direct answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict the witness of any crime, he is not bound to answer it, so as to furnish matter for that conviction. U. S. v. Burr (C. C. 1807), Fed. Cas. No. 14,692e.

An officer is not bound to be a witness against himself on a charge of misconduct, whether amounting to an indictable offense, or only to his discredit, which would furnish ground for his removal or impeachment. U. S. v. Collins (C. C. 1873), Fed. Cas. No. 14837.

Where a person has already been indicted for an offense about which he is to be examined as a witness, and the questions asked him tend to connect him with such offense, the testimony sought is within the inhibition of this amendment. Foot v. Buchanan (C. C. 1902), 113 Fed. 156.

The constitutional privilege of a witness not to be compelled to give evidence which may incriminate him is personal, and can not be invoked by counsel as a ground of exception to interrogatories propounded in a pleading. In re Knickerbocker Steamboat Co. (D. C. 1905), 136 Fed. 956.

Right, under this amendment, to refuse to incriminate oneself, is a personal privilege of an individual witness, and is not without the aid of the fourth amendment, relating to searches and seizures to be extended to a corporation. U. S. v. Philadelphia & R. Ry. Co. (D. C. 1915), 225 Fed. 301.

The constitutional guaranty against self-incrimination gives the citizen protection as broad as that afforded by the common-law principle from which it is derived. Calhoun v. State (Ga. 1916), 87 S. E. 893.

Both the Federal and State constitutions are always liberally construed to prevent compulsory self-incrimination. State v. Thomas (1913), 157 S. W. 330, 250 Mo. 189.

Exemption from compulsory self-incrimination is not a natural right, nor is it a right secured by the Federal Constitution, which a State constitution can neither take away nor abridge. Commonwealth v. Cameron (1910), 42 Pa. Super. Ct. 347.

Persons within the provision.—Resident aliens are within the protection of this amendment. U. S. v. Wong Quong Wong (D. C. 1899), 94 Fed. 832; Same v. Wong Chin Shuen (D. C. 1899), 94 Fed. 832.

In what proceedings privilege may be asserted.—Where an investigation before a grand jury is in progress for the purpose of ascertaining whether a crime has been committed, not based on any complaint or formal accusation, evidence given in such investigation by persons subsequently indicted is not, by founding an indictment upon it, used elsewhere, in violation of R. S. sec. 860, now repealed, declaring that any evidence voluntarily given by a witness can not be used against him in any criminal prosecution. U. S. v. Kimball (C. C. 1902), 117 Fed. 156.

Applicability of privilege to future prosecutions.—The immunity which must be accorded to a witness compelled to give evidence against himself relates only to past offenses, and need not exempt the witnesses from prosecution for perjury committed when so testifying. Glickstein v. U. S. (1911), 32 Sup. Ct. 71, 222 U. S. 139, 56 L. Ed. 128.

The amendment is not limited to proceedings actually brought, but applies as well to criminal proceedings which might be brought against the witness in the future. In re Hess (D. C. 1905), 134 Fed. 109.

Admission of testimony given at prior hearings.—Admission at the trial of the testimony of accused, voluntarily given at preliminary hearing, held not to violate his privilege against self-crimination. Powers v. U. S. (1912), 32 Sup. Ct. 281, 223 U. S. 303, 56 L. Ed. 448.

In an action to enforce a statutory penalty, evidence obtained from the defendant in the course of a prior judicial proceeding is inadmissible against him. Daly v. Brady (C. C. 1895), 69 Fed. 285.

Exposure to infamy or disgrace.—The constitutional privilege of refusing to give self-incriminating testimony was not intended to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime, but only from actual prosecution and punishment. Mr. Justice Field dissenting. Brown v. Walker (1896), 16 Sup. Ct. 644, 161 U. S. 591, 40 L. Ed. 819, affirming (C. C. 1895), 70 Fed. 46.

Where the answer of a witness will not directly show his infamy, but only tends to disgrace him, he is bound to answer. Id.

A witness need not answer a question which does not relate to any matter of fact in issue, or to any matter contained in his direct testimony, where a truthful answer would tend to degrade him. U. S. v. Craig (C. C. 1827), Fed. Cas. No. 14,883; Same v. Dickinson (C. C. 1840), Fed. Cas. No.

14,958. In re Lewis (D. C. 1870), Fed. Cas. No. 8,312.

A witness can not be asked, on cross-examination, a question tending to degrade him, unless it be in relation to a fact in issue in the record. U. S. v. White (C. C. 1836), Fed. Cas. No. 16,676; U. S. v. Hudland (C. C. 1837), Fed. Cas. No. 15,411.

Production and introduction of documents and books.—The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture, is equally within the prohibition of the amendment. Boyd v. U. S. (1886), 6 Sup. Ct. 524, 534, 116 U. S. 616, 29 L. Ed. 746; Gouled v. U. S. (1921), 254 U. S. —; 65 L. Ed. 311.

To permit a demand to be made on the defendant in a criminal case, in the presence of the jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment to the Constitution, providing that no person in any criminal case shall be compelled to be a witness against himself, even though no order for the production of the paper is made, and the demand is made solely because of its supposed necessity to authorize the introduction of secondary evidence. McKnight v. U. S. (1902), 115 Fed. 972, 54 C. C. A. 358.

Necessity and mode of assertion of privilege. That a witness may be prosecuted, and put to the annoyance and expense of pleading his constitutional immunity by way of confession and avoidance, is a detriment which the law does not recognize, and to which the constitutional provision does not extend. Brown v. Walker (1896), 16 Sup. Ct. 644, 651, 161 U. S. 591, 40 L. Ed. 819.

The question whether a witness was privileged to refuse to answer a question on the ground that the answer tended to criminate him is not [illegible] court for review where the witness did not stand on his privilege but answered the question. Taylor v. U. S. (1907), 152 Fed. 1, 81 C. C. A. 197, [illegible] (1907), 28 Sup. Ct. 54, 207 U. S. 120, 52 L. Ed. 120.

The claim that a witness is protected from answering [illegible] cannot be asserted on [illegible] Brandon v. Ewing, 91 [illegible] (1907), 179 Fed. 3[illegible], C. C. A. 130.

The court should [illegible] as to their power [illegible] questions, [illegible] might in [illegible] are asked. U. S. v. Reid (C. C. 1855), Fed. Cas. No. 16,018.

Witness who can not testify in a cause without criminating himself shall not be sworn. Neale v. Coningham (C. C. 1802), Fed. Cas. No. 10,067.

That a person subsequently indicted was subpœnaed before the grand jury and compelled to take the usual oath was not an infringement of his constitutional right not to testify against himself; he not being able to claim his constitutional privilege until he had been sworn as a witness. U. S. v. Kimball (C. C. 1902), 117 Fed. 156.

A witness's privilege not to answer incriminating questions must be claimed by her as her personal privilege, and can not be claimed by her counsel. In re O'Shea (D. C. 1908), 166 Fed. 180.

Determination as to whether testimony would incriminate. To entitle a witness to the privilege of silence, the court must say from the circumstances of the case and the nature of the evidence which the witness is called on to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer, but, this being made to appear, great latitude should be allowed him. U. S. v. Burr (C. C. 1807), Fed. Cas. No. 14,692e. [C. S. p. 14,343].

A witness in a criminal case is in contempt for refusing to answer a question, though he objects that it may disclose a fact constituting important and material evidence to criminate him if the court is of opinion that no direct answer to the question could furnish evidence against the witness. U. S. v. Miller (C. C. 1821), Fed. Cas. No. 15,772.

Where, from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of evidence to establish the commission of a crime by the witness, the court can not inquire whether the witness claimed his privilege in good faith or otherwise. It is only where the criminality of the question is doubtful that the witness's motive is to be considered, for [illegible] bad faith would lead [illegible] answer would [illegible] In re [illegible] (1906), 74 Fed. 954.

Grant of immunity from prosecution. Effect of immunity grants or statutes upon right to claim privilege. [illegible] grant of immunity which may [illegible] the witness protected [illegible] constitutional privilege [illegible] Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; Ex parte Irvine (C. C. 1906), 74 Fed. 954.

A witness may be compelled in a criminal [illegible] to testify to matters [illegible] himself, but no use could be made of such testimony against the

witness in a criminal proceeding. Act Feb. 25, 1868, now repealed. U. S. v. Brown (D. C. 1871), Fed. Cas. No. 14,671; Same v. Williams (C. C. 1872), Fed. Cas. No. 16,717.

A stipulation by the Government officials of immunity from penalties or forfeitures in consideration of testimony of violations of the law will be enforced by the courts. U. S. v. Roelle (C. C. 1878), Fed. Cas. No. 16,186.

H., accused as an accomplice, on a promise of immunity if he would testify truly before the grand and trial juries, testified before the grand jury, and a joint indictment was found against his associates and himself. After a trial jury had been impaneled to try three of the accused, to whom a separate trial had been granted, H. informed the prosecuting attorney of his determination to so change his testimony as to exonerate those on trial, and render it impossible to convict them on testimony then available; and, on being threatened with a prosecution for perjury if his testimony should be so changed, he refused to testify at all, and the prosecuting attorney made an arrangement with another accomplice to testify on similar terms, who, having testified, was discharged on a nol. pros. H. was arrested, and held to answer to the indictment. After the other testimony of the prosecution and of the defense was in, H. offered, and was anxious, to testify in rebuttal, but his offer was declined. Held, that H., by refusing to testify as agreed notwithstanding his testifying before the grand jury, had forfeited all right to immunity, and subjected himself to trial and conviction, and the court refused to continue the case in order to allow him an opportunity to apply for a pardon before conviction. U. S. v. Hinz (C. C. 1888), 35 Fed. 272.

Effect of limitations, pardon, or immunity.—Where testimony relates to criminal acts against which the statute of limitations has run or for which accused has received a pardon or is guaranteed an immunity, the amendment does not apply. Hale v. Henkel (1906), 26 Sup. Ct. 370, 375, 201 U. S. 43, 50 L. Ed. 652.

Where a prosecution for the crime concerning which the witness is interrogated is barred by the statute of limitations, he is compellable to answer. Brown v. Walker (1896), 16 Sup. Ct. 644, 647, 161 U. S. 591, 40 L. Ed. 819.

A witness who has received a pardon can no longer set up his privilege. Id.

The provision that no one shall be a witness against himself does not impair his obligation to testify, if prosecution against him be barred by laches of time, pardon, or by statutory enactment. Robertson v. Baldwin (1897), 17 Sup. Ct. 326, 329, 165 U. S. 275, 41 L. Ed. 715.

Waiver of privilege.—Where accused takes the stand in his own behalf, he may be subjected to cross-examination upon his statements. Anarchists' Case (1887), 8 Sup. Ct. 22, 31, 123 U. S. 131, 31 L. Ed. 80; Brown v. Walker (1896), 16 Sup. Ct. 644, 647, 161 U. S. 591, 40 L. Ed. 819; Powers v. U. S. (1912), 32 Sup. Ct. 281, 283, 223 U. S. 303, 56 L. Ed. 448; Harrold v. Territory of Oklahoma (1909), 169 Fed. 47, 94 C. C. A. 415, 17 Ann. Cas. 868, reversing judgment (1907), 89 P. 202, 18 Okl. 395; U. S. v. Oppenheim (D. C. 1915), 228 Fed. 220.

Where a witness elects to waive his privilege and discloses his criminal connections, he will not be permitted to stop, but must go on and make a full disclosure. Brown v. Walker (1896), 16 Sup. Ct. 644, 647, 161 U. S. 591, 40 L. Ed. 819.

A witness who voluntarily testifies can not resist the effect of the testimony by claiming that, under this amendment, he could not have been compelled to give the testimony. Burrell v. Montana (1904), 24 Sup. Ct. 787, 788, 194 U. S. 572, 48 L. Ed. 122.

Accused, being tried on two indictments and having testified only as to a fact involved in one, did not waive his constitutional privilege except as to such fact. Myrick v. U. S. (1915), 219 Fed. 1, 134 C. C. A. 619.

Under Const. Amend. 5, and act Mar. 16, 1878, where accused testifies in his own behalf, his waiver of his privilege is complete. Diggs v. U. S. (C. C. A. 1915), 220 Fed. 545.

V. Due Process of Law.

Limitation on Federal action.—The "due process of law" provision of this amendment is a limitation on Congress, not on the individual States. Twitchell v. Pennsylvania (1868), 74 U. S. (7 Wall.) 321, 19 L. Ed. 223. [C. S. p. 14,348].

"Due process of law" in general.—The expressions "due process of law" and "the law of the land" are synonymous. Murray v. Hoboken Land Co. (1855), 59 U. S. (18 How.), 272, 15 L. Ed. 372; U. S. v. New York, N. H. & H. R. Co. (C. C. 1908), 165 Fed. 742; U. S. v. Billings (C. C. 1911), 190 Fed. 359; Ex parte Toscano (D. C. 1913), 208 Fed. 938; Porter v. Mitchell (1911), 4 Alaska, 327.

The provisions that no person shall be deprived of life, liberty, or property without due process of law relate to that class of rights whose protection is peculiarly within the province of the judicial branch of the Government. U. S. v. Lee (1882), 1 Sup. Ct. 240, 259, 106 U. S. 196, 27 L. Ed. 171.

"Due process of law," as used in the Constitution, requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be entered for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise the judgment will be erroneous. Crain v. U. S. (1896), 16 Sup. Ct. 952, 162 U. S. 625, 40 L. Ed. 1097.

The due process clause applies only to privileges and immunities arising out of the natural character of the National Government or those specifically granted to all citizens and persons by the Constitution of the United States, and those fundamental rights which are inherent to all are privileges and immunities of State citizenship only and not within the protection of this amendment. Watson v. St. Louis, I. M. & S. Ry Co. (C. C. 1909), 169 Fed. 942; judgment affirmed, St. Louis, I. M. & S. R. Co. v. Watson (1912), 32 Sup. Ct. 533, 223 U. S. 745, 56 L. Ed. 639.

The words "due process of law," mean such an exercise of the powers of the Government as the several maxims of the law permit and sanction. They mean the due course of legal proceedings according to those rules and forms that have been established for the protection of private rights, and if a person be imprisoned by virtue of process, though there is error in the proceeding resulting in that process, yet, if the law is valid under which the proceeding is had such imprisonment is not without due process of law. People v. Sheriff of Chautauqua County (N. Y. 1886), 11 Civ. Proc. R. 172.

Congress, under the fifth amendment is governed by the principle that there can be no discrimination in the laws except such as is based on just and proper classification. Kilby v. Chicago, M. & St. P. Ry. Co. (1910), 125 N. W. 464, 142 Wis. 154; Id. v. Minneapolis, St. P. & S. S. M. Ry. Co. (1910), 125 N. W. 468, 142 Wis. 165.

The amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights. Yesler v. Board of Harbor Line Com'rs (1892), 12 Sup. Ct. 964, 145 U. S. 535, 36 L. Ed. 812.

Military law tribunals, and measures. The confiscation acts of Aug. 6, 1861, and July 17, 1862, were in excess of the war power of the Government and not an exercise of its ordinary powers and so not in conflict with the provisions of Miller v. U. S. (1870), 78 U. S. (11 Wall.) 268, 20 L. Ed. 135.

The constitutionality of the statutes touching Army and Navy courts-martial is no longer an open question. Ex parte Reed (1879), 100 U. S. 13, 21, 25 L. Ed. 538.

Military law is due process of law to those in the military or naval service of the United States. Reaves v. Ainsworth (1911), 31 Sup. Ct. 230, 219 U. S. 296, 55 L. Ed. 225, affirming judgment (1906), 28 App. D. C. 157.

The military governor of Porto Rico was not authorized by the President to make any judicial order that would deprive any person of his property without due process of law, where the instructions from the President safeguarding the property of the inhabitants were recognized as a declaration of the principles by which the military government of Porto Rico was limited. Ochoa v. Hernandez y Morales (1913), 33 Sup. Ct. 1033, 230 U. S. 139, 57 L. Ed. 1427.

The retroactive clause in the order of the military governor of Porto Rico reducing from 20 to 6 years the period during which possession of real property must continue to permit ex parte conversion on the public records of an ex parte entry of possessory title into a record of ownership conferring an apparent title on such possessor as against true owners by his bona fide grantees without notice, is limited to cases where there still remains a reasonable opportunity to the true owners to contest the claims of the possessor. Id.

The two orders issued by the War Department August 8, 1862, one "to prevent the evasion of military duty and for the suppression of disloyal practices," and the other "authorizing the arrest of persons discouraging enlistments" were issued in violation of the due process clause. Ex parte Field (C. C. 1862), Fed. Cas. No. 4,761.

The arrest and detention of the Confederate Warren Richmond, in 1864, from his destination at Port Gibson, or that person of Lord to have been a military necessity, and his subsequent imprisonment by military force and without process of law, were illegal acts, and any promise exacted from him as a condition of his release concerning his future claim to the property was and is void and of no effect; parole would a verbal promise of to obtain how ever taken or made, be sufficient to affect his right to or interest in the premises. U. S. v. Rogers (C. C. 1882), 12 Fed. 615.

Interned pursuant to treaty belligerent: Martial fleeing across the border does not deprive them of liberty without due process of law. Ex parte Toscano (D. C. 1913), 208 Fed. 938.

Criminal prosecutions. Due process of law in a criminal case requires a law de-

scribing the offense, which offense must be described in the accusation, and the accused must be given his day in court, and his trial must proceed according to established procedure, consisting of rules of pleading and practice, and it is imperative that the court be one of competent jurisdiction. Jamison v. Wimbish (D. C. 1904), 130 Fed. 351; order reversed, Wimbish v. Jamison (1905), 26 Sup. Ct. 747, 199 U. S. 599, 50 L. Ed. 327.

Authority for arrest.—The detention of a vessel in port by the President, under act Apr. 30, 1818 (3 Stat. 447), forbidding the setting afoot of military expeditions against neutral Governments, was not a taking and use of private property for public purposes within the meaning of the Constitution, but was an arrest by "due process of law." Graham v. U. S. (1866), 2 Ct. Cl. 327.

Presence of accused.—Due process of law was not denied by the action of the Supreme Court of the Philippine Islands in making an order upon its own motion when the accused was absent from the court, requiring the judge and clerk of the court below to supply deficiencies in the record. Dowdell v. U. S. (1911), 31 Sup. Ct. 590, 221 U. S. 325, 55 L. Ed. 753.

Necessity of plea.—"Due process of law," as used in the constitution requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be entered for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise the judgment will be erroneous. Crain v. U. S. (1896), 16 Sup. Ct. 952, 959, 162 U. S. 625, 40 L. Ed. 1097.

VI. Compensation for Taking Property.

Provision declaratory of common law.—The provision that "private property shall not be taken for public use without just compensation," does not create any new principle of restriction on either the national or State governments, which did not exist before, but is declaratory of the common-law principle applicable to all republican governments. Young v. McKenzie (1847), 3 Ga. (3 Kelly) 31; Parham v. Justices of Decatur County Inferior Court (1851), 9 Ga. 341; People v. White (N. Y. 1851), 11 Barb. 26.

The fifth amendment did not originate the right of eminent domain in the Federal Government, but simply recognized it as a prerogative incident to sovereignty, to be exercised only upon the condition that compensation be made to the owner. Smith v. U. S. (1897), 32 Ct. Cl. 295.

"Public use."—The taking of private property for use or for destruction, when the public exigency demands it, by a military officer commanding any part of the public forces, is an exercise of eminent domain. Grant v. U. S. (1863), 1 Ct. Cl. 41.

A public park is a public use. U. S. v. Cooper (1891), 20 D. C. 104.

The taking of land for the erection of a fort, or the construction of a navy yard, is a taking for public use. In re League Island (Pa. 1868), 1 Brewst. 524.

General scope of provision.—The provisions that private property shall not be taken for public use without just compensation are intended solely as a limitation on the exercise of power by the Government of the United States, and are not applicable to the legislation of the States. Barron v. City of Baltimore (1833), 32 U. S. (7 Pet.) 243, 8 L. Ed. 672. [C. S. p. 14,368].

The provision is merely a limitation upon the use of the power of eminent domain. U. S. v. Jones (1883), 109 U. S. 518.

Acts passed under war power.—The confiscation acts passed during the rebellion are constitutional, and are not in conflict with this amendment, since they were passed under the war power. Miller v. U. S. (1870), 11 Wall. 268, 304, 20 L. Ed. 135.

The right to damages for false imprisonment is property; and therefore act Mar. 3, 1863, sec. 4, which provides that an order of the President or under his authority, made during the Rebellion, shall be a defense to any action, civil or criminal, for any arrest or imprisonment under and by virtue of such order, is unconstitutional in so far as it assumes to defeat such right. Griffin v. Wilcox (1863), 21 Ind. 370.

Act Aug. 6, 1861, requiring the President in certain cases to cause certain property "to be seized, confiscated, and condemned," does not authorize it to be done, except by due process of law; hence a mere order issued by the district attorney, under which a marshal seizes upon the officer of a person's newspaper and on all its contents, and proceedings are instituted for its forfeiture, is no protection to an action by the owner against the marshal for trespass. Hodgson v. Millward (Pa. 1863), 3 Grant, Cas. 406.

Exemption from military service.—Assuming that a conscript, by furnishing a substitute, as authorized by act Apr. 16, 1862, made a contract with the Government, the latter, under the power to declare war and raise and support armies, may annul such contract without making any compensation; exemption from military service not being property, but a mere personal

privilege. Gatlin v. Walton (1864), 60 N. C. 325, 333.

Pensions.—Pensioners of the United States have no vested legal rights to their pensions, and it was competent for Congress by act July 25, 1882, sec. 5, to provide that no person receiving a pension under a special act should receive in addition a pension under the general law. U. S. v. Teller (1883), 2 Sup. Ct. 39, 107 U. S. 64, 27 L. Ed. 352.

Purpose of taking.—The Government is liable for property taken to be destroyed as for property taken to be used. Wiggins v. U. S. (1867), 3 Ct. Cl. 412, reaffirming Grant's Case (1863), 1 Ct. Cl. 41.

Incidental and future injuries in general.—Congress is prohibited by this amendment from conferring immunity in action for a private nuisance which amounts in effect to a taking of private property for public use. Richards v. Washington Terminal Co. (1914), 34 Sup. Ct. 654, 233 U. S. 546, 58 L. Ed. 1088, reversing judgment (1911), 37 App. D. C. 289.

Semble, the rule of law that merely incidental injury to property arising from the occupation and use of the property of another by the State or United States for public purposes does not constitute a "taking" of the property so incidentally injured, which entitles the owner to compensation, can not be avoided by private covenants, so as to impose an additional burden upon the public in the exercise of the right of eminent domain. U. S. v. Certain Lands in Town of Jamestown, R. I. (C. C. 1899), 112 Fed. 622; judgment affirmed, Wharton v. U. S. (1907), 153 Fed. 876, 83 C. C. A. 58.

Acts done in the exercise of governmental powers, and not directly encroaching on private property, though impairing the use thereof, are not a taking. Id.

Where the owner is merely put to some expense in warding off consequences resulting from a public work, there is not a taking. Peabody v. U. S. (1907), 43 Ct. Cl. 5; Wells v. U. S. (1909), 44 Ct. Cl. 482.

Change or improvement of navigable waters, rivers, and harbors. The [illegible] of the United States under this amendment to make just compensation for any appropriation of land for public use is not defeated because such land was taken by the Government in the exercise of its power to improve navigation. U. S. [illegible], 23 Sup. Ct. 349, 357, 188 U. S. 445, 47 L. Ed. 529.

The taking by the United States [illegible] parts of [illegible] sec. 11, act of Mar. 3, 1909 [illegible] north of the [illegible] tween such [illegible] ary line, is [illegible] cause sec. 1, [illegible] 358), permits the lease by the Secretary of War of any water power resulting from such conservation and the works the Government may construct. U. S. v. Chandler-Dunbar Water Power Co. (1913), 33 Sup. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

Erection and use of fortifications.—That the erection and use of a fortification by the United States interferes with the purpose a neighboring landowner had in view in purchasing and improving his property, or even impairs it value, does not constitute a taking of such property which entitles him to compensation. U. S. v. Certain Lands in Town of Jamestown, R. I. (C. C. 1899), 112 Fed. 622; judgment affirmed, Wharton v. U. S. (1907), 153 Fed. 876, 83 C. C. A. 58.

Firing guns in such a direction as to send projectiles over and beyond land does not constitute a taking. Peabody v. U. S. (1907), 43 Ct. Cl. 5; Id. (1911), 46 Ct. Cl. 39.

The concussion of guns fired from a fort for practice purposes may injure an adjacent hotel, and the continued occupancy of the fort by the military forces may be a constant menace to the quietude of the hotel as a summer resort, impairing its value; but these acts do not constitute a taking of private property for public use. Peabody v. U. S. (1911), 46 Ct. Cl. 39.

Use of patented machines. R. S. 4899, relating to use of patented machines, held not unconstitutional as depriving one of his property without compensation. Dable Grain Shovel Co. v. Flint (1890), 11 Sup. Ct. 8, 9, 137 U. S. 41, 34 L. Ed. 618.

Using a patented machine, by officers of the Government, although in prosecuting public works, does not constitute such a taking of private property for public use as is contemplated by the Constitution. It is a usurpation of a property right of the patentee, and not a [illegible] of his property. Tilghman v. U. S. (1870), 1 Ct. Cl. 7.

Taking of property under military authority. [illegible] forces of the United States have the right while in occupation of [illegible] territory in time of war, [illegible] the purpose of military necessity, to [illegible] the purpose of destroying property without [illegible] Bowen-Merrill Co. v. Citizens' Water Works Co. (1894), 14 C. C. A. 1794, Circuit Court [illegible] 107 U. S. 192, 2 Sup. Ct. 2[illegible] 7 L. Ed. U. S. Petition [illegible] of [illegible] of [illegible] (1851), [illegible] 41 [illegible] Nat. [illegible] R. Co. [illegible] Ct. Cl. 98 Va. [illegible]

W[illegible] [illegible] property pressed [illegible] Quartermaster but refused

to hire it and the officer subsequently put it to use in the Government service it must be considered as property taken for a public use; and the owner may recover its reasonable value and can not be required to take it back and accept compensation for its use. Peck *v.* U. S. (1878), 14 Ct. Cl. 84.

Occasions may arise when a military officer may destroy private property to prevent its falling into the hands of the public enemy, or, where the officer is charged with a particular duty, he may impress private property and take it for public use, and then the Government is bound to compensate the owner, and the officer is not a trespasser; but in all such cases the danger must be immediate and impending, or the necessity for the public service so urgent as not to admit of delay. Yost *v.* Stout (1867), 44 Tenn. (4 Cold.) 205, 94 Am. Dec. 194.

The laws of war do not justify the taking of private property for the purpose of feeding the inmates of an incorporated asylum located in a city occupied by the military forces without making compensation to the owner. Eastern Lunatic Asylum *v.* Garrett (Va. 1876), 27 Grat. 163.

Elements and measures of damage in general.—The compensation to be made for land taken for public use in the exercise of the right of eminent domain is measured by its market value at the time of the taking. U. S. *v.* Honolulu Plantation Co. (1903), 122 Fed. 581, 58 C. C. A. 279; U. S. *v.* Inlots (C. C. 1873), Fed Cas. No. 15,441; U. S. *v.* Inlots (C. C. 1873), Fed. Cas. No. 15,441a; Archer *v.* U. S. (1912), 47 Ct. Cl. 248.

393. Equal rights under the law.—All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. *R. S. 1977.*

Notes of Decisions.

General scope of statute.—This section, so far as it confers rights, is not limited to negroes and colored persons. It confers rights on white persons, and puts in the form of statute what has been substantially ordained by the Constitution. Kentucky *v.* Powers (C. C. 1905), 139 Fed. 452.

Crimes against negroes.—A crime inflicted upon a colored person, not by reason of his race, color, or previous condition, is not within the civil rights act of 1866. U. S. *v.* Cruikshank (C. C. 1874), Fed. Cas. No. 14,897.

Effect of court-martial conviction.—Conviction of a military offense by court-martial does not make a witness incompetent to testify in the civil courts in a criminal prosecution. Reed *v.* U. S. (C. C. A. 1918), 252 Fed. 21.

394. Equal rights in respect to property.—All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. *R. S. 1978.*

Notes of Decisions.

Validity.—This section was enacted by virtue of the thirteenth amendment. U. S. *v.* Harris (1882), 1 Sup. Ct. 601, 610, 106 U. S. 629, 27 L. Ed. 290; U. S. *v.* Morris (D. C. 1903), 125 Fed. 322.

Congress has the power, under the thirteenth constitutional amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of such rights is solely because of race or color; and this section is within such power. U. S. *v.* Morris (D. C. 1903), 125 Fed. 322.

395. Accused persons may testify.—That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts,

Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. *Act of Mar. 16, 1878 (20 Stat. 30).*

Notes of Decisions.

Right of defendant to testify and weight of his testimony.—The purpose of this act was to make defendants competent witnesses, but reserving to them the right to refrain from testifying without prejudice, and when any defendant chooses to testify he may do so, and it does not matter whether his testimony is for or against himself or for or against a codefendant. Wolfson v. U. S. (1900), 101 Fed. 430, 436, 41 C. C. A. 422, writ of certiorari denied (1901), 21 Sup. Ct. 919, 180 U. S. 637, 45 L. Ed. 710.

One of two defendants jointly indicted and tried may, at his own request, be examined as a witness by the Government. Wolfson v. U. S. (1900), 101 Fed. 430, 41 C. C. A. 422; writ of certiorari denied (1901), 21 Sup. Ct. 919, 180 U. S. 637, 47 L. Ed. 710; Id. (1900), 102 Fed. 134, 41 C. C. A. 422; writ of certiorari denied (1901), 21 Sup. Ct. 919, 180 U. S. 637, 47 L. Ed. 710.

Codefendants who had pleaded guilty were competent to testify for the Government against their codefendants in the indictment. Ryan v. U. S. (C. C. A. 1914), 216 Fed. 13.

The laws of the United States permit a person charged with crime or misdemeanor to be a witness in his own behalf, and such weight is to be given to his testimony as, under all the circumstances, it is fairly entitled to. U. S. v. Houghton (D. C. 1882), 14 Fed. 544.

Comment on failure to testify.—The fact that the accused declines to testify on his own behalf can not be commented on by the public prosecutor in his remarks to the jury. U. S. v. Snyder (C. C. 1882), 14 Fed. 754 Wilson v. U. S. (1893), 13 Sup. Ct. 765, 766, 149 U. S. 60, 37 L. Ed. 650; Stout v. U. S. (C. C. A. 1915), 227 Fed. 799; U. S. v. Ogden (D. C. 1900), 105 Fed. 371.

It is prejudicial error for the court or counsel to call to the attention of the jury, in a criminal case, in any manner, the right of the defendant, under the statute, to testify in his own behalf; and such an error can only be cured, if at all, by a clear and emphatic statement by the court that the jury are not permitted to attach any importance to the failure of the defendant to testify. Such comment is not rendered harmless by the fact that the defendant does afterwards testify, since it virtually compels him to do so to avoid unfavorable inferences by the jury. McKnight v. U. S. (1902), 115 Fed. 972, 54 C. C. A. 358. See U. S. v. Breese (D. C. 1904), 131 Fed. 915, 927; reversed (1906), 143 Fed. 250, 74 C. C. A. 388. Nor can it be commented on by the court. Stout v. U. S. (C. C. A. 1915), 227 Fed. 799; U. S. v. Ogden (D. C. 1900), 105 Fed. 371. But, where accused has waived the privilege accorded him by testifying in his own behalf, his failure to testify concerning certain matters may be commented on by counsel. Diggs v. U. S. (C. C. A. 1915), 220 Fed. 545. And may be considered by the jury. Diggs v. U. S. (C. C. A. 1915), 220 Fed. 545.

The exception to the court's action or want of action on objection to reference by counsel for the prosecution to the failure of accused to take the stand is the proper method of objection, and such an exception when properly presented can be considered on writ of error. Wilson v. U. S. (1893), 13 Sup. Ct. 765, 766, 767, 149 U. S. 60, 37 L. Ed. 650.

That the district attorney may not refer in argument to failure of accused to testify did not prevent argument that the Government had made out a prima facie case, which had not been contradicted. Carlisle v. U. S. (1912), 194 Fed. 827, 114 C. C. A. 531.

Accused, being tried on two indictments and having testified only as to a fact involved in one, did not waive his right to object to argument of counsel as to his failure to testify fully. Myrick v. U. S. (1915), 219 Fed. 1, 134 C. C. A. 619.

Witness compelled to testify.—A particeps criminis, where the statute of limitations has run in his favor, may be compelled to testify against the defendant. U. S. v. Smith (C. C. 1809), Fed. Cas. No. 16,332.

Presumption.—Where, in a prosecution for using the mails with intent to defraud, defendant became a witness in his own behalf, as authorized by this section, an instruction that, defendant having gone on the stand, if he had not fully explained or had not explained matters material to the issues which were naturally within his knowledge, the jury might consider such failure as a circumstance tending to show

that the facts, if explained would bear out the contention of the Government, and his failure to explain them, or give a truthful explanation, was against him, was erroneous as misleading, and as placing an undue burden of proof on defendant. Balliet v. U. S. (1904), 129 Fed. 689, 64 C. C. A. 201.

Waiver of privilege.—Where accused testifies in his own behalf, his waiver of his privilege is complete. Diggs v. U. S. (C. C. A. 1915), 220 Fed. 545.

Cross-examination and impeachment.—Where a defendant in a criminal case becomes a witness for himself, his credibility may be impeached. U. S. v. Brown (D. C. 1880), 40 Fed. 457. He waives his constitutional privilege by taking the witness stand, occupies the attitude of any other witness, and may be cross-examined like an ordinary witness and to the same extent. Balliet v. U. S. (1904), 129 Fed. 689, 64 C. C. A. 201.

396. Issue of writs of habeas corpus.—The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus. *R. S. 751.*

The several justices and judges of the said courts, within their respective jurisdiction, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. *R. S. 752.*

Circuit courts mentioned in R. S. 751 were abolished by secs. 289–291, Judicial Code of March 3, 1911 (36 Stat. 1087), and their powers and duties transferred to the district courts.

Notes of Decisions.

Construction of provision.—The office of the writ of habeas corpus is confined to an inquiry as to the cause of commitment, and if it is ascertained that the party invoking it is held under a process of a court or tribunal having jurisdiction of his person and the subject-matter of the charge the writ must be dismissed. Ex parte Jim Hong (1914), 211 Fed. 73, 127 C. C. A. 569.

The writ will be issued in the territorial jurisdiction of the courts, or the judges thereof, to relieve a person, who is in custody in violation of the Constitution. Ex parte Kenyon (C. C. 1878), Fed. Cas. No. 7,720; Ex parte Farley (C. C. 1889), 40 Fed. 66.

The writ of habeas corpus provided for in the United States statutes is the high prerogative writ of right granted upon the application of a person illegally imprisoned or in any way restrained of his liberty. U. S. v. Harden (D. C. 1881), 10 Fed. 802, 808.

Proceedings on habeas corpus in the Federal courts are not governed by State legislation, but must conform to common-law rules. In re Morris (C. C. 1889), 40 Fed. 824.

The special grant of power to issue writs of habeas corpus is contained in this chapter, and it is necessary for a correct analysis thereof to consider the several sections separately, and also to treat the chapter in its entirety as one law. This section provides that the Supreme Court, circuit courts, and district courts, and the justices and judges of said courts within their respective jurisdictions, shall have power to issue writs of habeas corpus for the purpose of inquiry into the cause of restraint of liberty. Section 404, post, provides for a summary hearing and authorizes the court or justice or judge to dispose of the party as law and justice require. These sections seem to contain the entire grant of power, but they do not contain any clause or sentence indicating limitations of the power. Clifford v. Williams (C. C. 1904), 131 Fed. 100, 102; State v. Sullivan (C. C. 1892), 50 Fed. 593.

To ascertain the nature of the writ which the courts and judges are authorized to issue, reference must be made to the common law. In re Keeler (D. C. 1843), Fed. Cas. No. 7,637.

The right to a writ of habeas corpus is the right to have the lawfulness of the restraint to which the petitioner is subjected inquired into by the courts, to be adjudged and determined by the law of the land. In re Jung Ah Lung (D. C. 1885), 25 Fed. 141, 143.

The Federal district court, or the judge thereof, has jurisdiction to issue the writ and hear the case when petitioner is held under illegal restraint, without any formal or technical commitment. In re McDonald (D. C. 1861), Fed. Cas. No. 8,751.

The several acts of Congress relative to the jurisdiction of the courts of the United States to issue writs of habeas corpus do not declare that the jurisdiction of those courts shall be exclusive of the jurisdiction of the State courts, even in cases provided for by Federal law. (1867) 12 Op. Atty. Gen. 259.

Power of Federal courts in general.—Resort may be had to the common law for the

meaning of the term habeas corpus, but the power of the Federal courts to grant the writ must be given by statute. Ex parte Bollman (1807), 4 Cranch. 75, 2 L. Ed. 554.

The circuit courts (whose powers have now been transferred to the district courts), as well as the judges thereof, may issue writs of habeas corpus to inquire into the cause of a commitment, and they have jurisdiction, except in cases where the privilege of the writ is suspended, to hear and determine the question whether the party is entitled to be discharged. Ex parte Milligan (1866), 4 Wall. 2, 110, 18 L. Ed. 281.

The broad language of this section is limited by the general condition that the authority must be exercised agreeably to the principles and usages of law. Ex parte Royall (1886), 6 Sup. Ct. 734, 737, 117 U. S. 241, 29 L. Ed. 868.

The right under this section and the two following sections to apply for a writ of habeas corpus is an ample protection against the danger of unlawful oppression from the courts or authority of a State. Virginia v. Paul (1893), 13 Sup. Ct. 536, 148 U. S. 107, 37 L. Ed. 386. Where an ordinary writ of habeas corpus is issued by a district judge on the ground that the prisoner is in custody for an act done in pursuance of a law of the United States, the question whether good cause was shown for his discharge is for the judicial determination of the judge, in the exercise of the jurisdiction vested in him by this section and the two following sections. Id.

The Federal courts can not issue the writ, unless it is necessary in aid of jurisdiction in a case or proceeding pending therein. Ex parte Everts (C. C. 1858), Fed. Cas. No. 4,581.

A Federal court has jurisdiction to issue a writ of certiorari as ancillary to a writ of habeas corpus, and to render their jurisdiction under the latter writ effective. In re Martin (C. C. 1868), Fed. Cas. No. 9,151.

The jurisdiction of Federal courts in habeas corpus cases is derived from this section and not from sections conferring general jurisdiction. Rosenbaum v. Board of Police (C. C. 1886), 28 Fed. 223, 225; affirmed (1887), 7 Sup. Ct. 633, 120 U. S. 450, 30 L. Ed. 743. This grant of authority to issue writs of habeas corpus includes every species of the writ. State v. Sullivan (C. C. 1892), 50 Fed. 593.

The power of Federal courts to issue writs of habeas corpus to inquire into the cause of restraint of liberty in certain specified instances is expressly restricted by this section and 397, post, to the territorial jurisdiction of the court in which the application is made. Ex parte Gouyet (D. C. 1920), 175 Fed. 230.

The capacity of the proper courts of the United States to take jurisdiction in habeas corpus of persons enlisted in the Navy does not, before its actual exercise, oust the jurisdiction of a State court. (1867) 12 Op. Atty. Gen. 259.

Proceedings by certiorari in a State court for the review of a decision on a habeas corpus in said court do not prevent a United States court from proceeding on a habeas corpus subsequently issued from the latter court in behalf of the same prisoner. In re Leary (N. Y. 1857), 6 Abb. N. C. 43.

Power of Supreme Court.—The Supreme Court has authority to issue the writ of habeas corpus ad subjiciendum, such writ being for the purpose of revising a decision that the party should be imprisoned. Ex parte Bollman (1807), 8 U. S. (4 Cranch.) 75, 2 L. Ed. 554; Ex parte Watkins (1833), 32 U. S. (7 Pet.) 568, 8 L. Ed. 786; Ex parte Milburn (1835), 34 U. S. (9 Pet.) 704, 9 L. Ed. 280; Ex parte Clarke (1879), 100 U. S. 399, 25 L. Ed. 715.

The Supreme Court has no appellate jurisdiction in criminal cases; and it can not revise the judgments of the circuit courts, by writ of error or habeas corpus, in any case where a party has been convicted of a public offense. Ex parte Kearney (1822), 20 U. S. (7 Wheat.) 38, 5 L. Ed. 391. The power to do so is conferred by this section. Ex parte Watkins (1830), 3 Pet. 193, 201, 7 L. Ed. 650.

The original jurisdiction of the Supreme Court of the United States does not extend to the case of a petition by a private individual for a habeas corpus to bring up the body of his infant daughter, alleged to be unlawfully detained from him. Ex parte Barry (U. S. 1844), 43 U. S. (2 How.) 65, 11 L. Ed. 181.

Where a district judge at his chambers decided that there was sufficient cause for surrender of a person claimed by the French Government, and committed him to custody to await the order of the President of the United States, the Supreme Court has no jurisdiction to issue a habeas corpus to review that decision. In re Metzger (1847), 5 How. 176, 12 L. Ed. 104.

The Supreme Court of the United States has no jurisdiction of a writ of habeas corpus, under the seal of the circuit court, issued and tested by an associate judge of the Supreme Court, returnable before him at chambers, and adjourned by him into the Supreme Court in banc. In re Kaine (1852), 55 U. S. (14 How.) 103, 14 L. Ed. 345.

It seems that the Supreme Court of the United States has power to issue a writ of habeas corpus to discharge a person committed by a commissioner of the circuit court of the United States, as a fugitive

from justice in Great Britain, after the circuit court has ordered that a writ of habeas corpus, issued by itself, should be dismissed, and the prisoner remanded to the custody of the marshal, under his original commitment. Id.

Where, upon a writ of habeas corpus, the circuit court having jurisdiction thereof has decided against the prisoner, the Supreme Court of the United States has a quasi appellate jurisdiction of another writ in the same case sued out of that court. Ex parte Wells (1855), 59 U. S. (18 How.) 307, 15 L. Ed. 421.

In all cases where a circuit court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, the Supreme Court may, in the exercise of its appellate jurisdiction, by the writ of habeas corpus, aided by the writ of certiorari, revise the decision of the circuit court, and, if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded. Ex parte Yerger (1868), 75 U. S. (8 Wall.) 85, 19 L. Ed. 332.

The authority of the Supreme Court to issue writs of habeas corpus to determine whether an inferior tribunal exceeded its jurisdiction in incarcerating the petitioner affirmed. In re Lange (1873), 18 Wall. 163, 166, 21 L. Ed. 872.

The Federal Supreme Court will not on habeas corpus review the proceedings of the District Court on a conviction for crime, for error therein, where the court had jurisdiction of the cause and of the person, and where the proceedings are not reviewable on writ of error. Ex parte Parks (1876), 93 U. S. 18, 22, 23 L. Ed. 787.

The jurisdiction of the Supreme Court by habeas corpus, when not restrained by some special law, extends generally to imprisonment pursuant to judgment of an inferior tribunal of the United States, which has no jurisdiction of the cause or whose proceedings are otherwise void, and not merely erroneous. Ex parte Siebold (1879), 100 U. S. 371, 374, 25 L. Ed. 717.

The Supreme Court has no general power to review the judgments of inferior Federal courts in criminal cases by the use of the writ of habeas corpus or otherwise. Ex parte Curtis (1882), 1 Sup. Ct. 381, 386, 106 U. S. 371, 27 L. Ed. 232; Ex parte Carll (1883), 1 Sup. Ct. 535, 106 U. S. 521, 27 L. Ed. 288.

Except in cases affecting ambassadors, other public ministers, or consuls, and those in which a State is a party, the Supreme Court can issue a writ of habeas corpus only under its appellate jurisdiction. Ex parte Hung Hang (1883), 108 U. S. 552, 2 Sup. Ct. 863, 27 L. Ed. 811.

The Supreme Court can not take jurisdiction of a certificate of division in opinion between the judges of a circuit court in proceedings under a writ of habeas corpus, until final judgment has been rendered in accordance with the opinion of the presiding justice or judge. Ex parte Cota (1884), 4 Sup. Ct. 25, 110 U. S. 385, 28 L. Ed. 172.

Though the Supreme Court of the United States has, under the Constitution, no appellate jurisdiction in criminal cases, yet, upon the matter being properly presented, it will intervene in the interest of a prisoner under sentence of a court of the United States which was not competent to try him. The Ku-Klux Cases (1884), 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274.

Since, under act March 3, 1885, an appeal lies from the judgments of the United States circuit courts in habeas corpus cases, the Supreme Court will not issue such a writ in cases where it may as well be done in the proper circuit court, if there are no special circumstances in the case making direct action by the Supreme Court necessary or expedient. Ex parte Mirzan (1887), 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513; In re Huntington (1890), 137 U. S. 63, 11 Sup. Ct. 4, 34 L. Ed. 567.

The Supreme Court by habeas corpus can not discharge a person imprisoned under the sentence of a territorial court, unless that court has transgressed its jurisdiction. Ex parte Harding (1887), 7 Sup. Ct. 780, 781, 120 U. S. 782, 30 L. Ed. 824.

The power of the Supreme Court and of the circuit courts of appeal to issue writs of habeas corpus is a part of their appellate jurisdiction, distinct from their power to review by writs of error or appeals, and extends to imprisonment by judgment or orders of inferior courts within their respective territorial jurisdiction, both when the final judgment or orders are not reviewable by error or appeals, as well as cases in which they are so reviewable. Ex parte Moran (1906), 144 Fed. 594, 75 C. C. A. 396.

Where a capias ad satisfaciendum, issuing from the United States circuit court, is regular on its face, and in a case in which that court had undoubted jurisdiction, the Supreme Court will not inquire into the exercise of that jurisdiction. In re Salisbury (1855), 16 Ill. (6 Peck) 350.

The Supreme Court of the United States, in the exercise of its appellate jurisdiction, may, by writ of habeas corpus, aided by the writ of certiorari, revise the decision of the circuit court, and, if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been re-

amended. Palmer v. Commonwealth (Pa. 1830), 6 Serg. & R. 245.

Power of district courts.—Circuit courts (now abolished, their powers being transferred to district courts) as well as the judges thereof, are authorized to issue a writ of habeas corpus to inquire into a writ of commitment, and have jurisdiction, except where the privilege of the writ is suspended, to hear and determine whether the party is entitled to be discharged. Ex parte Milligan (1866), 4 Wall. 2, 4, 18 L. Ed. 281.

The district court has power to issue the writ in behalf of any one claiming to be restrained of his liberty and must determine whether the allegations of the petition are such as to entitle the petitioner to relief, and make such order as the law and justice require. In re Durrant (C. C. 1898), 84 Fed. 317, 319.

Powers of judges of district or other Federal courts. Where an application to a district judge for a writ of habeas corpus alleged that petitioner's imprisonment was in violation of the Federal Constitution, the court was without discretion to refuse to allow an appeal to the Supreme Court for an order denying the writ, though it appeared that the same was without merit. In re Marmo (D. C. 1905), 138 Fed. 201.

Powers of judges in general.—A distinction must be made between a district judge and a district court. Chow Loy v. U. S. (1901), 112 Fed. 354, 359; 50 C. C. A. 79.

A Federal judge has no power to issue habeas corpus for one imprisoned under a State indictment for murder. Ex parte McCann (D. C. 1865), Fed. Cas. No. 8,679.

Proceedings before judge or court.—Where a petition for habeas corpus was presented to a judge, who directed the clerk of the court to issue a writ of habeas corpus and make it returnable before him at the courthouse, and the writ was issued under the seal of the court and made returnable before the judge of the circuit court, and the record showed that the jailer made his return to the writ, and that the petitioner filed a demurrer thereto upon consideration of which an order of discharge was entered at the foot of which it was directed that the papers in the case be filed in the circuit court and that the order be recorded in that court and the order was signed by the circuit judge, the proceeding was taken under this section before the judge sitting as a judge, and not as a court. Carper v. Fitzgerald (1887), 7 Sup. Ct. 825, 121 U. S. 87, 30 L. Ed. 882.

A justice of the Supreme Court can exercise the power of issuing the writ in any part of the United States where he happens to be. Ex parte Clark (1879), 100 U. S. 399, 25 L. Ed. 715.

A habeas corpus for discharge from imprisonment held rightfully issued by a justice of the Supreme Court, returnable before himself, and he had the right, if it could be done without injury to the prisoner, to refer the matter to the court for determination. Ex parte Clark (1879), 100 U. S. 399, 25 L. Ed. 715; In re Fitton (C. C. 1891), 45 Fed. 471.

Hearing in chambers.—The power to issue the writ may be exercised by the judge at chambers. Bennett v. Bennett (D. C. 1867), Fed. Cas. No. 1318; contra, Ex parte Benedict (D. C. 1862), Fed. Cas. No. 1292.

Restraint of liberty.—On ordering a court martial for the trial of a medical director in the Navy, on charges relating to his conduct as Chief of the Bureau of Medicine and Surgery in the Navy Department, the Secretary of the Navy notified him that he was placed under arrest, and should confine himself to the limits of the city of Washington. Held, that this constituted no such restraint of liberty as to sustain a writ of habeas corpus. Wales v. Whitney (1885), 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277.

To constitute restraint of liberty there must be actual confinement or the present means of enforcing it. Wales v. Whitney (1885), 5 Sup. Ct. 1050, 1053, 114 U. S. 564, 29 L. Ed. 277; Silbray v. U. S. (1911), 185 Fed. 401, 107 C. C. A. 483.

The writ will not lie where relator is at large on bail. Silbray v. U. S. (1911), 185 Fed. 401, 107 C. C. A. 483. But see Baker v. Grice (1898), 18 Sup. Ct. 323, 169 U. S. 284, 42 L. Ed. 748, as to effect of surrender to avoid not being in custody at time of issuing of writ.

397. Conditions for issue of a writ of habeas corpus.—The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption

claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify. *R. S. 753.*

Notes of Decisions.

I. Construction and nature of remedy in general.
II. Custody under authority of the United States, or for acts done or omitted pursuant to the law thereof.
III. Custody under indictments, process of courts, and decisions or orders of commissioners.
IV. Custody under judgment, decree, or order of court or judge thereof.
V. Custody in violation of Constitution, law, or treaty of the United States.
VI. Subjects of foreign states or countries.
VII. Procuring testimony of prisoners.

I. Construction and Nature of Remedy in General.

Construction of provision in general.—A habeas corpus does not lie to bring up a person confined within the prison limits under a civil process. Ex parte Wilson (1810), 10 U. S. (6 Cranch.) 52, 3 L. Ed. 149; Wilson v. Marshal of District of Columbia (C. C. 1809), Fed. Cas. No. 17,822.

The writ of habeas corpus is of the nature of a writ of error to examine the legality of a commitment. No law of the United States prescribes the cases in which it shall be issued, nor the power of the court over the party brought up by it. One tried by a court possessing general and final jurisdiction, and convicted, is not entitled to the benefit of the writ of habeas corpus. Ex parte Watkins (1830), 28 U. S. (3 Pet.) 193, 7 L. Ed. 650.

Though the Supreme Court of the United States has, under the Constitution, no appellate jurisdiction in criminal cases, yet, upon the matter being properly presented, it will intervene in the interest of a prisoner under sentence of a court of the United States which was not competent to try him. The Ku-Klux Cases (1884), 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274.

The power of the Supreme Court to issue a writ of habeas corpus to inquire into the cause of the restraint extends to cases among others of prisoners in jail under or by color of the authority of the United States and of persons who are in custody in violation of the Federal Constitution or laws. In re Terry (1888), 9 Sup. Ct. 77, 78, 128 U. S. 289, 32 L. Ed. 405.

The circuit courts and Federal judges may apply the writ to all cases which it would reach at common law, provided it is not issued to any person in jail, unless confined under or by color of the authority of the United States. Ex parte Des Rochers (C. C. 1856), Fed. Cas. No. 3,824.

One confined for an act done or omitted in pursuance of a law of the United States, or of process from a Federal court or judge, is entitled to discharge, whether held under State or Federal process. U. S. v. Jailer (C. C. 1867), Fed. Cas. No. 15,463; Ex parte Turner (C. C. 1879), Fed. Cas. No. 14,246.

The fact that the prisoner is retained for a time, either before or after sentence, in the county jail, does not in either case authorize a writ of habeas corpus as he is in custody of the marshal, who in practice places him in the county jail until his removal to the penitentiary. Ex parte Geary (C. C. 1871), Fed. Cas. No. 5,293.

This section restricts the jurisdiction of the court to such cases as come within some one of the causes of detention or imprisonment specifically mentioned, and the interpretation and application of the law of nations can only arise under the condition specified in the section. In re Wildenhaus (C. C. 1886), 28 Fed. 924, 925, affirmed (1887), 7 Sup. Ct. 385, 120 U. S. 1, 30 L. Ed. 565.

This clause, which declares that "the writ of habeas corpus shall in no case extend to a prisoner in jail," does not oust the Federal courts of jurisdiction to release on habeas corpus, for the purpose of bringing him before a commissioner for examination, a debtor who is in jail under executions in civil actions, since such debtor is not confined at the suit of the State, but of his creditors. In re Mineau (C. C. 1891), 45 Fed. 188.

Where the questions are whether the crime charged has been committed within the jurisdiction of the court or whether the act under which the prosecution is conducted is constitutional, the questions may be tested on habeas corpus. Ex parte Rickelt (C. C. 1894), 61 Fed. 203, 205.

To give a circuit court of the United States jurisdiction to grant a writ of habeas corpus it is not sufficient for the petition to allege generally that the petitioner is held in violation of the Constitution or a law or treaty, but it must also set out the

rific facts on which such allegation is ed which must be sufficient to sustain if proved. In re Storti (C. C. 1901), Fed. 807; judgment affirmed, Storti v. mmonwealth of Massachusetts (1901), up. Ct. 72, 183 U. S. 138, 46 L. Ed. 120.

This section contains no grant of power, is a restriction upon the power of the eral courts, prohibiting the issuance of writ of habeas corpus in behalf of a soner in jail except under the prescribed sitions enumerated. It was originally t of act Mar. 2, 1833, sec. 4, and was ended to meet the conditions existing at time of South Carolina's attempt to lify the laws of the United States, and lt with officers of the National Governt under its criminal laws for acts done performance of official duties. This act s reenat in the Revised Statutes, and body of it, with changed phraseology, constitutes this section, and since there s it no grant of power it must be conued with reference to its position, folwing ante, 396, in order to give it any finite and clear meaning, unless it is asmed that by implication it confers power grant writs of habeas corpus in the expted cases enumerated. Thus construed would by implication confer jurisdiction on the Federal courts generally without scriminating between circuit and district rts to issue writs of habeas corpus on half of prisoners held in custody in violion of the Constitution of the United tes. Clifford v. Williams (C. C. 1901), Fed. 160, 164.

The power of such courts to issue such rits is coextensive with the common-law wer provided only that the writ shall t be issued for the deliverance of a soner in jail, except in cases specified. parte Caldwell (C. C. 1905), 138 Fed. ; reversed, Carfer v. Caldwell (1906), Sup. Ct. 264, 200 U. S. 293, 50 L. Ed. 488.

The proviso in judiciary act, sec. 14 (1 t. 81), that the writ shall in no case exd to prisoners in jail unless in custody der authority of the United States, etc., rents the issue of the writ only in cases State prisoners. Bennett v. Bennett C. 1867), Fed. Cas. No. 1,318.

The laws of the United States providing the issuance, trial, and disposition of proceedings by habeas corpus are the suprme law of the land; they extend to every rt of its soil, and are controlling in fficers within the bounds of Federal jurisdiction. A judgment of acquittal thereder by a Federal court will, as to the ase involved, protect the relators from prosecution elsewhere. Kelly v. State of orgia (D. C. 1895), 68 Fed. 652.

Nature of remedy in general.—The writ f habeas corpus is of the highest remedial character intended to summarily protect the citizen from unlawful detention. Ex parte Mikell (D. C. 1918), 253 Fed. 817.

Civil or criminal nature of writ.—Habeas corpus proceedings are civil, though affecting criminal proceedings. Holmes v. Jennison (1840), 14 Pet. 540, 562, 10 L. Ed. 579. [C. S. p. 2073].

Discretion of court.—Where it appears that petitioner has been convicted on an indictment of a grand jury impaneled by a court without authority so to do, the writ of habeas corpus becomes a "writ of right," and the court having the power to issue it can exercise no sound discretion against issuing it. Ex parte Farley (C. C. 1889), 40 Fed. 66.

The power given is a discretionary one, and one of great delicacy, which should not be exercised in any case when suitable relief can be had through the regular procedure of the State tribunals. In re Bradley (C. C. 1898), 90 Fed. 969.

The issuance and entertainment of a writ of habeas corpus by a Federal court is a matter within the court's discretion to be exercised in sound judgment and in obedience of law that the ends of justice may be adequately subserved. Kroschel v. Munkers (D. C. 1910), 179 Fed. 961.

Habeas corpus is not a discretionary writ, as is certiorari. U. S. v. Rauch (D. C. 1918), 253 Fed. 814.

Discretion of court or officer.—The action of the court in consolidating indictments is not open to attack on a habeas corpus proceeding. Howard v. U. S. (1896), 75 Fed. 980, 21 C. C. A. 586, 34 L. R. A. 509.

Successive writs or proceedings.—Where, upon a writ of habeas corpus, the circuit court having jurisdiction thereof has decided against the prisoner, the Supreme Court of the United States has a quasi appellate jurisdiction of another writ in the same case sued out of that court. Ex parte Wells (1855), 59 U. S. (18 How.), 307, 15 L. Ed. 421.

The denial of a writ of habeas corpus by the Federal courts of one circuit does not render the questions determined res judicata, so as to preclude their reexamination by the courts of another circuit in subsequent habeas corpus proceedings instituted therein by the same petitioner. Carter v. McClaughry (C. C. 1900), 105 Fed. 614, affirmed (1902), 22 Sup. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

In jurisdictions where appeals have been provided for in habeas corpus cases it has come to be the rule, either as one of law or of practical administration, that a judge is not required to consider an application for a writ which has been denied by another judge, but may remit the petitioner to his

remedy by appeal. Ex parte Moebus (C. C. 1906), 148 Fed. 39.

Proceedings by certiorari in a State court for the review of a decision on a habeas corpus in said court do not prevent a United States court from proceeding on a habeas corpus subsequently issued from the latter court in behalf of the same prisoner. In re Leary (N. Y. 1879), 6 Abb. N. C. 43.

Remedy by appeal or error affecting power to issue.—The writ of habeas corpus can not be made a substitute for an appeal or writ of error. Ex parte Kearney (1822), 7 Wheat. 38, 5 L. Ed. 391. [C. S. p. 2074].

It will not be used as a mode of review of the question of the propriety of an injunction. In re Debs (1895), 15 Sup. Ct. 901, 158 U. S. 564, 39 L. Ed. 1092. [C. S. p. 2074].

Habeas corpus to review a judgment of a State court in a criminal case, on the ground that some right under the Constitution of the United States has been denied to the person convicted, will not ordinarily be granted, as the proper remedy is by appeal or writ of error. Duncan *v.* McCall (1891), 11 Sup. Ct. 573, 574, 139 U. S. 440, 35 L. Ed. 219. [C. S. pp. 2074, 2075].

It can not be used as a basis for review, as jurisdiction is confined to an examination of the record to determine whether the person restrained of his liberty is detained without authority of law. Harlan *v.* McGourin (1910), 31 Sup. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849, affirming decree Ex parte Harlan (C. C. 1909), 180 Fed. 119; Gonzales y Borrego *v.* Cunningham (1896), 17 Sup. Ct. 182, 164 U. S. 612, 41 L. Ed. 572.

Errors in point of law in criminal court in a case within its jurisdiction can not be reviewed by habeas corpus. Frank *v.* Mangum (1915), 35 Sup. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

It is incompetent for the court in habeas corpus proceedings to review the facts on which the commitment was ordered, or the regularity merely of the proceedings which resulted in the commitment. If any error be committed in these respects, the remedy of the prisoner is by appeal from the order of commitment. In re Reese (1901), 107 Fed. 942, 47 C. C. A. 87.

Habeas corpus will not lie for the discharge of a person under arrest for an offense under a Federal statute which gives him the right to a trial in which he can raise every question sought to be raised in the habeas corpus proceedings and to a review of the judgment therein by the appellate court. Hooper *v.* Remmel (1908), 165 Fed. 336, 91 C. C. A. 322.

One restrained of his liberty for many years under a judgment of a Federal court which is beyond its jurisdiction and void, is not barred from a release therefrom by a writ of habeas corpus, because he might have secured such relief by a writ of error, but failed to apply for it because it was too late. Stevens *v.* McClaughry (1913), 207 Fed. 18, 125 C. C. A. 102.

Upon a writ of habeas corpus, the court will not ordinarily consider questions arising in a criminal case which might be brought up by a bill of exceptions, but under special circumstances such questions were entertained; the court saying that, with reference to the mode of procedure, the case was not to be deemed a precedent for future cases. Commonwealth *v.* Huntley (1892), 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; affirmed, Plumley *v.* Commonwealth (1894), 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223; Jones *v.* Perkins (1917), 245 U. S. 390.

Scope of review and matters considered.—Where an application for habeas corpus, in behalf of a prisoner sentenced to death, is pending upon the day appointed for his execution, the court will not presume that he has been executed. Ex parte Milligan (1866), 71 U. S. (4 Wall.) 2, 18 L. Ed. 281.

It was within the jurisdiction of the trial court to determine whether or not the record of a prior conviction before a judge without a jury was legitimate proof of a first offense, where the prisoner had waived a trial by jury in accordance with a statute claimed to be unconstitutional, and its decision will not be reviewed on habeas corpus. In re Belt (1895), 159 U. S. 95, 15 Sup. Ct. 987, 40 L. Ed. 83.

A prisoner committed for assault, with intent to kill, on the President of the United States, held not entitled to a writ of habeas corpus, for the purpose of examining into his sanity. U. S. *v.* Lawrence (C. C. 1835), Fed. Cas. No. 15,577.

Cause or validity of commitment.—Upon a habeas corpus it can only be inquired whether there is sufficient probable cause to believe that the person charged has committed the offense stated in the warrant of commitment. U. S. *v.* Johns (1806), 4 U. S. (4 Dall.) 412, 1 L. Ed. 888.

On habeas corpus, the court will not inquire into the sufficiency of the cause of commitment. Ex parte Kearney (1822), 20 U. S. (7 Wheat.) 38, 5 L. Ed. 391.

The writ of habeas corpus is not designed to pass upon the merits, but merely to determine the cause of detention, and whether the detention is lawful. U. S. *v.* Williford (C. C. A. 1915), 220 Fed. 291.

A writ of habeas corpus may be issued out of the Federal courts to inquire into the cause of a commitment under a civil as well as a criminal process. Ex parte Randolph (C. C. 1833), Fed. Cas. No. 11,558; Ex parte Caldwell (C. C. 1905), 138 Fed.

487; reversed Carfer v. Caldwell (1906), 26 Sup. Ct. 264, 200 U. S. 293, 50 L. Ed. 488.

On petition for a writ of habeas corpus to release a United States marshal from custody under State process, the court can not inquire into the truth of justice of the charges against him, but is limited to the question whether his alleged unlawful acts were done in pursuance of a law of the United States. In re Marsh (D. C. 1892), 51 Fed. 277, 279.

Questions of fact in general. -Where a court, on passing sentence of imprisonment in a penitentiary, finds that in the district or territory where the court is held there is no penitentiary suitable for the confinement of convicts or available therefor, such finding is conclusive, and can not be reviewed upon habeas corpus. In re Karstendick (1876) 93 U. S. 396, 23 L. Ed 889.

Upon a writ of habeas corpus to procure the release of a person who has been committed for contempt in refusing to answer questions propounded to him in a criminal case on the ground that his answer would tend to incriminate himself the court may consider the testimony and the facts upon which the committing court based its action against the witness. Ex parte Irvine (C. C. 1896), 74 Fed. 954.

Where the return to a writ issued by the State court that the prisoner is held as a deserter from the Army is traversed, the court may inquire into the truth of the facts alleged, and may discharge the prisoner if it appear that he is illegally held. In re Reynolds (D. C. 1867), Fed Cas. No. 11,721.

Where a prisoner is held for an act committed in performance of a duty as a soldier of the United States the court has authority to determine summarily as a fact whether or not such allegation is true, and if so to discharge the prisoner. U. S. v. Lipsett (D. C. 1907), 156 Fed. 65.

The courts do not pass upon disputed questions of fact on habeas corpus. Ex parte Grafer (D. C. 1918), 247 Fed. 882.

Jurisdiction of court. Where a party has been committed for a contempt by a court having competent jurisdiction, the Supreme Court will not grant a habeas corpus. Ex parte Kearney (1822), 20 U. S. (7 Wheat.), 38, 5 L. Ed. 391.

Where a court has jurisdiction to hear and decide whether a person was guilty of contempt, and if found guilty to impose punishment therefor, its finding against such person can not be reviewed on a writ of habeas corpus. Ex parte Davis (C. C. 1901), 112 Fed. 139.

Sufficiency of indictment, information, or warrant of commitment. A prisoner who has been tried, convicted, and sentenced to the penitentiary upon an indictment in a Federal court, changed by order of the court, or by the prosecuting attorney, without resubmission to the grand jury, in violation of the fifth amendment to the United States Constitution, is entitled to his discharge on habeas corpus. Ex parte Bain (1887), 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849.

Whether an offense is sufficiently alleged in indictment is not a proper subject matter for inquiry on habeas corpus. Ex parte Webb (1912), 32 Sup. Ct. 769, 225 U. S. 663, 56 L. Ed. 1248.

Habeas corpus to secure petitioner's release from imprisonment on the ground that the indictment is fatally defective is a collateral, not a direct, attack on the indictment. Hopkins v. McClaughry (1913), 209 Fed. 821, 126 C. C. A. 545.

Sufficiency of evidence. A Federal court is not required to weigh the evidence of probable cause on habeas corpus to inquire into a detention to await the removal of the accused to another Federal district for trial, although a prisoner may have the right, on habeas corpus, under the State practice, to have the State court consider that question, since the provision of R. S. sec. 1014, that the usual mode of process adopted in the State shall be pursued, refers to the proceedings in arrest and examination of the accused before the commissioner, and has no bearing upon a subsequent independent proceeding on habeas corpus. Hyde v. Shine (1905), 25 Sup. Ct. 760, 199 U. S. 62, 50 L. Ed. 90; Beyond v. Same (1905), 25 Sup. Ct. 766, 199 U. S. 88, 50 L. Ed. 99.

Errors or irregularities in proceedings. -The United States Supreme Court will not, upon habeas corpus, review the proceedings of the district court, upon a conviction for crime, for error therein, where the court below had jurisdiction of the cause and of the person, and where the proceedings are not reviewable on writ of error. In such cases a discharge can be [illegible] where the proceedings below [illegible]. Ex parte Lange (1873), 85 U. S. 18, 21 L. Ed. 787.

Generally the writ of habeas corpus will not issue unless the court under whose warrant the petitioner is held is without jurisdiction, and it can not be used to correct errors. Ex parte Blair (D. C. 1918), 253 Fed. 801.

Effect of release under writ or further proceedings against prisoner. Where a defendant duly convicted of a crime, obtains his discharge from imprisonment on habeas corpus on the ground that [illegible] was illegal, the court has jurisdiction to impose a correctional sentence, although the term at which he was con-

victed has passed. Bryant v. U. S. (1914). 214 Fed. 51, 130 C. C. A. 491.

Grounds for issuance in general.—Where a petition for a writ of habeas corpus by a prisoner under sentence of death alleged that he was refused the right to consult with counsel prior to his preliminary examination, but the record showed that he waived examination, and that on his request counsel was assigned for the trial, who acted in proceedings in error in the supreme court, petitioner was not entitled to the writ on the ground of a deprivation of the right to be represented by counsel. Andersen v. Treat (18.8), 19 Sup. Ct. 67, 69, 172 U. S. 24, 43 L. Ed. 351.

A prisoner of war on board a foreign man-of-war or her prize can not be released by habeas corpus issuing from courts either of the United States or of a particular State. But if such prisoner of war be taken on shore, he becomes subject to the local jurisdiction or not, according as it may be agreed between the political authorities of the belligerent and the neutral power. (1855), 7 Op. Atty. Gen. 123.

On petition for discharge on habeas corpus of one arrested as a deserter, evidence of petitioner's relations, that he was under 16 years when he enlisted, is not sufficient to establish that fact against the sworn statement of the petitioner and the record in the family Bible, showing that the birth of petitioner, as recorded, had been changed from 1870 to 1871, and the record of the birth of a younger sister in 1871 entirely erased. In re Lawler (C. C. 1889), 40 Fed. 233.

Pardon as affecting issuance of writ.—The acceptance of a conditional pardon by a convict was not under duress, and he was not entitled to release on habeas corpus. Ex parte Wells (1855), 18 How. 307, 315, 15 L. Ed. 421.

The writ will not be granted after an unconditional pardon to one not restrained of his liberty, although he refuse to accept the pardon. In re Callicot (C. C. 1870), Fed. Cas. No. 2323.

II. Custody Under Authority of the United States, or for Acts Done or Omitted Pursuant to the Law Thereof.

In general.—Where probable ground is shown that the party is in custody under or by color of the authority of the United States, and is imprisoned without just cause, and therefore has a right to be delivered, the writ of habeas corpus then becomes a writ of right, which may not be denied. In re Winder (C. C. 1862), Fed. Cas. No. 17,867.

In case of imprisonment under Federal authority, not judicial, the State and Federal courts have concurrent jurisdiction to issue writs of habeas corpus to determine the legality of the imprisonment. Commonwealth v. Salfridge (Pa. 1868), 7 Phila. 76

President's action in ordering summary arrest and detention of an alien enemy within United States after the declaration of war between United States and Austria-Hungary, is conclusive, and not subject to judicial review on habeas corpus. Ex parte Graber (D. C. 1918), 247 Fed. 882.

Quaere, whether a petition for writ of habeas corpus lies when petitioner had been paroled upon conditions expressly consented to by him. In re Feinler (Sup. Ct., D. C., 1921), 49 Wash. L. R. 147.

Illegality or irregularity in proceedings.—Mere errors in the rejection of evidence in extradition proceedings are not subject to review by a writ of habeas corpus Charlton v. Kelly (1913), 33 Sup. Ct. 945, 229 U. S. 447, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397.

Scope of review and power of court.—Federal courts will not intervene by habeas corpus to prevent deportations by the executive officers of the Government, under the authority of the acts of Congress. Kaoru Yamataya v. Fisher (1903), 23 Sup. Ct. 611, 615, 189 U. S. 86, 47 L. Ed. 721.

Detention by Army officers or authorities.—A commander in the Army of the United States made return to a writ of habeas corpus issued by a State court, showing that he held the petitioner as a recruit in the Army, and pursuant to laws of the United States regulating enlistments. The State court examined the validity of the enlistment, determined it to be invalid, and directed the recruit to be discharged. The officer refused to discharge him and the State court committed the officer for contempt. Held, by the United States district court on a habeas corpus sued out by the commander, that the State court exceeded its jurisdiction in examining the validity of the enlistment; that it had no power to proceed beyond ascertaining that the officer held the recruit by color of authority from the United States. Ex parte Yerger (1868), 75 U. S. (8 Wall.), 85, 19 L. Ed. 332.

Where a soldier is illegally detained by an Army officer as an alleged private in the Army, the United States courts alone have authority to grant him release. In re Tarble (1871), 80 U. S. (13 Wall.), 397, 20 L. Ed. 597, reversing (1870), 25 Wis. 390, 3 Am. Rep. 85.

An order from a subordinate in the War Department, directing a marshal not to produce a person in his custody on habeas corpus, held no justification for his disobedience. Ex parte Field (C. C. 1862), Fed. Cas. No. 4,761.

The commander of a military department, even in a locality where martial law is not in force, may arrest citizens for mischievous acts of disloyalty impeding or endangering military operations, and the courts have no authority by writ of habeas corpus to inquire into the necessity of such action. Ex parte Vallandigham (C. C. 1863), Fed. Cas. No. 16,816.

The validity of an enlistment into the military service may be inquired into on habeas corpus by a Federal judge. Schmeltzer v. Barney (C. C. 1875), Fed. Cas. No. 12,492.

A minor, who enlisted in the Army without the consent of his parents or guardians, and who, three days thereafter, before being assigned to duty, deserted, and was arrested as a deserter, will be discharged on habeas corpus upon his own application. In re Hanchett (C. C. 1883), 18 Fed. 26.

R. S. 1117 (superseded by post, 2169) provides that no person under the age of 21 years shall be enlisted into the military service of the United States without the written consent of his parents or guardians. Act July 27, 1892, sec. 3, (27 Stat. 277), makes a fraudulent enlistment and the receipt of pay thereunder punishable by court-martial. Held, that the Federal court will entertain habeas corpus proceedings for the release of a minor who is detained in the military service of the United States under an enlistment in violation of R. S. 1117 (superseded by post, 2169), though charges have been filed against him for fraudulent enlistment, such charges not having been acted on by the executive department of the Government. In re Carver (C. C. 1900), 103 Fed. 624.

If a boy under the age of 18 years, who has enlisted in the naval service without his father's consent, be taken from the lawful custody of his father, to which he had returned, by the naval authorities on the charge of desertion, the writ of habeas corpus is the proper proceeding to determine his status and the right to his custody, the validity of the enlistment, as against the father being a matter which the civil courts have jurisdiction to determine; and a judgment awarding him to the custody of his father is conclusive upon the Government, and fixes the status of the prisoner as that of a civilian not amenable to military law. Ex parte Reaves (C. C. 1903), 121 Fed. 848, decree reversed U. S. v. Reaves (1903), 126 Fed. 127, 60 C. C. A. 67.

Under the laws of the United States a minor can not lawfully be enlisted in any branch of the military or naval service without the consent of his parents, and one who has been enlisted by misrepresenting his age will be discharged by writ of habeas corpus at suit of his parents. Ex parte Houghton (C. C. 1904), 129 Fed. 239.

For other cases on the enlistment of minors, see notes to 2169, post.

The court refused to take further action where a military officer made return to the writ that he declined to obey it at the present time under orders from his superior, which were produced in court. Ex parte McQuillon (D. C. 1861), Fed. Cas. No. 8,924.

A person illegally conscripted into the Federal Army may be discharged on habeas corpus. Stingle's Case (D. C. 1863), Fed. Cas. No. 13,458.

The Federal courts have jurisdiction on habeas corpus to discharge a minor unlawfully enlisted, notwithstanding the power given to the Secretary of War by acts Feb. 24, 1864, sec. 20, and July 4, 1864, sec. 5. In re McDonald (D. C. 1866), Fed. Cas. No. 8,752.

An order directing the arrest of a Mexican alien by the military authorities in the United States and his incarceration without trial, while an attempt was being made to secure evidence that he was endeavoring to violate the neutrality laws, held void, and that he was entitled to his discharge on habeas corpus. Ex parte Orozco (D. C. 1912), 201 Fed. 106.

The power conferred on the Secretary of War to discharge minors under the age of 18 from the Army is not exclusive, and does not oust judicial inquiry upon habeas corpus of the legality of the enlistment. (1867) 12 Op. Atty. Gen. 259.

The fact that an Army officer is taken from his house by order of his commanding officer, and held in close confinement in barracks without charges being preferred against him, will not justify the civil authorities releasing him on habeas corpus proceedings. Closson v. U. S. (1896), 7 App. D. C. 460.

The return, by the commander of the military department, in habeas corpus brought by one arrested and detained upon an order issued from the war office of the Federal Government, stating on oath that the prisoner is charged with the offense of arson in the nighttime in New York, and with being at the time within the Federal lines as a spy (being an officer of the Confederate Army), although founded on information and belief, was sufficient ground for detaining the prisoner in the custody of the civil authorities of the State until the evidence in the possession of the General Government, or the military officers, as to the charge of arson, could be produced before a grand jury or a committing magistrate. In re Martin (N. Y. 1865), 45 Barb. 142, 31 How. Prac. 228.

In habeas corpus to determine jurisdiction of State courts, as opposed to military courts, to try offenses by members of the military, the fact that an arrest is under a city ordinance is immaterial, if the ordinance is valid. In re Wulzen (D. C. 1916), 235 Fed. 362, Ann. Cas. 1917A, 274.

If a military tribunal has jurisdiction to try a person charged with an offense against military law, the civil courts can not interfere by writ of habeas corpus. Ex parte Dostal (D. C. 1917), 243 Fed. 664.

Where petitioners, who had been registered pending a prosecution for failure to register as required by selective-service act, failed to respond to call to report for service, and were sentenced by court-martial as deserters, their application to the civil court for habeas corpus, on the theory that such tribunal was entitled to proceed first, must be denied. Ex parte Dunn (D. C. 1918), 250 Fed. 871.

Detention by naval officers or authorities.—A minor enlisted in the Navy, though without consent of his parent and in violation of the statute, is punishable for breach of discipline, and can not be discharged on habeas corpus at suit of his parent while undergoing punishment. U. S. v. Pendleton (C. C. 1909), 167 Fed. 690; Dillingham v. Booker (1908), 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas 127. But see Commonwealth v. Downes (1836), 41 Mass. (24 Pick.) 227; In re Falconer (1898), 91 Fed. 649; Ex parte Bakley (1906), 148 Fed. 56, affirmed (1909), 152 Fed. 1022, 82 C. C. A. 659.

A person who has enlisted in the Navy before the required age and in violation of the statute, and is arrested and punished for desertion or other infraction of the rules and regulations of the Navy, can not be discharged on writ of habeas corpus pending proceedings against him therefor, as his enlistment is not void. Ex parte Rock (C. C. 1909), 171 Fed. 240.

In a habeas corpus proceeding to recover possession of a minor under 18 years of age, who had enlisted in the Navy without the consent of his parents or guardian, it was no answer to the writ that the naval authorities were entitled to retain the custody of the minor for the purpose of having him tried by a naval court-martial for fraudulent enlistment. Ex parte Lisk (D. C. 1906), 145 Fed. 860.

Courts-martial or military commissions.—The judgment of a court-martial can not be reviewed by a writ of habeas corpus, except to determine the question of jurisdiction. Wales v. Whitney (1885), 5 Sup. Ct. 1050, 1053, 114 U. S. 564, 29 L. Ed. 277; Rose v. Roberts (1900), 99 Fed. 948, 40 C. C. A. 199; In re Bogart (C. C. 1873), Fed. Cas. No. 1,596; Ex parte Henderson (C. C. 1878), Fed. Cas. No. 6,349; Carter v. McClaughry (C. C. 1900), 105 Fed. 614, affirmed (1902) 22 Sup. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

Habeas corpus will not lie to discharge a minor under 18 years of age enlisted in the military or naval service without the consent of his parents or guardian, where the minor is under arrest and held for trial by court-martial on a charge cognizable by a military or naval court. In re Scott (1906), 144 Fed. 79, 75 C. C. A. 237; Dillingham v. Booker (1908), 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127; Ex parte Hubbard (C. C. 1910), 182 Fed. 76; Ex parte Dunakin (D. C. 1913), 202 Fed. 290.

In habeas corpus to review the sentence of a court-martial, the only questions which can be inquired into are as to the jurisdiction of the court over the person of the accused and the offense charged, and whether it acted within the scope of its lawful powers. In re Crain (C. C. 1897), 84 Fed. 788; In re Esmond (1886), 5 Mackey (D. C.), 64.

Where a Navy court-martial, having jurisdiction of the person accused and the offense charged, acted within the scope of its lawful powers, its decision and sentence can not be reviewed or set aside by the civil courts by writ of habeas corpus. Johnson v. Sayre (1895), 15 Sup. Ct. 773, 777, 158 U. S. 109, 39 L. Ed. 914.

The invalidity of a court-martial constituted entirely of officers in the Regular Army of the United States in direct violation of the seventy-seventh article of war, declaring that such officers "shall not be competent to sit on courts-martial to try the officers or soldiers of other forces," can be raised on habeas corpus. McClaughry v. Deming (1902), 22 Sup. Ct. 786, 186 U. S. 49, 46 L. Ed. 1049, affirming order Deming v. McClaughry (1902), 113 Fed. 639, 51 C. C. A. 349.

The parents of a minor son under the age of 18 years, who has enlisted in the Navy without their knowledge or consent, in violation of R. S. sec. 1419, are entitled to his discharge on habeas corpus, and their right can not be denied because of contemplated or possible court-martial proceedings against the minor for fraudulent enlistment, especially where, between the time demand for his discharge was made by the parents and the procuring of the writ, several months elapsed, during which no proceedings were taken against him. Dillingham v. Bakley (1907), 152 Fed. 1022, 82 C. C. A. 659, affirming judgment Ex parte Bakley (D. C. 1906), 148 Fed. 56.

The civil courts have no jurisdiction, upon application for writ of habeas corpus, to determine whether a military commission by which the prisoner was tried was legally constituted, and had jurisdiction of the case. Ex parte Vallandigham (C. C. 1863), Fed. Cas. No. 16,816.

On the return to such writs the court has no power to revise the decision of the commissioner on the question of fact as to the criminality of the accused. In re Stupp (C. C. 1875), Fed. Cas. No. 13,563.

A party legally in custody for an offense triable by court-martial, and awaiting trial, can not avail himself of a United States civil court in a habeas corpus proceeding. In re Davison (C. C. 1884), 21 Fed. 618.

On habeas corpus the United States circuit court has jurisdiction to determine whether the military tribunal which tried the petitioner had jurisdiction; and the general finding of the military court that the petitioner was in the military service of the United States when he committed the crime of desertion, for which he was tried, is no bar to an inquiry into the military court's jurisdiction. In re Grimley (C. C. 1889), 38 Fed. 84; judgment reversed, U. S. v. Grimley (1890), 11 Sup. Ct. 54, 137 U. S. 147, 34 L. Ed. 636.

On the trial of an officer of the Army by a court-martial, whether the facts proved constitute a violation of the articles of war as charged is a question the determination of which is within the jurisdiction of the court-martial and its decision can not be reviewed by habeas corpus. Carter v. McClaughry (C. C. 1900), 105 Fed. 614; affirmed (1902), 22 Sup. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

A deserter from the Army, who has never been discharged from the service, is still subject to the jurisdiction of a military tribunal, so that, though he may plead the statute of limitations as a defense to a prosecution for desertion, a court will not interfere with such prosecution by a military tribunal. In re Dail (C. C. 1901), 107 Fed. 881.

Where a minor under the age of 18 years enlisted in the Army without the consent of his father, the latter, but not the minor, may sue for desertion, but a court will not discharge a writ of habeas corpus by the father or other person, the object of which is to secure the release of a minor charged with the crime of desertion and held for trial thereon, or who was delivered to the military authorities under such charge. In re [illegible] (C. C. 1900), 101 Fed. 308.

A minor, who by misrepresenting his age has fraudulently enlisted in the Army without the consent of his parents, and thereby subjected himself to punishment under military law, will not be relieved from such punishment by habeas corpus on the application of his parents, though the military prosecution is not instituted until after the writ was issued. Ex parte Lewkowitz (C. C. 1908), 163 Fed. 646.

The question of the right of exemption from service may be considered on habeas corpus notwithstanding adverse decision of military commission. Antrim's Case (D. C. 1863), Fed. Cas. No. 495.

The district court may release on habeas corpus a prisoner sentenced by a military commission under the reconstruction acts to a longer term of imprisonment than provided by the law of the State. Ex parte Hewitt (D. C. 1869), Fed. Cas. No. 6,442.

The judgment of a court-martial regularly organized convicting and sentencing a soldier for desertion, which judgment has been confirmed as provided in the Articles of War, is not subject to review by a civil court on habeas corpus proceedings on the ground that the prosecution was barred by limitation under the one hundred and fourth article of war, such defense being one to the merits to be determined by the court-martial, and not affecting its jurisdiction. Ex parte Townsend (D. C. 1911), 186 Fed. 74.

Where a court-martial had jurisdiction under the Army and Navy appropriations to try petitioner for an offense, and to impose sentence, the validity, regularity, or alleged errors of law of a court-martial by the court-martial could not be reviewed on habeas corpus. Ex parte Dickey (D. C. 1913), 204 Fed. 222.

Writ of habeas corpus will not issue, when the investigation will in effect be an appeal to review of what has been adjudged by some other tribunal of competent jurisdiction, as in contempt proceedings, or to the extent of inquiry to ascertain whether there is probable cause to believe the accused guilty of the offense charged. U. S. v. Hamilton (D. C. 1917), 247 Fed. 764.

The action of a military court in holding a person not in the service of the United States for trial for offenses committed while in the service is not reviewable on habeas corpus, and a writ of habeas corpus will be denied, where it appears that the petitioner is held for trial by a military court for offenses committed while in the service. Ex parte Pratt (D. C. 1918), 253 Fed. 413.

A person [illegible] habeas corpus proceedings [illegible] where [illegible] Swain (C. C. A. 1917), 240 Fed. 54; Ex parte Beck (D. C.

1917), 245 Fed. 967; Ex parte Hutflis (D. C. 1917), 245 Fed. 798; U. S. *v.* Bell (D. C. 1918), 248 Fed. 992; U. S. *v.* Mitchell (D. C. 1918), 248 Fed. 997.

In view of provisions for notice in Rules and Regulations, section 14, and as conscription act declares that decision of exemption boards shall be final, nondeclarant alien who, not having claimed exemption, was certified into service by boards, is not entitled to habeas corpus on ground he was denied fair hearing, there being no showing that boards did not give him notice required. Ex parte Blazekovic (D. C. 1918), 248 Fed. 327.

Where registrant under selective draft law is certified into military service, decisions of examining boards as to his physical condition can not be reviewed on habeas corpus; hence one so certified can not, where he refused to undergo operation as directed by military authorities for cure of preexisting trouble, obtain his discharge under habeas corpus. De Genaro *v.* Johnson (D. C. 1918), 249 Fed. 504.

A United States district court has no jurisdiction to review on habeas corpus action of a local or district draft board, acting under the selective service act, in calling to service an alien who has waived his claims for exemption and been duly classified for military service under the rules in class 1. Ex parte Beales (D. C. 1918), 252 Fed. 177.

It is not the province of the United States district court to pass judgment upon what constitutes sufficient evidence to satisfy exemption boards of the alienage of a registrant claiming exemption from military service, unless the board has acted arbitrarily or illegally. United States ex rel. Kotzen *v.* Local Exemption Board No. 157 of City of New York (D. C. 1918), 252 Fed. 245.

The court in a habeas corpus proceeding can not relieve against a merely erroneous decision of a draft board. Ex parte Tinkoff (D. C. 1918), 254 Fed. 222.

The failure of a registrant, denied exemption by the local board, to appeal to the district board is a bar to relief by habeas corpus. Id.

Detention in proceedings for extradition.—See notes under subdivision V, post, this section.

When it is conceded or so conclusively shown that no question can be made that the defendant was not within the demanding State when the crime is alleged to have been committed, and his arrest is sought on the ground only of a constructive presence, the court will discharge him. Munsey *v.* Clough (1905), 25 Sup. Ct. 282, 285, 196 U. S. 364, 49 L. Ed. 515.

A Federal court will not on habeas corpus discharge one held for interstate extradition under a charge of crime where the extradition papers show that no right secured to the prisoner by the Constitution or laws of the United States has been violated. Ex parte Dawson (1897), 83 Fed. 306, 28 C. C. A. 354.

The person is in the custody of the court from the time of the service on the marshal of a writ of habeas corpus, and, until the proceedings thereon are terminated, he can not lawfully be arrested on a warrant in extradition proceedings. In re Farez (C. C. 1869), Fed. Cas. No. 4,644.

Jurisdiction and power of courts.—Congress has not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction of issuing writs of habeas corpus in proceedings for the arrest of fugitives from justice, and their delivery to the authorities of the State in which they stand charged with crime. Robb *v.* Connolly (1884), 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542.

A Federal court has power to entertain a habeas corpus proceeding for the release of a person arrested under State process for extradition to another State, where it is alleged that he is restrained of his liberty in violation of the Constitution and laws of the United States, and may proceed to a speedy and summary hearing without regard to the extradition proceedings; but it may in its discretion delay the hearing to await the action of the State executive. Ex parte Thaw (D. C. 1913), 209 Fed. 56.

Questions of law or fact.—Where the governor of another State makes an application on the governor for an extradition warrant, the governor must determine whether the person is substantiallly charged with the crime in such other State and whether he is a fugitive from justice; and when it appears in habeas corpus proceedings on what showing the governor acted, it is a question of law for the court whether the accused has been substantially charged with the crime against the demanding State. Dennison *v.* Christian (1905), 25 Sup. Ct. 795, 196 U. S. 637, 49 L. Ed. 630, affirming judgment Ex parte Dennison (1904), 101 N. W. 1045, 72 Neb. 703, 117 Am. St. Rep. 817.

Scope of inquiry in general.—On a habeas corpus granted to a person committed after an examination to await a warrant for his surrender in extradition proceedings, the only questions that can be considered by the court are whether the commissioner had jurisdiction, and whether there was legal evidence to warrant the commitment, and it has no power to review the evidence as to guilt or innocence. Oteiza *v.* Jacobus (1889), 136 U. S. 330,

10 Sup. Ct. 1031, 34 L. Ed. 464, affirming In re Cortes (C. C. 1890), 42 Fed. 47.

A warrant of extradition of a State governor, issued upon the requisition of the governor of another State, accompanied by a copy of an indictment, is prima facie evidence that the accused had been indicted, and was a fugitive from justice, and, if the court in which the indictment was found had jurisdiction of the offense, is sufficient to make it the duty of the Federal courts to decline interposition by writ of habeas corpus, and to leave the question of the lawfulness of the prisoner's detention in the State in which he was indicted to be determined in the first instance by the State courts. Whitten v. Tomlinson (1895), 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406.

Inquiry as to legality or validity of proceedings.—The writ of habeas corpus can not perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings. Wright v. Henkel (1903), 23 Sup. Ct. 781, 784, 190 U. S. 40, 47 L. Ed. 948.

Questions of guilt or innocence of accused and matters of defense. In habeas corpus proceedings for the discharge of a person held under an extradition warrant issued by the governor of a State, the court will not receive evidence tending to show the guilt or innocence of the person whose surrender is sought in determining the question whether or not he is a fugitive from justice. Bruce v. Rayner (1903), 124 Fed. 481, 62 C. C. A. 501.

Sufficiency of indictment. On habeas corpus for discharge of a fugitive, the court will not inquire into the sufficiency of the indictment charging the offense as a matter of technical pleading. Reed v. U. S. (1915), 224 Fed. 378, 140 C. C. A. 64.

Errors and irregularities in proceedings. A writ of habeas corpus can only reach error in proceedings for extradition which is fatal to the jurisdiction of the officer entertaining them, over the person of the accused or the subject matter of the accusation. Sternaman v. Peck (1897), 80 Fed. 883, 26 C. C. A. 214, affirming order Ex parte Sternaman (D. C. 1896), 77 Fed. 595.

Where an indicted person, who has escaped to Canada, and against whom an extradition warrant has been issued, returns to this country without his consent under an agreement that he shall only be tried for the offense for which he has been extradited, and he is thereafter tried and convicted, the objection that the crime for which he was tried was not an extraditable offense must be raised at the trial and taken to the Supreme Court on appeal or certiorari in order to be available. In re Cross (D. C. 1890), 43 Fed. 517.

The judgment of a commissioner in an extradition proceeding can not be reviewed for error by a district court on a writ of habeas corpus. In re Herskovitz (D. C. 1901), 136 Fed. 713.

Questions as to admission and sufficiency of evidence.—R. S., sec. 5278, requiring the surrender of "a fugitive from justice" from one State or Territory to another, does not direct or authorize such surrender unless it is made to appear that the person is in fact a fugitive from justice. If the determination of that fact, upon proof before the executive of the State or Territory where the alleged fugitive is found, is subject to judicial review upon habeas corpus, the accused, being in custody under his warrant, should not be discharged, because, in the judgment of the court, the proof showing that he was a fugitive from justice may not be as full as might properly have been required. Ex parte Reggel (1885), 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250.

Errors in rejection of evidence in extradition proceedings are not reviewable by habeas corpus. Charlton v. Kelly (1913), 33 Sup. Ct. 945, 229 U. S. 447, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397, affirming judgment Ex parte Charlton (C. C. 1911), 185 Fed. 880.

A warrant of removal issued by a governor is not supported by a conclusive presumption that the governor had before him all the necessary papers to authorize it, but it may be shown on habeas corpus that it is invalid because of the insufficiency of the requisition papers on which it was issued. Ex parte Hart (1894), 63 Fed. 249, 11 C. C. A. 167, 28 L. R. A. 801, reversing judgment (C. C. 1894), 59 Fed. 894.

When an officer authorized to entertain proceedings for extradition has before him evidence which, though not satisfactory and far from conclusive, authorizes conflicting presumptions and probabilities as to the guilt of the accused, such evidence being sufficient for the exercise of his judgment upon the facts, gives him jurisdiction of the subject matter, and his determination can not be reviewed. Sternaman v. Peck (1897), 80 Fed. 883, 26 C. C. A. 214, affirming order Ex parte Sternaman (D. C. 1896), 77 Fed. 595.

Question of limitations affecting prosecution. In habeas corpus proceedings for the discharge of a person held under an extradition warrant for return to another State to answer to an indictment for bigamy, where, under the statute of such State, a prosecution for bigamy is barred in two years after the date of the offense, unless the accused flees from justice, and the in-

dictment upon which the requisition was based was found more than two years after the date of the offense laid therein, it is competent for the petitioner to show that he remained in such State, without being concealed, for more than two years after the date of the alleged offense, since such evidence does not go to any matter of defense, but tends to prove that petitioner is not a fugitive from justice. Bruce *v.* Rayner (1903), 124 Fed. 481, 62 C. C. A. 501.

Whether crime charged against a fugitive from justice is barred by statutes of demanding State will not be determined by the court on habeas corpus for his discharge. Reed *v.* U. S. (1915), 224 Fed. 378, 140 C. C. A. 64.

Political questions.—The existence of the treaty of June 16, 1852, between the United States and Prussia, which has been repeatedly recognized by both Governments as still in force, notwithstanding the incorporation of Prussia into the German Empire, can not be questioned by the judicial department in proceedings for a writ of habeas corpus to prevent the extradition of a fugitive from Prussia who is held under extradition proceedings under that treaty, as the question is a political one, and the courts must accept the determination thereof by the political department of the Government. Terlinden *v.* Ames (1902), 22 Sup Ct. 484, 184 U. S. 270, 46 L. Ed. 534.

Officers or others acting under Federal authority—Officers or others in custody.—A deputy United States marshal, arrested for carrying a concealed weapon outside of his district as he was about to pursue a person for whom he had a warrant, was not in custody within the meaning of this section, so as to be entitled to release on habeas corpus. Walker *v.* Lea (C. C. 1891), 47 Fed. 645, 648.

A Federal court can not release by habeas corpus a United States marshal held in custody under State process on the charge of kidnapping and carrying into Mexico a person named, though the marshal claimed to have been executing the law against the immigration of Chinese; for there is no law of the United States which would authorize such an act. In re Marsh (D. C. 1892), 51 Fed. 277.

A United States deputy marshal, arrested on a charge of murder committed by killing a person while attempting to execute a warrant of arrest issued by a Federal court, the killing being necessary either in self-defense or for the purpose of executing the warrant, is in custody for an act done in pursuance of a law of the United States. Kelly *v.* State of Georgia (D. C. 1895), 68 Fed. 652.

See notes under subdivision V, post, this section.

A person under arrest by State officers for an act done under process of a Federal court or in executing a Federal law may be discharged on habeas corpus. Anderson *v.* Elliott (1900), 101 Fed. 609, 41 C. C. A. 521. [C. S. p. 2108].

When a writ of habeas corpus is served on a marshal or other person having a prisoner in custody under Federal authority, it is his duty, by a proper return, to make known to the State judge or court the authority by which he holds him, but at the same time it is his duty, not to obey the process of the State authority, but to obey and execute the process of the United States. Ableman *v.* Booth (1858), 62 U. S. (21 How.) 506, 16 L. Ed. 169.

Judiciary act 1789, sec. 14, gave the United States power to issue writ of habeas corpus in cases of prisoners in jail, in custody under color of the authority of the United States, or committed for trial before some court of the United States. By the statute of 1833, the writ was extended to prisoners under any authority, State or national, for any act done or omitted in pursuance of the laws of the United States, or any decree of any judge or court of the United States. Held, that where an officer in the Army refused to discharge a recruit, under the order of a State court, because of the alleged invalidity of his enlistment, and was committed by the State court for contempt, he was entitled to be discharged by the United States court, under the act of 1833. Ex parte Yerger (1868), 75 U. S. (8 Wall.) 85, 19 L. Ed. 332.

Relief by habeas corpus is properly refused in a Federal circuit court to persons in the military service of the United States, held in the custody of State authorities to answer to a charge of homicide which is asserted by them to have been committed in the discharge of their duty, under the Federal Constitution and laws, to apprehend the deceased for a larceny of property from a Federal arsenal, where there is conflicting evidence on the question whether or not the deceased had surrendered before the fatal shot was fired. U. S. *v.* Lewis (1906), 26 Sup. Ct. 229, 200 U. S. 1, 50 L. Ed. 343, affirming order (C. C. 1904) 129 Fed. 823.

Federal courts have jurisdiction to release on habeas corpus an officer of the United States held in custody for an act done or omitted under authority vested in him by the laws of the United States, though there was no act of Congress covering the particular case. In re Leaken (C. C. 1905), 137 Fed. 680.

An officer of the United States Army, imprisoned for contempt in failing to make

a sworn return to a writ of habeas corpus issued by a State court to produce an enlisted soldier, may be released on habeas corpus issued by a Federal court. In re Neill (D. C. 1871), Fed. Cas. No. 10,089.

A soldier in the regular service, convicted in a State court, and sent to State prison, for murder, in firing upon and killing a bushwhacker while acting under orders of his superior officer, will be discharged on habeas corpus issued by a Federal court. In re Hurst (D. C. 1879), Fed. Cas. No. 6926.

Federal courts have authority on habeas corpus to inquire into the guilt or innocence of persons committed on preliminary examination by a State tribunal on a criminal charge for acts done in the service of the United States, so far as to determine whether the acts were done wantonly and with criminal intent. In re Lewis (D. C. 1897), 83 Fed. 159.

Petitioner, acting as a police officer of a city, and claiming to be such, with a posse, attempted to arrest a deserter from the United States Army under authority of act Oct. 1, 1890, as amended by act June 18, 1898, post, 2210, which provides that it shall be lawful for any civil officer having authority under the laws of any State to arrest offenders to summarily arrest a deserter from the military service of the United States, and deliver him into the custody of the military authority. The deserter, attempting to escape arrest, was fired upon and wounded by one of the posse, and petitioner was indicted and held in custody by the State authorities for such shooting. He petitioned a Federal court, and obtained a writ of habeas corpus on the ground that the act for which he was held was one done in pursuance of a law of the United States. Held, that the question whether the law authorized the shooting in making the arrest being a doubtful one, and the evidence being inconclusive as to whether there was reasonable ground to believe it necessary to prevent the escape, [illegible] as to whether petitioner was a police officer, either de jure or de facto, the court would not discharge him, but would leave his [illegible] Matter of [illegible] (D. C. 1902), 122 Fed. 248.

III. Custody Under Indictments. Process of Courts and Decisions or Orders of Commissioners.

Indictment [illegible] the State [illegible] indictment [illegible] as the unconstitutionality of the statute on which the indictment was based can be raised and determined in defense, subject to review by the Supreme Court. Fitts v. McGhee (1899), 19 Sup. Ct. 269, 275, 172 U. S. 516, 43 L. Ed. 535; Ex parte Royall (1886), 6 Sup. Ct. 734, 117 U. S. 241, 29 L. Ed. 868; New York v. Eno (1894), 15 Sup. Ct. 30, 155 U. S. 89, 39 L. Ed. 80; Whitten v. Tomlinson (1895), 16 Sup. Ct. 297, 160 U. S. 231, 40 L. Ed. 406; Baker v. Grice (1898), 18 Sup. Ct. 323, 169 U. S. 284, 42 L. Ed. 748.

Process of courts. A circuit or district court or judge may on habeas corpus inquire into cause of restraint of one held under process of a State court and to discharge him if he is held in violation of the Constitution or laws of the United States. Ex parte Royall (1886), 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; Ex parte Roach (D. C. 1908), 166 Fed. 314.

Effect of pendency of proceedings in State courts. Except in peculiar and urgent cases, the United States courts will not discharge the prisoner by habeas corpus in advance of the final determination of his case in the State courts, and, even after such determination, will generally leave the petitioner to the usual and orderly course of prosecuting a writ of error from the United States [illegible] Court. Wharton v. [illegible] U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. [illegible] Baker v. Grice (1898), 18 Sup. Ct. [illegible] 323, 169 U. S. 284, 42 L. Ed. 748; [illegible] v. Anderson (1889), 13 Sup. Ct. [illegible] U. S. 161, 33 L. Ed. 94; [illegible] 39 Fed. 566, 25 C. C. A. [illegible] [illegible] (D. C. 1897), 84 Fed. [illegible] [illegible] (D. C. 1899), 94 Fed. 487; [illegible] Watson (D. C. 1901), [illegible] 111 Fed. [illegible]

IV. Custody Under Judgment, Decision or Order of Court, or Judge Thereof.

Writ of authority or [illegible]

Validity of judgment in general.—Ableman *v.* Booth (1858), 21 How. 506, 521, 16 L. Ed. 169.

That a verdict of "guilty" of murder does not specify the degree thereof does not make a sentence imposed thereunder void, but only erroneous, and the same is not reviewable on habeas corpus. In re Eckart (1897), 17 Sup. Ct. 638, 166 U. S. 481, 41 L. Ed. 1085.

The objection that the original sentence, before modification on motion of the Government's counsel, exceeded the authority of the court, in that it required service at hard labor, is not available on habeas corpus, since, at most, only that part of the sentence in excess of the law is void. Harlan *v.* McGourin (1910), 31 Sup. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849, affirming decree Ex parte Harlan (C. C. 1909) 180 Fed. 119.

Where it appears affirmatively from the return in habeas corpus that the relators are imprisoned under a final sentence void on its face, habeas corpus is the proper remedy to procure their discharge. Mackey *v.* Miller (1903), 126 Fed. 161, 62 C. C. A. 139.

Habeas corpus will only be granted to discharge one whose conviction is void. U. S. *v.* Lair (1912), 195 Fed. 47, 115 C. C. A. 49.

Where a sentence has been imposed which neither the verdict nor the statute authorized the defendant is entitled to discharge on a writ of habeas corpus. In re Burns (C. C. 1902), 113 Fed. 987.

Errors or irregularities in proceedings.—Mere errors or irregularities, which only render the proceeding voidable, are not grounds for relief on writ of habeas corpus. Ex parte Reed (1879), 100 U. S. 13, 25 L. Ed. 538. [C. S. p. 2117.]

Habeas corpus will not issue out of a Federal court in behalf of one convicted of crime who asserts existence at trial of mob domination, and denial of due process of law guaranteed by Const. Amend. 14, which questions were submitted to the trial court and passed upon by the highest State court. Frank *v.* Mangum (1915), 35 Sup. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

Though the Federal court may release one restrained of his liberty under a void judgment of a Federal court beyond its jurisdiction, it may not release one held by an erroneous judgment within the jurisdiction of the court, and hence not void. Stevens *v.* McClaughry (1913), 207 Fed. 18, 125 C. C. A. 102.

Failure to impose fine in addition to imprisonment, under statute providing for both, held not available on habeas corpus. Linningen *v.* Morgan (C. C. A. 1917), 241 Fed. 645.

Mere error of law in exercise of jurisdiction, though serious, is no ground for habeas corpus. Collins *v.* Morgan (C. C. A. 1917), 243 Fed. 495.

Where the whole record, taken together, showed the crime of which accused was convicted, he will not be freed on habeas corpus because the order of sentence did not recite the crime. Ex parte Thurston (D. C. 1916), 233 Fed. 847.

Cumulative sentences and sentences in excess of authority.—A sentence of a Federal circuit court of two years' imprisonment in a State prison will not be held void on habeas corpus on the theory that as the convict was found guilty on two counts of the indictment the imprisonment was directed for a period not exceeding one year on each count, where there is nothing in the record to show that there was a separate sentence of one year's imprisonment upon each count. Dimmick *v.* Tompkins (1904), 24 Sup. Ct. 780, 194 U. S. 540, 48 L. Ed. 1110.

A sentence imposed in excess of what was authorized by statute is not void as to the excess, so as to justify relief by habeas corpus, where under the local practice the sentence was subject to change or reversal in a higher court and the accused subject to resentence. Ex parte Spencer (1913), 33 Sup. Ct. 709, 228 U. S. 652, 57 L. Ed. 1010.

Prior to the expiration of that part of a term of imprisonment that a court could legally impose, a prisoner will not be discharged on habeas corpus on the ground that the court imposed an excessive sentence. De Bara *v.* U. S. (1900), 99 Fed. 942, 944, 40 C. C. A. 194.

Where a defendant has been convicted on different counts of an indictment charging separate offenses under the same statute, and the court has imposed a single sentence for a term longer than is authorized by the statute for one offense, another court can not cure the defect by apportioning the term upon the different counts, but after serving the lawful part of the term the prisoner may be discharged on a writ of habeas corpus. U. S. *v.* Peeke (1907), 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314, affirming order Ex parte Peeke (D. C. 1906), 144 Fed. 1016.

Where part of a sentence was void, as beyond the jurisdiction of the court, the prisoner was entitled to release on habeas corpus, after having satisfied the part of the sentence that was good. Munson *v.* McClaughry (1912), 198 Fed. 72, 117 C. C. A. 180.

A prisoner confined in a Federal penitentiary under sentence for two successive

terms, the second of which was illegal, held entitled to be discharged from such illegal part, although the lawful term had not been served, because of the effect on his right to petition for a parole under act June 25, 1910, sec. 1. O'Brien v. McClaughry (1913), 209 Fed. 816, 126 C. C. A. 546.

Judgments or orders of State courts—Jurisdiction and power of Federal courts in general.—The Federal courts have power to discharge prisoners restrained of their liberty in violation of the Constitution of the United States under judgments of State courts. Andrews v. Swartz (1895), 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422; Ex parte McCready (C. C. 1874), Fed. Cas. No. 8,732; In re Weng Yung Quy (C. C. 1886), 47 Fed. 717; U. S. v. Lewis ex rel. Dorsey (C. C. 1904), 129 Fed. 823; order affirmed (1906), 26 Sup. Ct. 229, 200 U. S. 1, 50 L. Ed. 343; In re Dowd (C. C. 1904), 132 Fed. 747; Ex parte Yung Jon (D. C. 1886), 28 Fed. 308, 309; Walters v. McKaig (D. C. 1915), 221 Fed. 746.

Where an officer in the Army refused to discharge a recruit, under the order of a State court, because of the alleged invalidity of his enlistment, and was committed by the State court for contempt, he was entitled to be discharged by the United States court. Ex parte Yerger (1868), 75 U. S. (8 Wall.) 85, 19 L. Ed. 332.

The Federal court may, on habeas corpus, release a person after his conviction by a State court as well as before trial, when he is in custody for an act done in pursuance of a valid Federal law. Campbell v. Waite (1898), 88 Fed. 102, 105, 31 C. C. A. 403 (appeal dismissed [1901], 21 Sup. Ct. 920, 180 U. S. 635, 45 L. Ed. 709).

The case in which a United States court has jurisdiction by habeas corpus to discharge one imprisoned under judgment of a State court rests on special grounds, such as where the State is proceeding against an officer of the United States for an act done in pursuance of his official duty under the Federal Constitution or laws, or where the State court, assuming to act by authority of a State statute which is in conflict with the Federal Constitution and void for that reason, imprisons a citizen for exercising a right guaranteed by the Federal Constitution. Ex parte Ulrich (C. C. 1890), 43 Fed. 661, 664.

Where a prisoner convicted for a criminal offense in a State court was not given a jury trial or entitled to one under the State statute, he can not be discharged from habeas corpus by Federal court on the ground that his conviction was without due process of law. Ex parte Brown (D. C. 1906), 146 Fed. 461.

As to custody under indictments under State authority or process of State courts, see also subdivision III, ante, this section.

Scope of inquiry.—Courts of the United States, on an application for writ of habeas corpus under R. S. 754–761, post, 398–404, by a person confined under final judgment of a State court, may inquire into the truth of the causes of his detention. Frank v. Mangum (1915), 35 Sup. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

Federal courts, on application for habeas corpus by person held under final judgment, of a State court, are confined to examination of such jurisdictional question. Collins v. Johnston (1915), 35 Sup. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

Matters within jurisdiction of State courts.—Federal courts have no power to interfere by habeas corpus with the imprisonment of a person under a judgment of conviction of a crime in a State court, if that court had jurisdiction to try the case, and jurisdiction over the person of the accused, and did not lose such jurisdiction during the trial. Felts v. Murphy (1906), 26 Sup. Ct. 366, 201 U. S. 123, 50 L. Ed. 689; Valentina v. Mercer (1906), 26 Sup. Ct. 368, 201 U. S. 131, 50 L. Ed. 693; Ex parte Ulrich (C. C. 1890), 43 Fed. 661; Filer v. Steele (D. C. 1915), 228 Fed. 242.

Where, on a writ of habeas corpus to obtain the discharge of two members of the United States Army for an indictment for murder, found by the courts of the State where the offense was committed, it appeared that the shooting of deceased occurred in the streets of a city, outside the military reservation, while petitioners were endeavoring to arrest deceased for depredations committed on such reservation, but the evidence was conflicting as to whether the shooting was done while deceased was endeavoring to escape or after he had stopped, thrown up his hands, and offered to surrender, the determination of whether the shooting was justifiable was within the exclusive jurisdiction of the State courts. U. S. v. Lewis (C. C. 1904), 129 Fed. 823; order affirmed (1906), 26 Sup. Ct. 229, 200 U. S. 1, 50 L. Ed. 343.

Want of authority or jurisdiction.—Habeas corpus will lie in a Federal court in behalf of a person convicted of crime in a State court only where the judgment is absolutely void for want of jurisdiction. Frank v. Mangum (1915), 35 Sup. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

A Federal court may, in its discretion, release upon a writ of habeas corpus a person held in confinement under a judgment of a State court sentencing him to imprisonment for crime, where it appears that such

court had no jurisdiction over his person or of the crime charged; and where such want of jurisdiction arises from a provision of the Constitution or a law or a treaty of the United States which precludes a second prosecution for the offense, such relief may properly be granted, rather than to compel the petitioner to follow his remedy by writ of error. Cohn v. Jones (D. C. 1900), 100 Fed. 639.

Errors and irregularities in proceedings.—Where a State court having jurisdiction of the offense and person enters on the trial of a criminal case under a statute not repugnant to the Constitution of the United States, no mere error in the conduct of the trial will give a United States court jurisdiction to review the proceeding on habeas corpus. Andrews v. Swartz (1895), 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422.

V. Custody in Violation of Constitution, Law, or Treaty of the United States.

Construction and operation in general.—The circuit court (now superseded by the district court) of the United States may issue the writ of habeas corpus upon the application of any person who is imprisoned in violation of the Constitution, or of any law or treaty of the United States. Ex parte Bridges (C. C. and D. C. 1875), Fed. Cas. No. 1,862; In re Brosnahan (C. C. 1883), 18 Fed. 62; Ex parte Conway (C. C. 1891), 48 Fed. 77; United States v. Lewis (C. C. 1904), 129 Fed. 823 (affirmed [1906] 26 Sup. Ct. 229, 200 U. S. 1, 50 L. Ed. 343); Ex parte Collins (C. C. 1906) 149 Fed. 573; Ex parte Hanson (D. C. 1886), 28 Fed. 127.

Under habeas corpus act, Federal courts may issue writ of habeas corpus to inquire into cause of detention of prisoner held by a State on a criminal charge, if the petitioner alleges that he was performing duty as a soldier of the United States, and may determine summarily the truth of such allegation, and, if true, may discharge the prisoner on the ground that the State court is without jurisdiction. In re Wulzen (D. C. 1916), 235 Fed. 362, Ann. Cas. 1917A, 274.

The power to issue writ of habeas corpus is to be sparingly exercised, especially when directed toward release of members of the military accused of offenses against the peace of the State, the jurisdiction of the civil courts of the State over such offenses in time of peace being admitted. Id.

In habeas corpus proceedings the judges hear the evidence without a jury and proceed in a summary way to pass on the Federal question involved, which is whether the petitioner is deprived of his liberty in contravention of the Constitution or laws of the United States. West Virginia v. Laing (1904), 133 Fed. 887, 66 C. C. A. 617.

A Federal court or judge should not discharge on writ of habeas corpus a person in the custody of State authorities, on the ground that he is held in violation of the Constitution or of a law or treaty of the United States, unless the case is one of urgency, calling for immediate action. In re Matthews (D. C. 1902), 122 Fed. 248.

Violation of Federal laws.—This clause does not require that the law shall be by express act of Congress. Any obligation fairly and properly inferable from the Constitution, or any duty of a United States officer to be derived from the general scope of his duties under the laws of the United States, is a "law," within the meaning of the statute. In re Neagle (1889), 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

Where it appears on the writ of habeas corpus that the imprisonment is under the authority of an act of Congress, the jurisdiction of the State court is at an end. Ex parte Robinson (C. C. 1856), Fed. Cas. No. 11934.

Violation of United States Constitution.—The Federal courts have jurisdiction of a writ of habeas corpus, alleging the arrest and imprisonment of petitioner without due process of law. In re Monroe (C. C. 1891), 46 Fed. 52; Ex parte Harlan (C. C. 1909), 180 Fed. 119; decree affirmed, Harlan v. McGourin (1910), 31 Sup. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849; In re Ah Lee (D. C. 1880), 5 Fed. 899; In re Lee Tong (D. C. 1883), 18 Fed. 253; Laundry License Case (D. C. 1885), 22 Fed. 701.

In regard to the life and liberty of the citizen, the courts have so often exercised the power by writ of habeas corpus that there remains no question about their right to do so, and they are equally bound to give remedy for unlawful invasion of rights of property by officers of any branch of the Government. U. S. v. Lee (1882), 1 Sup. Ct. 240, 259, 106 U. S. 196, 27 L. Ed. 171.

The Federal courts are charged with a duty in the protection of individual rights secured by the Constitution of the United States, and the decision of the supreme court of a State that a State prisoner is not held in violation of such rights is not conclusive upon a Federal court which may, in its discretion, determine the question for itself on a writ of habeas corpus. Brown v. Urquhart (C. C. 1905), 139 Fed. 846, reversed Urquhart v. Brown (1907), 27 Sup. Ct. 459, 205 U. S. 179, 51 L. Ed. 760.

A Federal court has no power on such a writ to discharge a prisoner confined for contempt by a State court for refusing to answer questions as a witness, on the

ground that his answers might incriminate him; the provision of the fifth constitutional amendment that no person shall be compelled in a criminal case to be a witness against himself being a limitation solely on the powers of the National Government and its courts and officers. Ex parte Munn (D. C. 1905), 140 Fed. 782.

A Federal court will discharge from imprisonment by a State, on a writ of habeas corpus, a teamster in the employment of the Quartermaster's Department of the Army, where such imprisonment is in violation of the Constitution and laws of the United States and prevents the performance of the duties of his employment. Pundt v. Pendleton (D. C. 1909), 167 Fed. 997.

Violation of treaties.—A Federal court may issue habeas corpus to determine whether one of a crew of a foreign vessel in port of the United States, who is in custody of the State authorities for crime committed against its laws, is exempt from local jurisdiction under the provisions of a treaty. Wildenhus' case (1887), 7 Sup. Ct. 385, 387, 120 U. S. 1, 30 L. Ed. 565.

Where a committing magistrate has jurisdiction of the subject matter and of accused and the offense charged is within the treaty and the magistrate has legal evidence on which to exercise his judgment his decision can not be reviewed on habeas corpus. McNamara v. Henkel (1913), 33 Sup. Ct. 146, 226 U. S. 520, 57 L. Ed. 330.

A deserter from the naval service of a foreign Government, arrested and detained by the authorities of the United States on application of officers of that Government, under the supposed requirements of a treaty, is not thereby placed in the constructive custody of such officers, so that his release in habeas corpus proceedings is in any manner a invasion of their right to immunity from the jurisdiction or process of our courts; and, when his arrest and detention by the United States authorities were not warranted either by the treaty or by the rule of comity, it is the duty of the courts to discharge him. Motherwell v. U. S. (1901), 107 Fed. 437, 48 C. C. A. 97, affirming judgment U. S. v. Motherwell (D. C. 1900), 103 Fed. 198; and reversed, Tucker v. Alexandroff (1902), 22 Sup. Ct. 195, 183 U. S. 424, 46 L. Ed. 264.

VI. Subjects of Foreign States or Countries.

Construction and operation. This clause does not extend to the case of a prisoner who, being a subject of and domiciled in Belgium, engaged in a fight on a Belgian ship moored in New Jersey. In re Wildenhus (C. C. 1886), 28 Fed. 924.

VII. Procuring Testimony of Prisoners.

Construction and operation in general.—Neither the Supreme Court nor any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness. Ex parte Dorr (1845), 44 U. S. (3 How.), 103, 11 L. Ed. 514.

The power to issue the writ to bring the prisoner into court to testify, will not be exercised except in case of necessity, especially where the prisoner is confined by authority of a State court; and such writ will not be granted to require the production of a bankrupt for examination under bankruptcy act July 1, 1898, sec. 21 (30 Stat. 552), where he is confined in a hospital for the criminal insane in such State under a judgment of a court of such State; the taking of his testimony by deposition being also authorized in such cases. In re Thaw (D. C. 1908), 172 Fed. 288.

398. Application for writ of habeas corpus. Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application. R. S. 754.

Notes of Decisions.

Court to which application may or must be made. [illegible] a judgment of conviction rendered by a State court, the Federal court and the refusal of the State courts to grant a writ of error to review such a writ of habeas corpus for murder will not of its warrant interfere [illegible] in behalf by a Federal court by writ of habeas corpus. Knox v. Lee (1870), 12 Wall. (79 U. S.) 457, 20 L. Ed. 287; Ex parte Royall (1886), 6 Sup. Ct. 734, 117 U. S. 241, 29 L. Ed. 868.

An application for a writ of habeas corpus to release one held to service as a soldier in the Regular Army should be ad-

dressed to a United States court, and not to a State court. Ex parte Rielly (N. Y. 1867), 2 Abb. Prac. (N. S.) 334.

What law governs.—The proceedings on habeas corpus in the Federal courts are not governed by the local law, but by the common law. Ex parte Kaine (C. C. 1852), Fed. Cas. No. 7,598; Id. (C. C. 1853), Fed. Cas. No. 7,597.

Persons who may sue out writ.—A person merely indicted and not tried in the Supreme Court of the District of Columbia can not file in the United States Supreme Court a petition for habeas corpus on the ground that the statute creating the offense with which he is charged is in conflict with the United States Constitution and that the Supreme Court of the District is without jurisdiction, though that court and the District Court of Appeals have both held that such statute is valid and that the Supreme Court has jurisdiction. In re Chapman (1895), 15 Sup. Ct. 331, 332, 156 U. S. 211, 39 L. Ed. 401.

The wife of an enlisted man may prosecute the writ to inquire into the regularity of the enlistment. In re Ferrens (D. C. 1869), Fed. Cas. No. 4,746.

Time for application and laches.—Where a petitioner, serving a sentence of a State court, has delayed nearly two years to apply for a writ, and his right of appeal in the State court is not yet barred, habeas corpus will not issue unless his case is clear. In re Murphy (C. C. 1898), 87 Fed. 549.

Requisites of application in general.—A petition which merely alleges that petitioner is restrained in violation of the Constitution and laws of the United States and is illegally imprisoned without due process of law, but does not set out in detail anything touched by the Federal laws or Constitution, does not state facts giving the circuit court jurisdiction. Ex parte Cuddy (1888), 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154; Whitten *v.* Tomlinson (1895), 16 S. Ct. 297, 160 U. S. 231, 40 L. Ed. 406; Kohl *v.* Lehlback (1895), 16 Sup. Ct. 304, 160 U. S. 293, 40 L. Ed. 432; King *v.* McLean Asylum of the Massachusetts General Hospital (1894), 64 Fed. 325, 12 C. C. A. 139, 26 L. R. A. 784; In re Storti (C. C. 1901) 109 Fed. 807; judgment affirmed, Storti *v.* Massachusetts (1901), 22 Sup. Ct. 72, 183 U. S. 138, 46 L. Ed. 120.

Where petition for habeas corpus and certiorari against local board, under conscription act, does not show petitioner has complied with requirements of act and regulations, or ever presented to local and district boards reason of ignorance assigned in district court for failure to do so, relief asked against refusal of boards to exempt him as alien must be denied. Summertime *v.* Local Board, Division No. 10 (D. C. 1917), 248 Fed. 832.

The petition is of informal character; a simple application, stating that the party is unlawfully confined, being in most cases sufficient. Ex parte Mikell (D. C. 1918), 253 Fed. 817.

A petition for release of a prisoner after his conviction, on the ground that the proceedings and trial are void because the defendant was denied his constitutional rights therein, should set forth the essential parts of such proceeding and trial. Andersen *v.* Treat (1898), 19 Sup. Ct. 67, 69, 172 U. S. 24, 43 L. Ed. 351.

Contempt.—In a habeas corpus proceeding to obtain relief from imprisonment for contempt, the petitioner is entitled to supplement the record by alleging such additional facts as tend to show that his misbehavior was not a contempt. As to how far, see Ex parte Cuddy (1889), 9, S. Ct. 703, 131 U. S. 280, 33 L. Ed. 154; Ex parte O'Neal (C. C. 1903), 125 Fed. 967.

Extradition proceedings.—In a petition for a writ of habeas corpus, verified by petitioner's oath, as required by this section, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence; but no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous. Whitten *v.* Tomlinson (1895), 16 Sup. Ct. 297, 302, 160 U. S. 231, 40 L. Ed. 406.

Where a petition for habeas corpus alleges that the petitioner is the father of the person whose release is sought, and that such person, being between the ages of 18 and 21, entered into the United States Navy without the parent's consent, and is himself desirous of being released therefrom, and that, "under the statutes of the United States in such case made and provided, the entrance and enlistment" of such person "was illegal and invalid," no issue as to the intoxication of the recruit at the time of enlistment is presented, especially in view of R. S. sec. 1624, art. 19, requiring the dishonorable dismissal of an officer who knowingly enlists an intoxicated person. Thomas *v.* Winne (1903), 122 Fed. 395, 58 C. C. A. 613.

When it is alleged in a petition for a writ of habeas corpus that by the action of a judge of a police court a person has been deprived of his liberty without due process of law, the Federal court or judge thereof has jurisdiction to issue a writ of habeas corpus. In re Monroe (C. C. 1891), 46 Fed. 52, 54.

Particular averments.—The petition of one held in custody under authority of the President, under act Mar. 3, 1863, relating

to suspension of the writ, for discharge from imprisonment, need not aver the furnishing of list of names mentioned in statute. Ex parte Milligan (1866), 71 U. S. (4 Wall.) 2, 18 L. Ed. 281.

A petition for a writ of habeas corpus which does not impeach the judgment or the original mittimus, directed to the marshal, under which petitioner was actually committed, is bad. Howard v. U. S. (1896), 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509.

Where unlawfulness of detention alleged in petition consists in order of an inferior tribunal, legally constituted and having jurisdiction over subject-matter and person detained, petition must state facts constituting arbitrary or capricious action. Ex parte Tinkoff (D. C. 1918), 254 Fed. ——.

Copies of process.—Where a detention is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the party is held in custody, copies of the process or proceedings must be annexed to, or the essential parts thereof set out in, the petition for habeas corpus; mere averments of conclusions of law being necessarily inadequate. Craemer v. Washington (1897), 18 Sup. Ct. 1, 168 U. S. 124, 42 L. Ed. 407.

A petition for a writ of habeas corpus to release a prisoner after his conviction, on the ground that the proceedings and trial are void because the defendant was denied his constitutional rights therein, should set forth the essential parts of such proceedings and trial. Andersen v. Treat (1898), 19 Sup. Ct. 67, 172 U. S. 24, 43 L. Ed. 351.

The petitioner must produce a copy of the warrant of commitment, or an affidavit that the jailer refused to give a copy. Harrison's case (C. C. 1804), Fed. Cas. No. 6,131.

Verification.—See Kentucky v. Powers (1906), 26 Sup. Ct. 387, 397, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 692.

Where, because of infancy, incompetency, or lack of time, a petition for a writ of habeas corpus in a deportation case can not be verified by the applicant as required by this section, it may be verified by his attorney. U. S. v. Watchorn (C. C. 1908), 164 Fed. 152.

The application must be supported by an affidavit stating the circumstances under which the prisoner is entitled to the benefit of the writ. In re Keeler (D. C. 1843), Fed. Cas. No. 7,637.

The writ will not be granted where the application is sworn to before a justice of the peace of another State, of whose official character there is no evidence. Id.

It is essential that the application for the writ be made and verified by the prisoner. Ex parte Hibbs (D. C. 1886), 26 Fed. 421, 435.

Effect of verification.—In a petition for a writ of habeas corpus, verified by petitioner's oath, as required by this section, facts duly alleged may be taken to be true unless denied by the return or controlled by other evidence, but no allegation of fact in the petition can be assumed to be admitted unless distinct and unambiguous. Whitten v. Tomlinson (1895), 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406.

Demurrer to petition.—Where petition for habeas corpus is tested by demurrer, statements of fact therein must be taken as true. Choy Gum v. Backus (1915), 223 Fed. 487, 139 C. C. A. 35.

399. Award of a writ of habeas corpus.—The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained. *R. S. 755.*

Notes of Decisions.

Allowance of writ in general.—Under this section, where it appears from the petition that the case is not one which would justify the exercise of Federal authority, it may be dismissed, and the court is not required to either award a writ or issue an order to the respondent to show cause. Ex parte Milligan (1866), 4 Wall. 2, 110, 18 L. Ed. 281. [C. S. p. 2132].

The Federal courts have judicial discretion with reference to the granting of habeas corpus petitions, and unless the application is made by a Federal official, or relates to the obstruction of interstate commerce or to some other unlawful and unconstitutional obstruction of a continuing character, the writ should not issue. In re O'Brien (C. C. 1899), 95 Fed. 181, 182.

Compelling resort to other remedy.—A Federal court has discretion to grant habeas corpus or to require the prisoner to obtain review by writ of error in the State supreme court and the United States Supreme Court, where the State supreme court reversed a conviction of murder in the first degree for want of sufficient evidence and remanded the case, with directions to allow the verdict to stand for murder in the second

degree. Ex parte Frederich (1893), 13 Sup. Ct. 793, 796, 149 U. S. 70, 37 L. Ed. 653.

Rule to show cause.—On an application for a writ of habeas corpus presented to a Federal court, it is not required to issue the writ instanter, but the court in its discretion may, instead, make an order on the officer alleged to have petitioner in his custody to show cause on a day certain why the writ should not be issued. Ex parte Collins (C. C. 1907), 154 Fed. 980.

Evidence.—Upon an original application to the Supreme Court for a writ of habeas corpus for one committed for contempt by a circuit court, the facts set forth in the commitment must be regarded as true. In re Terry (1888), 9 Sup. Ct. 77, 78, 128 U. S. 289, 32 L. Ed. 405.

Disposition of merits on hearing of petition for writ.—Right of a petitioner to a writ of habeas corpus may be determined on the merits on a hearing on the application. Ex parte Hyde (C. C. 1904), 194 Fed. 207; Ex parte King (D. C. 1912), 200 Fed. 622.

Effect of issuance of writ.—Pending proceedings for extradition regularly and constitutionally taken under the acts of Congress can not be put an end to by writ of habeas corpus. Terlinden *v.* Ames (1902), 22 Sup. Ct. 484, 487, 184 U. S. 270, 46 L. Ed. 534.

Service of writ.—Where the service of the writ was prevented by force, it was ordered to be placed on the files of the court to be served when and where practicable. In re Winder (C. C. 1862), Fed. Cas. No. 17,867.

400. Return to a writ of habeas corpus.—Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days. *R. S. 756.*

In regard to the duties of an officer upon whom has been served a writ of habeas corpus, as well as for the forms of return, etc., see the Manual for Courts-Martial and the Army Regulations.

Notes of Decisions.

Purpose of section.—This section was designed to remedy procrastination and trifling with the writ, and prior to its enactment the mode of compelling a return was by taking out an alias and then a pluries writ, and thereafter issuing an attachment, and a reasonable time was always allowed for making a return, and it will not be presumed that one will not be made. Ex parte Baez (1900), 20 Sup. Ct. 673, 177 U. S. 378, 44 L. Ed. 813.

Attachment.—An attachment for not returning a writ of habeas corpus at the appointed time will not be issued until three days have expired after the service of the writ. U. S. *v.* Bollman (C. C. 1807), Fed. Cas. No. 14,622.

An attachment is not necessary where the party has not made a true return, if he is present in court; but an order may issue directing him immediately to answer interrogatories. U. S. *v.* Green (C. C. 1824), Fed. Cas. No. 15,256.

401. Cause of detention.—The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party. *R. S. 757.*

Notes of Decisions.

Form and sufficiency of return in general.—The return on the writ should be signed by the person to whom it was directed. Seavey *v.* Seymour (C. C. 1871), Fed. Cas. No. 12,596.

The marshal's statement on return of the writ that he had disobeyed it, and deported the prisoner in accordance with instructions from the Secretary of War, is a sufficient return. Ex parte Benedict (D. C. 1862), Fed. Cas. No. 1,292.

Unless the return to a writ of habeas corpus shows that the caption and detention are legal at the time of the service of the writ, the prisoner ought to be discharged; and a return showing a caption and detention upon valid process since such service is not sufficient. In re Doo Woon (D. C. 1883), 18 Fed. 898.

Evasive return.—Where the return to a writ of habeas corpus is evasive and insufficient, the person to whom it is addressed, if present in court, will be committed until he produce the prisoners, or be otherwise discharged. U. S. *v.* Davis (C. C. 1839), Fed. Cas. No. 14,926.

A person who makes a false and evasive return, though he can not produce the relator, is in contempt. U. S. v. Williamson (D. C. 1855), Fed. Cas. No. 16,725. See In re Stacy (N. Y. 1813), 10 Johns. 328.

Construction and effect of return.—At common law no evidence was necessary to support the return. It was deemed to import verity until impeached. Crowley v. Christensen (1890), 11 S. Ct. 13, 137 U. S. 86, 94, 34 L. Ed. 620.

The return to a writ of habeas corpus, reciting facts, imports verity until impeached. Stretton v. Rudy (1910), 176 Fed. 727, 101 C. C. A. 223.

The return to a writ of habeas corpus which contains the whole record of the commitment under the judgment of a court specified constitutes a full and decisive answer to every allegation in the petition for the writ, and, being admitted, negatives the same. In re Waldrip (1883), 1 Ariz. 462, 2 Pac. 751.

An allegation, in a petition for the writ of habeas corpus against the Secretary of the Navy, that the person in whose behalf the petition is filed is restrained of his liberty by the agents and subordinates of the Secretary, and is within his control, through the custody of a person unknown, who exercises his authority under the orders of the Secretary, states a conclusion of law, which is not admitted by a return which is in the nature of an objection to the jurisdiction of the court; and under such circumstances the Court of Appeals will take judicial notice of the powers and duties of the Secretary under the Constitution and laws. McGowan v. Moody (1903), 22 App. D. C. 148.

Certiorari to compel return.—A certiorari will be issued on request of the prisoner to the committing magistrate to certify the proceedings. Ex parte Bennett (C. C. 1825), Fed. Cas. No. 1,311; In re Martin (C. C. 1866), Fed. Cas. No. 9,151.

402. Body produced by habeas corpus.—The person making the return shall at the same time bring the body of the party before the judge who granted the writ. *R. S. 758.*

Notes of Decisions.

Necessity of production of petitioner.—See Ex parte Young (C. C. 1892), 50 Fed. 228.

Control of prisoner.—Where a sheriff, in obedience to a writ of habeas corpus, makes a proper return and brings his prisoner before the court, the safe-keeping of the prisoner is entirely under the direction and control of the court to which the return is made. Barth v. Clise (1870), 79 U. S. (12 Wall.) 400, 20 L. Ed. 393.

An order from a subordinate in the War Department to an officer not to obey the writ by the production of the body, is no justification to the officer. Ex parte Field, 5 Blatchford, C. C., 63.

403. Date for hearing.—When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time. *R. S. 759.*

Notes of Decisions.

Adjournment of hearing.—Where the return shows that petitioner is held under a commitment, regular on its face, of a competent State court, but petitioner alleges that he is really held for an act done under authority of the United States, the court will adjourn the hearing, and give notice to the county attorney. U. S. v. Jailer (C. C. 1887), Fed. Cas. No. 15,463.

404. Hearing of a case of habeas corpus.—The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. *R. S. 761.*

Notes of Decisions.

Construction and operation in general.—The mandate of this section is applicable to the Supreme Court, exercising original or ancillary jurisdiction, and the proceedings are to be promptly disposed of. Storti v. Massachusetts (1901), 22 Sup. Ct. 72, 183 U. S. 138, 46 L. Ed. 129.

This section means that if the party is held in custody in violation of the Federal Constitution or law, or for an act done or

omitted in pursuance of the Federal laws, he must be discharged. In re Anderson (C. C. 1899), 94 Fed. 487, 489.

The special grant of power to issue writs of habeas corpus is contained in this chapter, and it is necessary for a correct analysis thereof to consider the several sections separately and also to treat the chapter in its entirety as one law. Ante, 396 provides that the Supreme Court, circuit courts, and district courts, and the justices and judges of such courts within their respective jurisdictions, shall have power to issue writs of habeas corpus for the purpose of inquiry into the cause of restraining of liberty. This section provides for a summary hearing, and authorizes the court or justice or judge to dispose of the party as law and justice require. These sections seem to contain the entire grant of power, and they do not contain any clause or sentence indicating limitations of the power. Clifford *v.* Williams (C. C. 1904), 131 Fed. 100, 102.

Person in custody of military authorities.—Under this section and R. S. 1117, minor arrested for fraudulently enlisting in violation of sixty-second article of war after service of writ of habeas corpus sued out by his mother will not be taken from the custody of the military authorities. U. S. *v.* Williford (1915), 220 Fed. 291.

On habeas corpus by father to avoid enlistment of minor son over 16 and under 18 in National Guard, immediate surrender will not be directed, where son was guilty of military offense, but the military authorities will be allowed to retain custody to punish for such offense. Hoskins *v.* Dickerson (C. C. A. 1917), 239 Fed. 275.

Where members of State National Guard had been drafted into military service of United States, under national defense act, and hence are beyond jurisdiction of State courts, appellate court will not consider whether they were properly mustered into service of State, as case has become moot, and courts will decline to pass upon appeals in such cases. Ex parte McMillan (Ala. App. 1917), 74 So. 396.

Delay of hearing.—See ex parte Thaw (D. C. 1913), 209 Fed. 56.

Upon habeas corpus by a deputy United States marshal prosecuted in a State court for murder, his right to release because the killing was to protect a justice of the Supreme Court from an assault by a dissatisfied litigant; and hence, in pursuance of a law of the United States, should be summarily decided as required by this section, without waiting for the result of the proceedings in the State court. In re Neagle (C. C. 1889), 39 Fed. 833, 845, 5 L. R. A. 78, affirmed (1890) 10 Sup. Ct. 658, 135 U. S. 1, 34 L. Ed. 55.

Scope of inquiry and matters considered on trial or hearing.—Inquiry on application in a Federal court for writ of habeas corpus by one convicted of crime in a State court is not confined to proceedings in the trial court, but extends to appeals of which the prisoner has had the benefit. Frank *v.* Mangum (1915), 35 S. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

The determination by the highest court of a State that the offense charged in an indictment is one punishable under the laws of the State is conclusive in a subsequent proceeding by the accused in a Federal court for release on a writ of habeas corpus. Erickson *v.* Hodges (1910), 179 Fed. 177, 102 C. C. A. 443.

Upon a writ of habeas corpus to procure the release of a person who has been committed for contempt in refusing to answer questions propounded to him in a criminal case, on the ground that his answers would tend to criminate himself, the court may consider the testimony and the facts upon which the committing court based its action against the witness. Ex parte Irvine (C. C. 1896), 74 Fed. 954.

A circuit court of the United States, on the hearing upon writ of habeas corpus, will not hold an act of Congress unconstitutional. U. S. *v.* Ames (C. C. 1899), 95 Fed. 453.

Where petitioner was arrested under an extradition warrant as a fugitive from justice, his identity as the person described in the warrant and extradition proceedings is open to review on habeas corpus. Ex parte Chung Kin Tow (D. C. 1914), 218 Fed. 185.

Evidence.—A finding of probable cause for the removal to the District of Columbia of a person there charged with an offense against the United States will not be disturbed on habeas corpus as being wholly without any evidence to support it, where certified copies of indictments for conspiring against the United States, found in the District of Columbia, were produced before the commissioner, although copies of indictments found by a Federal court of the district where the accused resides, laying the locus of the conspiracy in that district, were also offered in evidence, together with testimony tending to show that the accused had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed. Price *v.* Henkel (1910), 30 Sup. Ct. 257, 259, 216 U. S. 488, 54 L. Ed. 581.

On habeas corpus to discharge petitioner under a warrant for his extradition, issuance of the warrant is at least prima facie evidence that petitioner is a fugitive from justice. Tiberg *v.* Warren (1911), 192 Fed. 458, 112 C. C. A. 596.

In habeas corpus the burden is on petitioner to substantiate the allegations of his traverse. Id.

Where one indicted for an offense committed in one State is subsequently found in another State, the presumption that he is a fugitive from justice may, on habeas corpus for his discharge, be overcome by proof. Reed v. U. S. (1915), 224 Fed. 378, 140 C. C. A. 64.

Where, on return to a writ of habeas corpus, the respondent alleged that he held the petitioner under a judgment of conviction by a military court-martial, the burden is on the respondent to show that the judgment was based on some provision of positive law. Hamilton v. McClaughry (C. C. 1903), 136 Fed. 445.

On habeas corpus to discharge an alleged minor, who swore on his enlistment that he was over 21, evidence may be given as to whether he understood what he was swearing to. In re Stokes (D. C. 1867), Fed. Cas. No. 13,474.

On a trial of the right of one enlisted as a soldier in the United States Army to be discharged on habeas corpus on the ground that he was a minor when enlisted, the descriptive roll made out at his enlistment, stating his age to be over 21, is important evidence of that fact. Green v. Ewell (1857), 1 N. M. 166.

Relief on proof of part of matters complained of.—A prisoner is not entitled to relief under habeas corpus that is equivalent to an acquittal, where upon writ of error he could only have secured relief from the portion of the sentence which was void. U. S. v. Pridgeon (1894), 14 Sup. Ct. 746, 751, 153 U. S. 48, 38 L. Ed. 631.

Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on habeas corpus because some of the questions might be safely answered. Foot v. Buchanan (C. C. 1902), 113 Fed. 156.

Color or judgment, and scope and extent of relief.—A writ of habeas corpus will be denied by the United States Supreme Court, if it appears on the face of the record that the decision of the Federal question complained of was so clearly right as not to permit of argument, under the rule that the writ must be denied when it is apparent that the only result of issuing it would be to remand the petitioner to custody. In re Durrant (1898), 18 Sup. Ct. 291, 293, 169 U. S. 39, 42 L. Ed. 653.

On habeas corpus, enlisted minor will be remanded to custody of military authorities for trial for offenses and service of any sentence imposed, but thereupon to be released from custody. U. S. v. Brown (D. C. 1917), 242 Fed. 983.

Courts of the United States in habeas corpus proceedings have jurisdiction and authority, under this section "to dispose of the party as law and justice require"; and they are not constrained to discharge the prisoner absolutely, even though the particular proceedings and commitment by virtue of which he is held are unwarranted and illegal, but may order his surrender to any other person or authority showing a legal right to his custody. Motherwell v. U. S. (1901), 107 Fed. 437, 48 C. C. A. 97, affirming order U. S. v. Motherwell (D. C. 1900), 103 Fed. 198; and judgment reversed, Tucker v. Alexandroff (1902), 22 S. Ct. 195, 183 U. S. 424, 46 L. Ed. 264.

A Federal court having before it, on habeas corpus, persons arrested under a State law alleged to be in conflict with the Federal Constitution, will not, on the ground of comity, remand them to the State courts. Ex parte Jervey (C. C. 1895), 66 Fed. 957, following State of Minnesota v. Barber (1889), 136 U. S. 313, 10 S. Ct. 862, 34 L. Ed. 455, and In re Van Vliet (C. C. 1890), 43 Fed. 761, 10 L. R. A. 451.

Where the prisoner is beyond the jurisdiction, and an order for his discharge on habeas corpus would be ineffectual, it should not be granted. Ex parte Benedict (D. C. 1862), Fed. Cas. No. 1,292.

Where the identity of the prisoner arrested as a deserter is established on a traverse to a return that he was a regularly enlisted soldier, he will be remanded. In re Hamilton (D. C. 1867), Fed. Cas. No. 5,976.

Correction of sentence or other proceeding.—Where a court has entered against a prisoner a sentence of imprisonment defective in form only, a Federal court, in a habeas corpus proceeding, which is required by this section to "dispose of the party as law and justice require," should not discharge such prisoner without affording the court which imposed the sentence an opportunity to correct the same. U. S. v. Carpenter (1907), 151 Fed. 214, 81 C. C. A. 194, 9 L. R. A. (N. S.), 1043, 10 Ann. Cas. 509; Bryant v. U. S. (1914), 214 Fed. 51, 130 C. C. A. 491.

Where petitioner was subject to deportation and had been legally sentenced, he would not be discharged on habeas corpus because the warrant was defective, until the Government had been afforded an opportunity to prepare a valid warrant. Ex parte Yabucanin (D. C. 1912), 199 Fed. 365.

Admission to bail.—On testimony given in court on the return of habeas corpus, bail will be allowed if it is clear that a conviction of murder should not take place. U. S. v. Marshal of the District of Columbia (Cr. Ct. D. C. 1856), Fed. Cas. No. 15,726a.

Conclusiveness and effect of decision.—The discharge of a party under a writ of habeas corpus from the process under which he is imprisoned discharges him from any further confinement under the same, but not from arrest under other process which may issue against him in the same indictment. Ex parte Milburn (1835), 34 U. S. (9 Pet.), 704, 9 L. Ed. 280.

One decision on habeas corpus is not final where a full trial was not had. Ex parte Robinson (C. C. 1855), Fed. Cas. No. 11,935.

A decision under one writ refusing the discharge of a prisoner is no bar to the issuing of other successive writs by any court or magistrate having jurisdiction. Ex parte Kaine (C. C. 1859), Fed. Cas. No. 7,597.

Where a petitioner for a writ of habeas corpus appeals to the United States Supreme Court from a judgment of the circuit court denying his application, voluntarily omitting a material portion of his case, he can not, after failing on the appeal upon the record presented, renew his application before another court or justice of the United States, upon the same record, with the addition of the matter thus omitted, without first having obtained leave for that purpose from the Supreme Court. Ex parte Cuddy (C. C. 1889), 40 Fed. 62.

405. Suspension of the privilege of the writ of habeas corpus.— * * * The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. * * * *Art. 1, sec. 9, Constitution of the United States.*

Notes of Decisions.

See, also, ante 396, and notes thereunder.

Construction and effect of clause in general.—This clause is not a grant of power to the Federal courts, but a prohibition against its suspension by Congress or the Executive. Ex parte Bollman (1807), 8 U. S. (4 Cranch) 75, 101, 2 L. Ed. 554; In re Barry (C. C. 1844), 42 Fed. 113; Ex parte Caldwell (C. C. 1905), 138 Fed. 487; reversed, Carfer v. Caldwell (1906), 26 Sup. Ct. 264, 200 U. S. 293, 50 L. Ed. 488.

The provision restricting the denial of the writ of habeas corpus, instead of being a limitation, shows that Congress has the power to deny that writ. The Legal Tender Cases (1870), 12 Wall. 457, 534, 20 L. Ed. 287.

This clause has no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. Neely v. Henkel (1901), 21 Sup. Ct. 302, 307, 180 U. S. 109, 45 L. Ed. 448.

This clause is one to which Congress can not give complete effect, except through the Federal tribunals. King v. McLean Asylum of the Massachusetts General Hospital (1894), 64 Fed. 331, 342, 12 C. C. A. 145.

Nature of writ or privilege thereof.—The writ of habeas corpus, as authorized by the Constitution, is the prerogative writ known to the common law to obtain the liberation of those who may be imprisoned without sufficient cause, and is in the nature of a writ of error to examine the legality of the commitment. Ex parte Watkins (1830), 3 Pet. 193, 201, 7 L. Ed. 650.

Suspension of writ in general.—The power to suspend refers only to the writ ad subjiciendum, when a person stands committed or detained as a prisoner for a crime within St. 31, Cas. II, c. 2, and does not include the other writs. Ex parte Bollman (1807), 8 U. S. (4 Cranch) 93, 2 L. Ed. 554 (1861) 10 Op. Atty. Gen. 74, 88; In re Cain (1864), 60 N. C. (2 Winst. 142) 525.

The suspension of the privilege of the writ of habeas corpus by the act of Mar. 3, 1863, does not suspend the writ itself, which issues as of course; and on the return made to it the court decides whether the applicant is denied the right of proceeding any further with it. Ex parte Milligan (1866), 71 U. S. (4 Wall.) 2, 131, 18 L. Ed. 281.

Where a military officer, under direction of the President, unlawfully assumed to suspend the writ of habeas corpus, a power not within the authority of the President, but exclusively belonging to Congress, and disregarded the mandate of the court on habeas corpus, the record of the proceedings and the opinion of the court were submitted to the President, in order that he, pursuant to his duty to take care that the laws may be faithfully executed, may determine what measures he would take to cause the civil process of the United States to be respected and enforced. Ex parte Merryman (C. C. 1861), Fed. Cas. No. 9,487.

The two orders issued by the War Department Aug. 8, 1862, one "to prevent the evasion of military duty, and for the suppression of disloyal practices," and the other "authorizing the arrest of persons discouraging enlistments," were issued in violation of this clause. Ex parte Field (C. C. 1862), Fed. Cas. No. 4,761.

It seems that an act suspending the writ of habeas corpus is itself a protection to officers making arrests thereunder, as against any action by the party arrested. McCall v. McDowell (C. C. 1867), Fed. Cas. No. 8,673.

Neither the President nor the Congress of the United States can suspend the issue of the writ of habeas corpus by a State court. Griffin v. Wilcox (1863), 21 Ind. 370. But see Bagnall v. Ableman (1855), 4 Wis. 163, declaring that "the State governments have, in their sovereign capacity, full authority of the writ of habeas corpus, and that the Federal Government is inhibited from suspending its privileges, except in case of rebellion or invasion. This power (to suspend the writ) was necessary to be vested in Congress, because in such case it might become essential to the preservation of the United States Government, or that of a State or States." And see In re Booth (1854), 3 Wis. 157.

A soldier illegally enlisted, and not charged with any offense against the Government, can not be held against a writ of habeas corpus, under the provisions of act Mar. 3, 1863, suspending that writ in certain cases. People v. Gaul (N. Y. 1865), 44 Barb. 98.

The language of the act of Congress suspending the writ of habeas corpus applies to the case of a person detained by the military authorities as a volunteer in the service of the United States. In re Oliver (1864), 17 Wis. 681.

Power of Congress as exclusive.—The power of suspending the writ of habeas corpus, under this clause, is a legislative power, and is vested exclusively in Congress; and the President has no power to suspend the privilege of the writ of habeas corpus. Ex parte Merryman (C. C. 1861), Fed. Cas. No. 9487; McCall v. McDowell (C. C. 1867), Fed. Cas. No. 8673; Ex parte Benedict (D. C. 1862) Fed. Cas. No. 1292; (1857) 8 Op. Atty. Gen. 365; In re Kemp (1862) 16 Wis. 359. Contra, (1861) 10 Op. Atty. Gen. 74, 89; In re Dugan (1865), 6 D. C. 131.

Congress is the exclusive judge of "when, in cases of rebellion or invasion," the public service requires suspension of habeas corpus. It may suspend it generally, or in particular cases, or may commit the matter, within proper limits, to the judgment of the President. McCall v. McDowell (C. C. 1867), Fed. Cas. No. 8,673.

The proclamation of Sept. 24, 1862, so far as it attempts to suspend the writ, is void as not authorized by Congress. Id.

See, also, Wright v. Johnson (1844), 5 Ark. (5 Pike) 687.

Establishment of peace.—Where the return to a writ of habeas corpus, issued to the officer commanding the military Department of the East, embracing New York, stated that the relator was charged with the offense of arson in the nighttime in the city of New York, in November, 1864, and also with being at that time within the Federal lines as a spy, he being at the time an officer in the Confederate Army, but disguising his rank and character in the dress of a citizen, it was held that the restoration of peace absolved all offenses committed by the public enemy during the existence of the war, that the prisoner could not therefore now be lawfully arraigned before a military tribunal for the offense of being a spy, and that, as the President's proclamation restoring the writ of habeas corpus proved the establishment of peace, the prisoner must be delivered into the custody of the civil authorities. In re Martin (N. Y. 1865), 45 Barb. 142, 31 How. Prac. 228.

Appeal or review in habeas corpus proceedings.—This provision against suspension of the writ applies to the absolute denial of the writ only, and has no reference to the delay involved in a review by a higher court of the judgment of a lower one upon the writ. Macready v. Wilcox (1866), 33 Conn. 321.

Authority of President.—A writ of habeas corpus was issued just prior to the suspension of such writ as a military necessity by the President, and the marshal was directed by the President not to execute the same. The court unanimously protested against the action of the military authorities. U. S. v. Porter (C. C. 1861), Fed. Cas. No. 16,074a.

The President had authority to issue his proclamation of Sept. 24, 1862, proclaiming martial law and the suspension of the writ of habeas corpus in the case of military arrests. Ex parte Field (C. C. 1862), Fed. Cas. No. 4,761.

An arbitrary arrest of a civilian by the commander of a department, of his own will and judgment, as necessary to preserve the peace, is not justified by the act of Mar. 3, 1863, authorizing the President to suspend the writ of habeas corpus, as specified, and the President's proclamation thereunder of Sept. 15, 1863; nor by the act of May 11, 1866. McCall v. McDowell (C. C. 1867), Fed. Cas. No. 8,673.

The proclamation of the President of Sept. 15, 1863, suspending the privi-

lege of the writ, was authorized by act Mar. 3, 1863, and suspended all proceedings pending upon writs served prior to its date. In re Dunn (D. C. 1863), Fed. Cas. No. 4,171; In re Fagan (D. C. 1863), Fed. Cas. No. 4,604.

Refusal of military officer to obey writ.—The court refused to take further action where a military officer made return to the writ that he declined to obey it at the present time under orders from his superior, which were produced in court. Ex parte McQuillon (D. C. 1861), Fed. Cas. No. 8,924.

Jurisdiction of courts.—Appellate jurisdiction by habeas corpus defined. Ex parte Bollman (1807), 8 U. S. (4 Cranch) 75, 100, 2 L. Ed. 554; In re Yerger (1868), 8 Wall. 85, 95, 19 L. Ed. 332; Ex parte Parks (1876), 93 U. S. 18, 21, 23 L. Ed. 787.

Although it is made the duty of the Secretary of War to discharge any person illegally enlisted as a soldier, that delegation of power to the Secretary of War does not deprive the courts of their power, prescribed by the Constitution, to discharge under writ of habeas corpus. U. S. *v.* Hanchett (C. C. 1883), 18 Fed. 26.

The suspension of the writ of habeas corpus under the Constitution in times of rebellion does not confer on a State court power to enjoin against an arrest. Kneedler *v.* Lane (1863), 45 Pa. (9 Wright) 238.

406. Issue of search warrants.—A search warrant authorized by this title may be issued by a judge of a United States district court, or by a judge of a State or Territorial court of record, or by a United States commissioner for the district wherein the property sought is located. *Title XI, sec. 1, act of June 15, 1917 (40 Stat. 228).*

Notes of Decisions.

Review of proceedings.—The action of a commissioner in issuing a search warrant under this title may be reviewed by the court. In re Rosenwasser Bros. (D. C. 1918), 254 Fed. 171. And if there was no probable cause for the issuance of the original search warrant, the court can set aside the entire action. Veeder *v.* U. S. (C. C. A. 1918), 252 Fed. 414; U. S. *v.* Friedberg (D. C. 1916), 233 Fed. 313.

407. Grounds for issue of a search warrant.—A search warrant may be issued under this title upon either of the following grounds:

1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

3. When the property, or any paper, is possessed, controlled, or used in violation of section twenty-two of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed. *Title XI, sec. 2, act of June 15, 1917 (40 Stat. 228).*

Sec. 22 above referred to is set forth 2856, post.

Notes of Decisions.

Return of property.—Motion for return of film of motion picture calculated to cause dissension between United States and its allies denied. U. S. *v.* Motion Picture Film, "The Spirit of '76" (D. C. 1917), 252 Fed. 946; Goldstein *v.* U. S. (C. C. A. 1919), 258 Fed. 908.

The addressee of a letter, taken from him under a search warrant issued under this section, is not entitled to return of same, where it contains material evidence against the writer, who is a codefendant. U. S. *v.* Gouled (D. C. 1918), 253 Fed. 770.

408. Probable cause requisite for issue of warrant.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *Constitution of the United States, fourth amendment.*

A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched. *Title XI, sec. 3, act of June 15, 1917 (40 Stat. 228).*

Notes of Decisions.

Construction and operation in general.—The constitutional inhibition against unreasonable searches and seizures is a limitation upon the power of the State to make such searches and seizures for its own benefit, and has no reference to the unauthorized acts of individuals. Bacon v. U. S. (1899), 97 Fed. 35, 38 C. C. A. 37.

The right to be secure in one's house is not derived from the Constitution of the United States, having existed long before at common law, and is not embraced in the phrase, "right," etc., "granted or secured by the Constitution," employed in the civil rights act of May 31, 1870 (16 Stat. 140), U. S. v. Crosby (C. C. 1871), Fed. Cas. No. 14,893.

The protection guaranteed is not against all seizures; it is against unreasonable seizures, can be made only upon probable cause, and, when authorized, the evidence of its reasonableness is to be furnished by oath or affirmation. (1843) 4 Op. Atty. Gen. 213.

The provision of the espionage act (407, note), authorizing the use of search warrants within specific limits, impliedly prohibits the use of search warrants to procure evidence of membership by aliens in organizations seeking to overthrow the Government by force or violence. Colyer v. Skeffington (D. C. 1920), 265 Fed. 17.

Limitation to Federal action.—This provision restrains the issue of warrants only under the laws of the United States and has no application to State process. Smith v. Maryland (1855), 18 How. 71, 76, 15 L. Ed. 269. [C. S. p. 14,312].

"Persons" within constitutional protection.—This amendment is not limited in its application to citizens but applies generally to all persons within the jurisdiction of the United States. Yick Wo v. Hopkins (1886), 118 U. S. 356; Colyer v. Skeffington (D. C. 1920), 265 Fed. 17.

This amendment may be invoked in behalf of aliens residing in the United States, and it protects persons, not only from the unreasonable seizure of their private papers, but from the use of such papers, when unlawfully seized, as evidence against them in cases involving a forfeiture of their property or personal rights. U. S. v. Wong Quong Wong (D. C. 1899), 94 Fed. 832.

Corporations are persons within the protection of this amendment. U. S. v. McHie (D. C. 1912), 194 Fed. 894.

This amendment being applicable to aliens as well as citizens, the President had no power in time of peace to order the arrest of an alien by the military authorities, and restrain him of his liberty indefinitely without trial, while the Government was endeavoring to secure evidence against him for alleged breach of the neutrality laws. Ex parte Orozco (D. C. 1912), 201 Fed. 106.

Right, under Const. Amend. 5, to refuse to incriminate oneself, is a personal privilege of an individual witness, and is not without the aid of this amendment extended to a corporation. U. S. v. Philadelphia & R. Ry. Co. (D. C. 1915), 225 Fed. 301.

Probable cause.—The expression "probable cause" means that there is a probability that crime has been committed by the person named in the warrant. U. S. v. Baumert (D. C. 1910), 179 Fed. 735; Ex parte Heacock (Cal. App. 1908) 97 P. 77.

The oaths in writing should state the facts from which the officer issuing the warrant may determine the existence of probable cause, or there should be a hearing by him for that purpose, and the immunity guaranteed should not be set aside by a mere general declaration of a nonjudicial officer that he has reason to believe and does believe, etc. Ripper v. U. S. (1910), 178 Fed. 24, 101 C. C. A. 152, rehearing denied (1910), 179 Fed. 497, 103 C. C. A. 478.

The probable cause referred to must be submitted to the committing magistrate, who must judge of the sufficiency of the grounds shown for believing the accused party guilty. In re Rule of Court (C. C. 1877), Fed. Cas. No. 12,126.

An affidavit to an information that affiant says that "all the statements and averments in the foregoing information are true, as he verily believes," is insufficient under this constitutional amendment, as "probable cause supported by oath or affirmation" means oaths or affidavits of those persons who, of their own knowledge, depose to the facts which constitute the offense. U. S. *v.* Tureaud (C. C. 1884), 20 Fed. 621, 622, 623.

Necessity of warrant and compliance therewith.—It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the fourth amendment; a compulsory production of a party's private books and papers, to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the amendment. Boyd *v.* U. S. (1886), 6 Sup. Ct. 524, 527, 116 U. S. 616, 29 L. Ed. 746.

A military order authorizing the arrest of persons "discouraging enlistments," without complaint or warrant, is in conflict with the fourth amendment to the United States Constitution, which provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation describing the place to be searched and the person or things to be seized. Ex parte Field (C. C. 1862), Fed. Cas. No. 4,761.

The marshal may examine all books and papers on the premises in order to select those mentioned in the warrant, but for no other purpose. Kimball *v.* Weld (D. C. 1871). Fed. Cas. No. 7,776.

Requisites of warrant.—A warrant of commitment by justices of the peace must state a good cause certain, supported by oath. Ex parte Burford (1806), 3 Cranch, 448, 453, 2 L. Ed. 495.

This amendment does not prohibit a Federal officer from arresting without a warrant, but when a warrant is issued it must be upon probable cause, and the person to be arrested must be described therein. In re Acker (C. C. 1894), 66 Fed. 290, 293.

A warrant for the seizure of smuggled goods merely describing the goods seized as "goods, wares, and merchandise" in a certain place is insufficient under this amendment requiring warrants to particularly describe the property to be seized. Sandford *v.* Nichols (1816), 13 Mass. 286, 7 Am. Dec. 151.

Requisites of information, oath, or affidavit.—An affidavit which states simply that the offense of obstructing the due administration of justice in a district court of the United States for a certain district has been committed, and that there is probable cause to believe that it was committed by a person named, but which neither sets out any act done nor avers any knowledge of the facts by affiant, is insufficient as the basis of an information. Johnston *v.* U. S. (1898), 87 Fed. 187, 30 C. C. A. 612.

The verification of an information filed by a prosecuting attorney in the United States is unnecessary, unless required by some constitutional or statutory provision. Weeks *v.* U. S. (C. C. A. 1914), 216 Fed. 292.

This amendment does not require an information filed by a district attorney of the United States to be verified or supported by an affidavit showing probable cause, unless it is made the basis of an application for a warrant of arrest. Id.

Offenses "not capital or otherwise infamous" may, by leave of court, upon complaint on oath, be prosecuted in the Federal courts by criminal information. U. S. *v.* Maxwell (C. C. 1875), Fed. Cas. No. 15,750.

Informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them. The mere belief of the affiant is insufficient. U. S. *v.* Tureaud (C. C. 1884), 20 Fed. 621.

An affidavit, to authorize an information, must conform substantially to the language of the statute alleged to be violated. It must plainly distinguish the offense. U. S. *v.* Strickland (D. C. 1885), 25 Fed. 469.

This constitutional provision does not require that the oaths or affirmations of the supporting witnesses be taken in open court or before the judge issuing the warrant or directing its issuance, but that the information is so supported where it is accompanied by the evidence of witnesses sworn before a United States commissioner on a preliminary examination, properly taken and certified, or when accompanied by the affidavits made on oath of witness sworn before any officer authorized by law to take and subscribe such oaths or affirmations. U. S. *v.* Baumert (D. C. 1910), 179 Fed. 735.

Failure to attach to an information affidavits on which it is based does not justify setting aside a conviction. U. S. *v.* American Laboratories (D. C. 1915), 222 Fed. 104.

Under this amendment it is not essential that an information, filed ex officio by a prosecuting attorney in the prosecution of a misdemeanor, should be sustained by affidavit other than his oath of office. Territory *v.* Cutinola (1887), 4 N. M. (Gild.) 160, 14 Pac. 809.

Arrest of suspicious persons.—Act July 4, 1884 (23 Stat. 723), declaring that all "suspicious persons" can be arrested and prosecuted as criminals, and on conviction be fined and imprisoned, violates this amendment; and hence the police court of the District of Columbia is without jurisdiction to try, convict, and sentence to imprisonment a person charged thereunder. Mattingly v. Frazier (1900), 16 App. D. C. 229.

Proceedings under military authority.—Military commissioners, organized in a State not invaded and not engaged in rebellion, in which the Federal courts were open and in the unobstructed exercise of their judicial functions, had no jurisdiction to try a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service, and Congress could not invest them with any such power. Ex parte Milligan (1866), 4 Wall. 2, 119, 18 L. Ed. 281.

The two orders issued by the War Department Aug. 5, 1862, one "to prevent the evasion of military duty, and for the suppression of disloyal practices," and the other "authorizing the arrest of persons discouraging enlistments," were issued in violation of this amendment. Ex parte Field (C. C. 1862), Fed. Cas. No. 4,761.

Officers seizing the valise of one whom they hope thereby to arrest while seeking to evade a draft do not violate this amendment, where such arrest was sought in compliance with a military law authorized by Constitution, art. 1, sec. 8, giving Congress power to raise and support armies. Allen v. Colby (1867), 47 N. H. 544.

Compulsory production of documents.—An order for the compulsory production of defendant's private books and papers, under act June 22, 1874, making a refusal to produce books equivalent to a confession of the allegations which it is charged that they will prove, is void, as in violation of this amendment. Boyd v. U. S. (1886), 6 Sup. Ct. 524, 116 U. S. 616, 29 L. Ed. 746, reversing judgment U. S. v. Boyd (C. C. 1885), 24 Fed. 690, 692.

Where it appears that the production of books and papers would lay a party open to criminal prosecution, or might subject such party to a penalty or forfeiture, equity will deny such application, and the Federal courts will do the same. U. S. v. National Lead Co. (C. C. 1896), 75 Fed. 94.

A party has no right, and a court no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case. Any practice which sanctions such a proceeding is an infringement of a fundamental personal right guaranteed by the Federal Constitution, and which the courts have always recognized in the exercise of power given them to compel the production of papers. Daniel v. Goodyear Shoe Machinery Co. (C. C. 1904), 128 Fed. 753.

On the taking of a deposition de bene esse in another Federal district under R. S. sec. 863, the witness may assert his legal privilege to refuse to give testimony or to produce documents called for the same as though examined in open court, and in such case he has a right to be heard before the court in such district, and to have his claim of privilege determined by such court, before being compelled to answer or produce the documents. Id.

A subpœna duces tecum, directed to an officer of a railroad corporation, requiring him to appear before a Federal grand jury and to bring with him certain records of the railroad company relating to freight claims, was not objectionable as violating this amendment, protecting the people from unreasonable searches and seizures. Santa Fe Pac. R. Co. v. Davidson (C. C. 1906), 149 Fed. 603.

Authority of court over documents irregularly seized.—A Federal court has power to impound books and papers, although the property of a third person and unlawfully or irregularly seized by officers of the Government, where they are shown to be essential evidence in a criminal case. U. S. v. McHie (D. C. 1912), 196 Fed. 586.

Examination of documents of adverse party.—Where papers were voluntarily surrendered by accused to the United States attorney in an endeavor to show innocence and he used them in obtaining an indictment, there was no unlawful search or seizure. U. S. v. Hart (D. C. 1914), 216 Fed. 374.

An order requiring a party to a suit to produce books, records, papers, and correspondence in his possession which may contain evidence relating to the matter at issue in the case is not repugnant to this amendment. Anti-Kalsomine Co. v. Adsit (1899), 79 N. W. 186, 120 Mich. 250, 6 Detroit Leg. N. 109.

The seizure of revolvers found in the house of one accused of homicide by shooting held not an unlawful search or seizure in violation of the Federal Constitution. People v. Cona (Mich. 1914), 147 N. W. 525.

Nonproduction of documents as confession. It is equivalent to a compulsory production of papers to make the nonproduction of them a confession of the allegations which it is pretended they will prove. Boyd v. U. S. (1886), 6 Sup. Ct. 524, 116 U. S. 616, 29 L. Ed. 746.

Refusal to return documents illegally seized. The immunity from unreasonable searches and seizures afforded by this

amendment has been denied the accused in a criminal prosecution in a Federal district court, where that court has refused the accused's seasonable application for the return of his letters and private documents seized in his house in his absence, by a United States marshal holding no warrant for his arrest and none for the search of his premises, and has permitted their use in evidence at the trial. Weeks v. U. S. (1914), 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652.

Defendants' papers and documents having been unlawfully seized by inspectors after defendants' arrest, defendants were entitled to have the same returned to them, though such documents might contain incriminatory evidence which the district attorney desired to submit to the grand jury and use against them. U. S. v. Mounday (D. C. 1913), 208 Fed. 186.

Who may issue subpœna.—A notary public, before whom depositions de bene esse are to be taken, under R. S. 863, has no power to issue a subpœna duces tecum to compel the production of books and papers by a witness. Dancel v. Goodyear Shoe Machinery Co. (C. C. 1904), 128 Fed. 753.

Articles taken from person or possession of one arrested.—On the arrest of a defendant by officers of the United States, a trunk check was found on his person, and on its presentation to a railroad company the officers obtained the trunk, which was searched, the papers taken therefrom, which were held by the district attorney to be used as evidence on defendant's trial on a criminal charge. Held, that defendant was not entitled to a return of such papers before the trial, and that they were not obtained as the result of an unlawful search and seizure in violation of the fourth constitutional amendment, but the rights of the defendant were not greater than if they had been taken from his person at the time of his arrest, and the district attorney had the right to hold and use the same as evidence, subject to objections made when they were offered as to their admissibility, or on the ground that their use would be compelling defendant to testify against himself, contrary to the provisions of the fifth amendment. U. S. v. Wilson (C. C. 1908), 163 Fed. 338.

Searching the person of one charged with a crime for instruments used in the commission thereof is not an unreasonable search, within the meaning of the Constitution. State v. Edwards (1902), 41 S. E. 429, 51 W. Va. 220, 59 L. R. A. 465.

Unlawful seizure as affecting admissibility of evidence.—The secret taking, without force, from the house or office of one suspected of crime of a paper belonging to him, of evidential value only, by a representative of any branch or subdivision of the Government of the United States, is a violation of the Fourth Amendment. Gouled v. U. S. (1921), 254 U. S. ——; 65 L. Ed. 311.

The law in cases of unlawful searches is now well settled. Documents illegally seized must be returned, with all copies taken while the officers retained illegal possession. Furthermore, the prosecution may not use at the trial, or in its preparation, any information obtained from their scrutiny. U. S. v. Kraus (D. C. 1921), 270 Fed. 578.

It is no objection to the admissibility of evidence which is pertinent to the issue in a criminal case that it was obtained by means of a search warrant illegally issued or executed. Adams v. New York (1904), 24 Sup. Ct. 372, 374, 192 U. S. 585, 48 L. Ed. 575; Hardesty v. U. S. (1908), 164 Fed. 420, 91 C. C. A. 1; Hartman v. U. S. (1909), 168 Fed. 30, 94 C. C. A. 124; Ripper v. U. S. (1910), 178 Fed. 24, 101 C. C. A. 152; rehearing denied (1910), 179 Fed. 497, 103 C. C. A. 478; Lum Yan v. U. S. (1912), 193 Fed. 970, 115 C. C. A. 122.

Whether evidence forcibly seized on the premises of a defendant charged with crime without a search warrant or other legal process was erroneously received in evidence against him will not be considered by the Supreme Court on writ of error to review a decision of a State court where objection to the evidence was not made in the trial court on that account. The Anarchists' Case (1887), 8 Sup. Ct. 22, 31, 123 U. S. 131, 31 L. Ed. 80.

This amendment does not make inadmissible in evidence against accused articles taken from his person by the officers making the arrest and from a satchel belonging to him; the provision having no application to the unlawful acts of individuals. Lawrence v. State (1906), 63 Atl. 96, 103 Md. 17.

Papers taken from the person of accused after his arrest by the officer making the arrest are properly received in evidence, notwithstanding this amendment. State v. Sharpless (1908), 111 S. W. 69, 212 Mo. 176.

Papers and articles seized from a defendant on a search warrant issued under 407, ante, as property used as the means of committing a felony, where no petition for its return was filed, held properly received in evidence. MacKnight v. U. S. (C. C. A. 1920), 263 Fed. 832.

Letters and packages in the mails.—Letters and sealed packages subject to letter postage in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forward-

ing them in their own domiciles. Ex parte Jackson (1877), 96 U. S. 727, 733, 24 L. Ed. 877.

The guaranty of the right to be secure in papers against searches and seizures extends to papers in the mail closed against inspection. Id.

Whilst in the mail letters and sealed packages subject to letter postage can only be opened and examined under warrant as herein prescribed. Id.

Arrest of fugitives from justice. The President can not order an arrest either by proclamation or by instructions to marshals, as such proclamation or instructions would be, in effect, a warrant to arrest, and a violation of the sixth article of the amendments of the Constitution. But he may issue his proclamation against an offender who has once been regularly arrested and has made his escape; for the regularity of the arrest implies that the probable cause has been furnished on oath or affirmation according to the requirement of the Constitution and that the warrant of arrest has been duly issued and has had its effect. (1818) 1 Op. Atty. Gen. 229.

The President may issue his proclamation against an offender who has once been regularly arrested and made his escape; for in such case the regularity of the arrest implies that the probable cause has been furnished on oath, according to the Constitution. Id.

Internment of foreign troops. Belligerent Mexicans interned pursuant to treaty when fleeing across the border are not entitled to the protection of this amendment. Ex parte Toscano (D. C. 1913), 208 Fed. 938.

The provision of ch. 2, art. 11, of the Hague Treaty of Oct. 18, 1907 (36 Stat. 2324), that a neutral power which receives in its territory troops belonging to belligerent armies shall intern them is not violative of this amendment. Id.

Return of property illegally seized. The right of a defendant in a criminal case to a return of property held by the district attorney and alleged to have been obtained as the result of an unconstitutional search and seizure, and which includes papers intended to be used as evidence on the trial in alleged violation of defendant's rights, may be determined by the court on his motion in advance of the trial. U. S. v. Wilson (C. C. 1908), 163 Fed. 338.

The district court has authority to order a return of papers in the possession of the district attorney and other officers of the court which have been obtained from a defendant by officers of the Government while acting under color of their office. U. S. v. Abrams (D. C. 1916), 230 Fed. 262.

Appeal. An order denying the petition of defendants in a criminal case for return of books and documents seized under search warrants issued pursuant to 407, ante, is an interlocutory order in a criminal case and, under sec. 128, Judicial Code, is reviewable by the Circuit Court of Appeals. Cotswise Lumber & Supply Co. v. U. S. (C. C. A. 1919), 259 Fed. 847.

409. Examination of applicant for a search warrant and witnesses. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. *Title XI, sec. 3, act of June 15, 1917 (40 Stat. 228).*

The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. *Title XI, sec. 3, act of June 15, 1917 (40 Stat. 228).*

Notes of Decisions.

Sufficiency.—Affidavits and depositions in support of the warrant must contain statements of facts and not mere conclusions or surmises. In re Tri-State Coal & Coke Co. (D. C. 1918), 253 Fed. 605; Veeder v. U. S. (C. C. A. 1918), 252 Fed. 414.

Not only the affidavit on which the search warrant was issued, but the complaint and affidavit charging the crime may be considered. In re Rosenwasser Bros. (D. C. 1918), 254 Fed. 151.

410. Contents of search warrants. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly

authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner. *Title XI, sec. 6, act of June 15, 1917 (40 Stat. 229).*

411. **Service of search warrants.**—A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution. *Title XI, sec. 7, act of June 15, 1917 (40 Stat. 229).*

412. **Breaking and entering to serve a search warrant.**—The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. *Title XI, sec. 8, act of June 15, 1917 (40 Stat. 229).*

413. **Breaking and entering to liberate detained officer.**—He may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation. *Title XI, sec. 9, act of June 15, 1917 (40 Stat. 229).*

414. **Service of a search warrant in the daytime.**—The judge or commissioner must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night. *Title XI, sec. 10, act of June 15, 1917 (40 Stat. 229).*

415. **Search warrant to be served within ten days.**—A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void. *Title XI, sec. 11, act of June 15, 1917 (40 Stat. 229).*

Notes of Decisions.

Strict construction.—A statutory power to divest an owner of his property is to be strictly construed, and where the statute prescribes the procedure such provisions are mandatory. U. S. *v.* 267 Twenty-Dollar Gold Pieces (D. C. 1919), 255 Fed. 217.

416. **Copy of the warrant and a receipt given to the possessor of property seized.**—When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property. *Title XI, sec. 12, act of June 15, 1917 (40 Stat. 229).*

417. **Return of a search warrant with inventory of property.**—The officer must forthwith return the warrant to the judge or commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory and taken before the judge or commissioner at the time, to the following effect: "I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant." *Title XI, sec. 13, act of June 15, 1917 (40 Stat. 229).*

418. Inventory for the possessor of property taken.—The judge or commissioner must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken and to the applicant for the warrant. *Title XI, sec. 14, act of June 15, 1917 (40 Stat. 229).*

419. Written testimony concerning a search warrant.—If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness. *Title XI, sec. 15, act of June 15, 1917 (40 Stat. 229).*

420. Property restored or retained.—If it appears that the property or paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law. *Title XI, sec. 16, act of June 15, 1917 (40 Stat. 229).*

421. Filing search warrant and papers.—The judge or commissioner must annex the affidavits, search warrant, return, inventory, and evidence, and if he has not power to inquire into the offense in respect to which the warrant was issued he must at once file the same, together with a copy of the record of his proceedings, with the clerk of the court having power to so inquire. *Title XI, sec. 17, act of June 15, 1917 (40 Stat. 230).*

422. Obstructing service of a search warrant.—Whoever shall knowingly and willfully obstruct, resist, or oppose any such officer or person in serving or attempting to serve or execute any such search warrant, or shall assault, beat, or wound any such officer or person, knowing him to be an officer or person so authorized, shall be fined not more than $1,000 or imprisoned not more than two years. *Title XI, sec. 18, act of June 15, 1917 (40 Stat. 230).*

423. Perjury and subornation of perjury.—Sections one hundred and twenty-five and one hundred and twenty-six of the Criminal Code of the United States shall apply to and embrace all persons making oath or affirmation or procuring the same under the provisions of this title, and such persons shall be subject to all the pains and penalties of said sections. *Title XI, sec. 19, act of June 15, 1917 (40 Stat. 230).*

The above named sections are found in 35 Stat. 1111, and define perjury and subornation of perjury, and fix the maximum punishment for each at five years' imprisonment and a fine of $2,000.

424. Maliciously procuring issue of a search warrant.—A person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than $1,000 or imprisoned not more than one year. *Title XI, sec. 20, act of June 15, 1917 (40 Stat. 230).*

425. Authority exceeded by an officer in executing a search warrant. An officer who in executing a search warrant willfully exceeds his authority, or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year. *Title XI, sec. 21, act of June 15, 1917 (40 Stat. 230).*

426. Existing laws as to search warrants not impaired. Nothing contained in this title shall be held to repeal or impair any existing provisions of law

regulating search and the issue of search warrants. *Title XI, sec. 23, act of June 15, 1917 (40 Stat. 230).*

427. Commissioners of Federal courts.—The circuit courts of the United States and the district courts of the Territories, from time to time, shall increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crimes referred to in the preceding section; and such commissioners are authorized and required to exercise all the powers and duties conferred on them herein with regard to such offenses in like manner as they are authorized by law to exercise with regard to other offenses against the laws of the United States. *R. S. 1983.*

Notes of Decisions.

Appointment of commissioners.—Appointment of commissioners is not authorized for the first time, but merely directed by this section, and hence the power to appoint process servers must extend to all commissioners. In re Upchurch (C. C. 1889), 38 Fed. 25.

428. Execution of process by commissioners.—The commissioners authorized to be appointed by the preceding section are empowered, within their respective counties, to appoint, in writing, under their hands, one or more suitable persons, from time to time, who shall execute all such warrants or other process as the commissioners may issue in the lawful performance of their duties, and the persons so appointed shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged; and such warrants shall run and be executed anywhere in the State or Territory within which they are issued. *R. S. 1984.*

The Army is not to be used, as a posse comitatus or otherwise, for the purpose of executing the laws, except as expressly authorized by the Constitution or by act of Congress, by sec. 15, act of June 18, 1878, post 2812.

Obstructing the execution of process issued under the provisions of this section and the section next following was made punishable by R. S. 5516, incorporated in sec. 141, Criminal Code.

Notes of Decisions.

Appointment of commissioners.—The power to appoint process servers, given by this section, extends to all commissioners. In re Upchurch (C. C. 1889), 38 Fed. 25.

429. Execution of process by marshals.—Every marshal and deputy marshal shall obey and execute all warrants or other process, when directed to him, issued under the provisions hereof. *R. S. 1985.*

430. Fees for making arrest, etc.—Every person appointed to execute process under section nineteen hundred and eighty-four shall be entitled to a fee of five dollars for each party he may arrest and take before the commissioner, with such other fees as may be deemed reasonable by the commissioner for any additional services necessarily performed by him, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of the commissioner; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the

arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction. *R. S. 1987.*

431. Jurisdiction of the federal courts over crimes.—The crimes and offenses defined in this chapter shall be punished as herein prescribed:

First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof.

Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of said lakes, or upon the River Saint Lawrence where the same constitutes the International boundary line.

Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building.

Fourth. On any island, rock, or key, containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.—*Sec. 272, Criminal Code, act of March 4, 1909 (35 Stat., 1142).*

The crimes here referred to are murder, manslaughter, rape, robbery, larceny, etc.

Notes of Decisions.

Jurisdiction in general.—Paragraph 1 clearly includes murder committed on any land within the exclusive jurisdiction of the United States and within any judicial district, as well as murder committed on the high seas. Jones v. U. S. (1890), 11 S. Ct. 80, 83, 137 U. S. 202, 34 L. Ed. 691.

The mere fact that the executive department of the Federal Government took possession of San Juan Island, and excluded civil officers appointed by the territorial government from exercising their functions there, did not displace the territorial jurisdiction, that by virtue of the organic act extended over it, but merely suspended the execution of the territorial laws for the time being therein. Watts v. United States (1870), 1 Wash. T. 288.

Where a State grants land to the General Government, reserving concurrent jurisdiction in executing process therein for offenses committed out of it, the Federal courts have exclusive jurisdiction of offenses committed within such territory. U. S. v. Travers (C. C. 1814), Fed. Cas. No. 16,237.

A United States court has exclusive jurisdiction of offenses committed in places in California purchased by the United States, with the consent of the State legislature, for the erection of a customhouse and other necessary public buildings, and so used. Sharon v. Hill (C. C. 1885), 24 Fed. 726.

The State courts can not take cognizance of offenses committed on territory within it belonging to the United States, over which Congress has exclusive power of legislation. Id.

The United States courts have jurisdiction to try charges of crime committed on board any vessel belonging in whole or in part to the United States, or any citizen thereof, at any point on the high seas, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State. U. S. v. Meyer (C. C. 1887), 31 Fed. 35.

Under Constitution, article 1, section 8, clause 17, giving the Congress power "to exercise exclusive legislation in all cases whatsoever over * * * all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," such power extends to land purchased by

the United States, by consent of the legislature of the State, and used for the public governmental purpose of maintaining thereon locks and dams for the improvement of the navigation of a river, and the United States has exclusive jurisdiction to prescribe and punish criminal offenses committed thereon; and the fact that the legislative consent was granted after the purchase is immaterial so far as relates to offenses committed thereafter. U. S. *v.* Tucker (D. C. 1903), 122 Fed. 518.

The exclusive jurisdiction of the United States to prescribe and punish criminal offenses committed on land or in a "place" occupied for governmental purposes may be derived either from article 1, section 8, of the Constitution, where the place was purchased by consent of the State legislature, or from an express cession of such jurisdiction by the legislature. Id.

Where both the acts of Congress and the State make a defined act an offense, the commission of the act may be an offense against each, and punishable by each. Sligh *v.* Kirkwood (Fla. 1913), 61 So. 185.

Where a State cedes to the United States exclusive jurisdiction over land purchased as a site for a public building, "for all purposes except the administration of the criminal laws of this State," the State has no jurisdiction for the punishment of crimes committed on the purchased land, but only the right to execute criminal process there for the violation of the laws of the State committed elsewhere within the State. State *v.* Mack (1897), 23 Nev. 359, 47 Pac. 763, 62 Am. St. Rep. 811.

Where an assault was committed on land purchased by the United States with the consent of the State of New Jersey, and jurisdiction of the State over such lands was vested in the United States by an act of the legislature and thereafter Congress passed an act for the punishment of such offense, it was the exercise of power conferred by Constitution, article 1, section 8, and is exclusive, and the State courts have no jurisdiction to try or punish such offense. State *v.* Morris (N. J. 1908), 68 A. 1103.

In 1869, San Juan Island, on the northwestern coast, was held in joint military occupancy by Great Britain and the United States. Held, that an offense committed there was not committed at a place within the "sole and exclusive jurisdiction" of the United States, within the crimes acts of 1790, and that the territorial court had jurisdiction. Watts *v.* U. S. (1870), 1 Wash. T. 288; Same *v.* Territory (1872), 1 Wash. T. 409.

Question of law or fact.—Whether a homicide committed within the boundaries of a State constitutes an offense against the laws of the United States, of which a Federal court has jurisdiction, depends on two questions: First, whether there has been such a cession by the State to the United States of the territory upon which the act alleged to constitute the crime was committed as to render such territory a "place or district of country under the exclusive jurisdiction of the United States," within R. S., section 5339, which is a question of law for the court; and second, if such cession was made, whether the act was committed within the territory so ceded, which is a question of fact, to be submitted to the jury. U. S. *v.* Lewis (C. C. 1901), 111 Fed. 630.

High seas and other waters within admiralty and maritime jurisdiction.—Under act 1790, chapter 9, section 8, providing for the punishment of murder, etc., committed "upon the high seas, or any river, haven, basin, or bay, out of the jurisdiction of any particular State," it is not the offense, but the bay, etc., in which it is committed, that must be out of the jurisdiction of a State. U. S. *v.* Bevans (1818), 16 U. S. (3 Wheat. 336, 4 L. Ed. 404.

R. S. section 5372, does not confer on the Federal courts jurisdiction of a murder committed in the waters of a State where the tide ebbs and flows. Id.

The United States has no jurisdiction of the crime of manslaughter, committed on board an American ship in a tidal river within a foreign state. U. S. *v.* Wiltberger (1820), 18 U. S. (5 Wheat.) 76, 5 L. Ed. 37.

Under act April 30, 1790, providing for punishment of murder or robbery on the high seas, out of the jurisdiction of any State, United States courts have jurisdiction of such offenses, though they are not committed on board a vessel belonging to citizens of the United States, where the vessel did not belong to subjects of any foreign state. U. S. *v.* Holmes (1820), 18 U. S. (5 Wheat.) 412, 5 L. Ed. 122.

It makes no difference on the question of jurisdiction whether a crime committed on the high seas is committed on board a vessel or in the water. Id.

The courts of the United States had jurisdiction of murder or robbery committed on a vessel in possession of persons acknowledging obedience to no government or flag and acting in defiance of law, and a murder or robbery committed on the high seas may be cognizable by the courts of the United States, though committed on board a vessel not belonging to citizens of the United States, as if she had no national character, but was possessed and held by pirates or persons not lawfully sailing under the flag of any foreign nation. Id.

Where a murder or robbery is committed on board a foreign vessel by a citizen of

ited States or on board a vessel of
ited States by a foreigner, or by a
or foreigner on board a piratical
the offense is cognizable by the
of the United States. Id.

offense committed on board of a
al vessel, or in the sea, as by throw-
cident overboard, or drowning him,
ting him, or in the sea, though not
overboard, is within the jurisdic-
f the United States. Id.

who, on a vessel owned by citizens
United States, committed on the
as the offense of assault with a dan-
weapon, and who was put in irons
keeping, and who, on the arrival
vessel at the lower quarantine in the
district of New York, was delivered
ers of the State of New York, and
as by them carried into the southern
t and there delivered to the marshal
United States for that district, to
a warrant to apprehend and bring
justice was first issued, was triable
southern district. U. S. v. Arwo,
19 Wall. 486, 490, 22 L. Ed. 67.

order committed on board a ship ly-
the harbor of Honolulu is cognizable
district court of the United States
Territory of Hawaii, under R. S.
5339, as committed in a haven or
f the sea within the admiralty and
me jurisdiction of the United States,
out of the jurisdiction of any par-
State." Wynne v. U. S. (1910),
Ct. 447, 449, 217 U. S. 234, 54
748

re is nothing in the Hawaiian or-
act of Apr 30, 1900 (31 Stat. 141)
expressly or impliedly deprives the
courts of their jurisdiction under
section 5339, to punish a murder
tted on board a ship lying in the
of Honolulu. Id.

waters inclosed between the shore
e Government breakwaters in Lake
t the port of Buffalo, without as well
hin the line designated on the Gov
t chart as "Buffalo harbor line,"
ute a "haven" and not "high seas,"
assault with a dangerous weapon
tted on a vessel belonging to the
States or citizens thereof anchored
waters is within the State, and not
deral, jurisdiction. Ex parte O'Hare
179 Fed. 662, 103 C. C. A. 220,
ng order (D. C. 1909), 171 Fed. 290.

give the Federal courts jurisdiction
murder, as having been committed
high seas, the death, as well as the
stroke, must have happened on the
sea. U. S. v. McGill (C. C. 1806),
Cas. No. 15,676.

gh seas," within act Apr. 30, 1790,
r 9, section 8, means any waters on
the sea coast which are without the bounda-
ries of low-water mark. U. S. v. Ross (C.
C. 1813), Fed. Cas. No. 16,196.

The part of the sea below low-water
mark, and not within the body of any coun-
try, is the "high seas" within the act of
1789, sec. 9. The Abby (C. C. 1818), Fed.
Cas. No. 14; Gedney v. L'Amistad (D. C.
1840), Fed. Cas. No. 5,294a; Johnson v.
Twenty-one Bales, etc. (C. C. 1814), Fed.
Cas. No. 7,417; The Martha Anne (D. C.
1843), Fed. Cas. No. 9,146; Thackarey v.
The Farmer of Salem (D. C. 1835), Fed.
Cas. No. 13,852; U. S. v. The Julia Law-
rence (D. C. 1871), Fed. Cas. No. 15,502.

A vessel lying on the sea outside of the
bar of a harbor of the United States within
3 miles of the shore, is on the high seas.
U. S. v. Smith (C. C. 1816), Fed. Cas. No.
16,337.

An offense committed in a bay which is
entirely landlocked and inclosed by reefs
is not committed on the high seas, within
act March 26, 1804, chapter 40. U. S. v.
Robinson (C. C. 1826), Fed. Cas. No. 16,176.

The words "high seas," in act 1825,
chapter 276, section 22, mean the unin-
closed waters of the ocean on the sea coast,
outside of the fauces terræ. U. S. v. Grush
(C. C. 1829), Fed. Cas. No. 15,268, over-
ruling U. S. v. Bevans (C. C. 1816), Fed.
Cas. No. 14,589.

Where such arm of the sea, creek, haven,
etc., is so narrow that a person standing
on one shore can reasonably discern and dis-
tinctly see by the naked eye what is doing
on the opposite shore, the waters are within
the body of a county. Id.

State courts have exclusive jurisdiction
of offenses committed on arms of the sea,
creeks, havens, basins, and bays within the
ebb and flow of the tide within the body of
a county. Id.

Act 1790, chapter 9, section 8, as well as
act 1820, chapter 113 applies to all mur-
ders and robberies committed on board of
or upon American ships on the high seas.
U. S. v. Gilbert (C. C. 1834), Fed. Cas. No.
15,204.

In the case of a homicide by shooting, the
place where the shot takes effect, and not
that from which it is fired, determines the
jurisdiction of the offense, and where a shot
from an American vessel in a foreign har-
bor kills a person on board of a foreign
vessel lying in such harbor, the jurisdiction
of the offense belongs to the foreign gov-
ernment, and not to the courts of the United
States, under act 1790, chapter 36, section
12. U. S. v. Davis (C. C. 1837), Fed. Cas.
No. 14,932.

To render a vessel American, so as to
punish offenses on board of her, it is enough
to show that she sailed from and to an
American port, and was apparently owned

and controlled by citizens of the United States. U. S. *v.* Peterson (C. C. 1846), Fed. Cas. No. 16,037.

The term "high seas" is used in the acts of Congress in its popular and natural sense. U. S. *v.* Wilson (C. C. 1856), Fed. Cas. No. 16,731.

A vessel lying in a harbor, fastened to the shore by cables, and communicating with the land by her boats, and not within any inclosed dock, or at any pier or wharf, is on the "high seas," outside of low-water mark on the coast. U. S. *v.* Seagrist (C. C. 1860), Fed. Cas. No. 16,245.

An offense commenced to be committed on board an American vessel lying at the time in a river which is an arm of the sea on the coast of Africa, and continued uninterruptedly to a point in the Atlantic Ocean several miles from our shores, is within the jurisdiction of the Federal circuit court. U. S. *v.* Gordon (C. C. 1861), Fed. Cas. No. 15,231.

The Federal courts have no jurisdiction of the crime of larceny under act 1790, section 16, committed in a place where the jurisdiction of the United States is concurrent with that of a State. U. S. *v.* Tierney (C. C. 1864), Fed. Cas. No. 16,517.

The United States courts have jurisdiction to try charges of crime committed on board any vessel belonging in whole or in part to the United States, or any citizen thereof, at any point on the high seas, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State. U. S. *v.* Beyer (C. C. 1887), 31 Fed. 35.

The words "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State," used in R. S., section 5346, are limited to the high seas, and to the waters connected immediately with them. Ex parte Byers (D. C. 1887), 32 Fed. 404.

An offense committed on board a vessel on the high seas is an offense against the sovereignty of the nation to which it belongs, but, when a private ship enters a foreign jurisdiction, it becomes, with all on board, in the absence of previous stipulations to the contrary, subject to municipal laws of such country. People *v.* Tyler (1859), 7 Mich. 161, 74 Am. Dec. 703.

Every vessel on the high seas is for jurisdiction purposes a part of the territory of the nation to which it belongs, and an offense committed on board of it is an offense against the sovereignty of that nation. Id.

Stealing of fish from pound erected by American citizens held offense punishable under laws of United States, though the pound was on the high seas. Miller *v.* U. S. (C. C. A. 1917); certiorari denied, 245 U. S. 660.

Islands.—Guano Islands act Aug. 18, 1856, section 6 (R. S. 5576), providing that all crimes committed on such islands shall be deemed to have been committed on the high seas on board a merchant ship belonging to the United States, and shall be punished according to the laws relating to offenses committed in such places, which laws are extended to such islands for that purpose, does not extend the admiralty jurisdiction over land, but simply extends the operation of the statutes relating to crimes and punishments to the islands which may have been determined by the President to appertain to the United States. Jones *v.* U. S. (1890), 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; Smith *v.* Same (1890), 137 U. S. 224, 11 Sup. Ct. 88, 34 L. Ed. 700.

The criminal jurisdiction of the courts of the United States extends to the island of Navassa, and an indictment for murder committed there may be tried in the district into which the offender is first brought, as provided by R. S., section 730, in cases of offenses committed on the high seas, or elsewhere, out of the jurisdiction of any particular State or district. Id.

Ships of war.—An offense committed on a United States naval vessel while lying in the channel of the harbor of Boston, outside of low-water mark, is committed upon the "high seas," and is within the jurisdiction of the Federal courts. U. S. *v.* Bevans (C. C. 1816), Fed. Cas. No. 14,589.

A murder committed on board a warship in Boston harbor held not cognizable in the circuit court. U. S. *v.* Bevans (1818), 3 Wheat. 336, 386, 4 L. Ed. 404.

The words "within any fort, arsenal, dockyard, magazine, or any other place" refer to objects in their nature, fixed and territorial, and do not extend to a ship of war. Id.

The proper Federal court has jurisdiction of a murder committed on board a Government naval vessel lying at a dock within a tract the jurisdiction of which has been ceded by a State to the United States for the purposes of a navy yard and a naval hospital, though the tract has not been purchased by the United States. U. S. *v.* Carter (C. C. 1897), 84 Fed. 622.

A battleship, the property of the United States, lying in waters wholly within the jurisdiction of the United States, is a "place" under the exclusive jurisdiction of the United States, within the meaning of subdivision 1 of R. S., section 5339. Id.

Congress has not, by the crimes acts of 1825 and 1835 (4 Stat. 115, 775), given to the civil courts any jurisdiction over the

crime of murder, when committed on board a United States ship of war, and triable before a court-martial under the Navy Regulations. U. S. v. Mackenzie (D. C.), Fed. Cas. No. 18,313.

Great Lakes and connecting waters.—The courts of the United States have jurisdiction, under R. S., section 5346, of an assault with a dangerous weapon committed on a vessel belonging to a citizen of the United States, in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada. U. S. v. Rodgers (1893), 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071, disapproving People v. Tyler (1859), 7 Mich. 161, 74 Am. Dec. 703.

The open waters of the Great Lakes are "high seas," within the meaning of R. S., section 5346; U. S. v. Rodgers (1893), 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071, overruling In re Miller (D. C. 1867), Fed. Cas. No. 9,558, and Ex parte Byers (D. C. 1887), 32 Fed. 404.

The limitation to the jurisdiction, by the qualification in R. S. section 5346, that the offenses punishable are committed on vessels in any arm of the sea, or in any river, haven, creek, basin, or bay, "without the jurisdiction of any particular State," does not apply to vessels on the "high seas" of the lakes, but only to vessels on the waters designated as connecting with them. So far as vessels on those seas are concerned, there is no limitation named to the authority of the United States. U. S. v. Rodgers (1893), 14 Sup. Ct. 109, 114, 150 U. S. 249, 37 L. Ed. 1071.

The fact that, by treaty between the United States and Great Britain, the boundary line between the two countries is run through the center of the Great Lakes, does not change their character as seas, or impair in any respect the jurisdiction of the United States over vessels of its own citizens navigating those waters, and persons on board. Id.

Under act September 4, 1890, extending the criminal jurisdiction of the Federal courts to offenses committed upon any vessel registered or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, "or any of the waters connecting any of the said lakes," such courts have no jurisdiction of a larceny committed upon a steam barge while lying in the Menominee River, a tributary of Lake Michigan, half a mile from its mouth. U. S. v. Rogers (D. C. 1891), 46 Fed. 1.

The United States courts have no common-law jurisdiction in criminal matters, and can only take such jurisdiction as is given them by statute; and the fact that, though the larceny was committed within the limits of a State, the stolen property was not discovered in defendant's possession until the vessel was upon Lake Michigan, will not aid their jurisdiction. Id.

Manslaughter, committed by a mortal blow given on the river St. Clair, beyond the boundary line between the United States and the Province of Canada, and within a county in said Province, from which blow death ensued upon land, is not within the crimes act Mar. 3, 1857, and the circuit court of the United States has no jurisdiction of the same. Tyler v. People (1860), 8 Mich. 320.

Military posts, forts, or reservations.—In a cession to the United States by the State of land for a military post, a reservation of "concurrent jurisdiction" to serve State civil and criminal process in the ceded place does not defeat the exclusive jurisdiction of the United States over the ceded place, and the State courts have no jurisdiction of crimes committed therein. Steele v. Halligan (D. C. 1916), 229 Fed. 1011; U. S. v. Travers (C. C. 1814), Fed. Cas. No. 16,537; Same v. Meagher (C. C. 1888), 37 Fed. 875; U. S. v. Knapp (D. C. 1849), Fed. Cas. No. 15,538; Lasher v. State (1891), 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

The circuit court had jurisdiction over the offense of murder committed within a fort purchased by the United States by the consent of the State legislature (act 1790, c. 9, secs. 3, 7), although in the cession the State reserved the right to execute its civil and criminal processes in such places. U. S. v. Cornell (C. C. 1820), Fed. Cas. No. 14,868.

Under a cession of jurisdiction in places purchased by the United States "for forts or fortifications," the Federal courts have no jurisdiction to punish a crime committed upon land purchased and used for the purposes of an arsenal only. U. S. v. Hopkins (C. C. 1839), Fed. Cas. No. 15,387a.

The acceptance by Congress of the cession by a State of exclusive jurisdiction over territory in a military reservation which existed before the State was created is not necessary to vest such jurisdiction in the United States, under Constitution, art. 1, sec. 8. Ex parte Hebard (C. C. 1877), Fed. Cas. No. 6,312.

Offenses committed upon lands purchased by the United States for the erection of forts, with the consent of the legislature of a State, and of which jurisdiction has been ceded to the United States, are within the jurisdiction of the Federal courts. Kelly v. U. S. (C. C. 1885), 27 Fed. 616.

In a cession to the United States by the State of land for a military post, a reservation of "concurrent jurisdiction" to serve State civil and criminal process in

the ceded place does not defeat the exclusive jurisdiction of the United States over the ceded place, and the State courts have no jurisdiction of crimes committed therein. U. S. v. Meagher (C. C. 1888), 37 Fed. 875.

After the cession by a State to the United States of its jurisdiction over land used as a military reservation, upon condition that such jurisdiction shall continue only so long as the United States shall own and occupy the reservation; that the State shall have the right, within the reservation, to serve civil process, and to execute criminal process against persons charged with crime committed within the State; and that roads may be opened and kept in repair within the reservation, while the municipal laws of the State governing property and property rights continue in force in the ceded territory, except so far as in conflict with the laws and regulations of the United States applying thereto, the criminal laws of the State cease to be of force therein, and laws regulating the sale of intoxicating liquors cease to be operative, both as in conflict with the regulation of the United States governing military reservations and as penal in character; hence officers acting under authority of the State have no jurisdiction over the ceded territory in matters of alleged criminal violation of State liquor laws committed in such territory. In re Ladd (C. C. 1896), 74 Fed. 31.

Within the meaning of this section the United States has exclusive jurisdiction over the entire military reservation of Fort Leavenworth. Id.

The proper Federal court has jurisdiction of a murder committed on board a Government naval vessel lying at a dock within a tract the jurisdiction of which has been ceded by a State to the United States for the purpose of a navy yard and a naval hospital, though the tract has not been purchased by the United States. U. S. v. Carter (C. C. 1897), 84 Fed. 622.

To give a Federal court jurisdiction to try a person for a criminal offense, on the ground that it was committed within a fort or military reservation, such fort or reservation must have been established by law, as contemplated by Constitution, article 1, section 8, either by purchase with the consent of the legislature of the State or by reservation of public lands therefor by compact with the State at the time of its admission, and exclusive jurisdiction over the same must have been reserved to the United States, either by express words or by necessary implication. U. S. v. Tully (C. C. 1905), 140 Fed. 899.

The "navy yard" includes contiguous waters necessary to float vessels of the Navy while at the navy yard. Ex parte Tatem (D. C. 1877), Fed. Cas. No. 13,759.

Under Constitution, article 1, section 8, clause 17, giving the Congress power "to exercise exclusive legislation in all cases whatsoever over * * * all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings," such power extends to land purchased by the United States, by consent of the legislature of the State, and used for the public governmental purpose of maintaining thereon locks and dams for the improvement of the navigation of a river, and the United States has exclusive jurisdiction to prescribe and punish criminal offenses committed thereon; and the fact that the legislative consent was granted after the purchase is immaterial so far as relates to offenses committed thereafter. U. S. v. Tucker (D. C. 1903), 122 Fed. 518.

The exclusive jurisdiction of the United States to prescribe and punish criminal offenses committed on land or in a "place" occupied for governmental purposes may be derived either from article 1, section 8, of the Constitution, where the place was purchased by consent of the State legislature, or from an express cession of such jurisdiction by the legislature. Id.

Constitution, article 2, section 8, clause 17, declaring that Congress may exercise exclusive legislation over all territory purchased by the Government with consent of the State in which the same may be for the erection of forts and other needful buildings, does not preclude the exercise of jurisdiction by the State of Kansas over criminal offenses committed on the military reservation at Fort Leavenworth, for the reason that such reservation was not purchased with the consent of the State or for the erection of forts and other buildings, but was purchased before the formation of the State as a part of the territory of Louisiana, and for the further reason that no attempt was made by Congress in the act admitting the State to the Union to reserve control by exacting guaranties or otherwise against exercising jurisdiction. Clay v. State (1866), 4 Kans. 49.

Where a mortal wound is unlawfully inflicted in a fort of the United States, and the victim dies out of the fort, the State courts have no jurisdiction, although the State statute should profess to give jurisdiction. State v. Kelly (1884), 76 Me. 331, 49 Am. Rep. 620.

Where the United States holds land by purchase, with the consent of the State, as a military post, the Federal courts have exclusive jurisdiction of offenses committed thereon, including any part of the grant outside of the garrison wall and fence, though

it is used as a street. Baker v. State (1904), 83 S. W. 1122, 47 Tex. Cr. R. 482.

Federal cemeteries.—Const., art. 1, sec. 8, cl. 17, giving Congress the exclusive right of legislation over any places purchased by the United States, with the consent of the state in which the same are situated, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, confers no jurisdiction upon the Federal courts to try a person for a petty larceny committed in the national cemetery on the Arlington estate, which was purchased by the United States at a tax sale, without the consent of the State of Virginia. U. S. v. Penn (1890), 48 Fed. 669.

During the temporary occupation of the adjacent ground used by the United States forces while preparing the United States cemetery, the jurisdiction was exclusive in the United States, and excluded the jurisdiction of the State to punish a misdemeanor committed therein during that time. Harris v. State (1871), 50 Tenn. (3 Heisk.) 140, note.

Jurisdiction of the United States over the United States cemeteries, under the terms of 1867, c. 44, does not exclude the right of the State to punish offenses committed therein. Id.

Soldiers' home. Upon lands ceded by a State to the United States, for a home for disabled volunteers, the criminal laws of the United States, which apply only to places within their exclusive jurisdiction, are not operative. In re Kelly (C. C. 1895), 71 Fed. 545.

Post offices or land bought therefor.—A murder committed on land bought for a post office and courthouse is an offense against the United States, justiciable in the Federal courts. Battle v. U. S. (1909), 28 Sup. Ct. 42, 209 U. S. 36, 52 L. Ed. 670, affirming judgment U. S. v. Battle (C. C. 1907), 154 Fed. 540.

Where on a trial for an offense committed in a building used as a post office, it was shown that the post office was rented by the government, the questions of the right of the State to try offenses committed in places ceded to the United States, or of the force of Code Alabama, 1896, sec. 625, authorizing the ceding of jurisdiction to the United States, were immaterial. Brooke v. State (Ala., 1908), 46 So. 491.

A New York State court has no jurisdiction to prosecute a person for larceny committed in the United States post office building in the city of New York. People v. Marra (1886), 4 N. Y. Cr. R. 304.

Indian reservations or country.—An Indian reservation is part of the Indian country. Ex parte Wilson (1891), 11 Sup. Ct. 870, 871, 140 U. S. 575, 35 L. Ed. 513.

The provision of the enabling act of Montana that all Indian lands within the State "shall remain under the absolute jurisdiction and control of the Congress of the United States" does not amount to a reservation by the United States of jurisdiction over crimes committed on such lands by or against persons not Indians. Draper v. U. S. (1896), 17 Sup. Ct. 107, 109, 164 U. S. 240, 41 L. Ed. 419.

The killing of an Indian by one not of Indian blood on an Indian reservation within the limits of a State is cognizable in the Federal courts under R. S., section 2145, and section 5339 (embodied herein). Donnelly v. U. S. (1913), 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied (1913) 33 Sup. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035.

District of Columbia.—R. S., sec. 5339 (act Apr. 30, 1790, sec. 3), providing that every person who commits murder within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, shall suffer death, applies to murder committed within the District of Columbia, though it was acquired since the passage of the act. U. S. v. Guiteau (D. C. 1882), 1 Mackey, 498, 47 Am. Rep. 247.

All crimes and criminal procedure known to the common law are still in force in the District of Columbia, except as otherwise provided by statute. Hill v. U. S. (1903), 22 App. D. C. 395.

There can be no crimes against the District of Columbia, the District not being a sovereignty; but crimes committed in the District of Columbia are crimes against the United States. U. S. v. Cella (1911), 37 App. D. C. 133, writ of certiorari denied Cella v. U. S. (1912), 32 Sup. Ct. 526.

432 Laws of States adopted for punishing wrongful acts, etc. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in

force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District.—*Sec. 289, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1145).*

For sec. 272 above referred to see 431, ante.

Notes of Decisions.

Constitutionality.—The claim that power of legislation is unconstitutionally delegated to the State legislatures by act July 7, 1898, section 2, adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the State in which such places are situated "now provide" for a like offense, the punishment therefor not being otherwise provided for by any law of the United States, is too clearly unfounded to serve as the basis of a writ of error from a Federal supreme court to a circuit court. Franklin *v.* U. S. (1909), 30 Sup. Ct. 434, 435, 216 U. S. 559, 54 L. Ed. 615.

Congress may lawfully declare that the criminal law of a State as it exists at the time shall be the law of the United States in force in particular portions of the territory of the United States, subject to the latter's exclusive jurisdiction. Washington P. & C. Ry. Co. *v.* Magruder (D. C. 1912), 198 Fed. 218.

Design of statute in general.—Congress, with the design that the places under the exclusive jurisdiction of the United States shall not be freed from the restraints of the law, has enacted for them a criminal code ending with this section. Western Union Tel. Co. *v.* Chiles (1909), 29 Sup. Ct. 613, 614, 214 U. S. 274, 53 L. Ed. 994.

Statute as incorporating into Federal law State statute of limitations.—Act July 7, 1898, chapter 576, section 2, providing that when any offense is committed in any place, jurisdiction over which has been retained by, or ceded to, the United States the punishment for which is not provided for by any law of the United States, the offender shall receive the same punishment as the laws of the State provide for the like offense, does not incorporate into the Federal law the general statute of limitations of the State relating to crimes, but a prosecution thereunder is governed as to limitation by the Federal statute. U. S. *v.* Andem (D. C. 1908), 158 Fed. 996.

Statute as limited to fixing of punishment for offenses under Federal laws.—R. S., section 5391 (embodied herein), and act of July 7, 1898 (30 Stat. 717), the former of which provide that in case of any offense committed in any place ceded to and under the jurisdiction of the United States, "which offense is not prohibited or the punishment thereof is not specially provided for by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the State in which such place is situated now in force provide for the like offense," and the latter of which contains similar provisions respecting offenses committed in any place jurisdiction over which has been retained by the United States or ceded to it, etc., "the punishment for which offense is not provided for by any law of the United States," are neither of them limited to the fixing of punishment for offenses expressly created by the Federal laws, but they apply to and make punishable any act committed in such places not so provided for, but which is an offense under the laws of the State. U. S. *v.* Franklin (C. C. 1909), 174 Fed. 163.

Application to offenses under State laws in general.—This section is limited to offenses committed in places ceded to the United States and adopts the State law as to such offenses if not otherwise provided for, and in such cases, if the offense is a felony by State law, it becomes a felony by this section. U. S. *v.* Coppersmith (C. C. 1880), 4 Fed. 198, 204.

An act not specifically made an offense by the statute of the United States, but which is an offense under the laws of the State wherein performed, is made, by R. S. section 5391 (embodied herein), an offense under the laws of the United States, and punishable by the same penalties which are inflicted under the laws of the State. Sharon *v.* Hill (C. C. 1885), 24 Fed. 726, 731.

State statutes to which law applies.—In U. S. *v.* Paul (1832), 6 Pet. 141, 8 L. Ed. 348, this provision was held to be limited to the laws of the several States in force at the time of its enactment. Hollister *v.* U. S. (1906), 145 Fed. 773, 76 C. C. A. 337; Steele *v.* Halligan (D. C. 1916), 229 Fed. 1011.

R. S. section 5391 (embodied herein), providing that when an offense not provided for by the laws of the United States

is committed in a place ceded to the Government, the same shall be subject to the same penalties provided for the like offense by the laws "now in force" of the State in which such place is situated, applied only to State statutes existing at the time of its passage, in 1825. U. S. v. Barnaby (C. C. 1892), 51 Fed. 20, following U. S. v. Paul (1832), 6 Pet. 141, 142, 8 L. Ed. 348.

R. S., section 5391 (embodied herein), making criminal offenses committed in any place under the jurisdiction of the United States, not prohibited or provided for by any law of the United States, subject to punishment in accordance with the laws of the State in which such place is situated, "now in force," is not referable, for the purpose of ascertaining the State laws applicable, to the date when it was first enacted, in 1825, but to the date of the adoption of the Revised Statutes, in 1878, by sections 5595 and 5596, post, 2979, 2980, of which the prior act was superseded and repealed. In no event could such section relate back to an earlier date than April 5, 1866, when the old act was substantially reenacted. U. S. v. Tucker (D. C. 1903), 122 Fed. 518.

Common-law crimes.—The common law of crimes is in force in the State, except where affected by statute, and common-law procedure is in force unless special provision is made by statute to exclude the same. Territory v. Montoya (N. M. 1912), 125 P. 622.

State crime committed in post-office building.—Sec. 2, act of July 7, 1898 (30 Stat. 717), provides that, when any offense is committed in any place jurisdiction over which has been retained by or ceded to the United States the punishment for which is not provided for by any law of the United States, the offender shall receive the same punishment as the laws of the State provide for a like offense. Held, that under such statute a Federal court has jurisdiction to prosecute and punish for a crime denounced by the State law committed in a post-office building owned and occupied by the United States within a State over which legislative jurisdiction has been ceded by the State. U. S. v. Andem (D. C. 1908), 158 Fed. 996.

Criminal libel.—The circulation in the Government reservation at West Point and in the post-office building in New York City of copies of a newspaper containing a criminal libel printed and primarily published in such city can not be punished in the Federal courts under sec. 2, act of July 7, 1898, providing that offenses committed in places under the exclusive jurisdiction and control of the United States, when not expressly made criminal by any law of the United States, shall be punished in accordance with the laws of the State in which such places are situated, since the State laws afford adequate punishment for the offense, without resorting to the Federal courts, and the plain purpose is that there shall be but a single prosecution and conviction for a criminal libel. U. S. v. Press Pub. Co. (1911), 31 Sup. Ct. 212, 219 U. S. 1, 55 L. Ed. 65, 21 Ann. Cas. 942.

Offenses by Indians.—R. S., sec. 5391 (embodied herein), providing that, when an offense not provided for by the laws of the United States is committed in a place ceded to the Government, the same shall be subject to the same penalties provided for the like offense by the laws "now in force" of the State in which such place is situated, does not apply to an offense committed by one Indian against another on the Flathead Reservation, because Indians living in the tribal relation are not subject, in their internal social relations, either to the laws of the States or of the United States. U. S. v. Barnaby (C. C. 1892), 51 Fed. 20.

Assault to kill in navy yard.—The circuit court for the eastern district of New York had jurisdiction of an indictment for an assault with intent to kill committed in the navy yard at Brooklyn. Act March 3, 1825. U. S. v. Dolan (C. C. 1865), Fed. Cas. No. 14,978.

False pretenses.—Under sec. 1, this act, July 7, 1898 (30 Stat. 717), which is in substance a reenactment of R. S. 5391 (embodied herein), any act committed in any place under the jurisdiction of the United States, if made an offense by the laws of the State in which such place is situated, when committed elsewhere in the State is an offense against the United States and punishable as in the State law provided, since at the date of the passage of this act the act of obtaining money or goods by false pretenses was made a crime by most of the laws of the States of the Union and is therefore under this act also made a crime against the United States in all places over which the United States exercises exclusive legislative jurisdiction, within the several States having laws providing for the punishment of such an act as a crime. Biddle v. U. S. (1907), 156 Fed. 759, 763, 84 C. C. A. 415.

Larceny.—A larceny committed in a place not under the sole and exclusive jurisdiction of the United States may be punishable under act 1825, chapter 65, sec. 3. U. S. v. Davis (C. C. 1829), Fed. Cas. No. 14,930.

Indictment.—In an indictment under sec. 2, act of Apr. 5, 1866, chapter 24, it is not necessary to aver that the offense is not punishable by any law of Congress, and is punishable by the State laws, and a con-

clusion "against the form of the statute" is correct. U. S. *v.* Wright (D. C. 1871), Fed. Cas. No. 16,774.

Under R. S., section 5391 (embodied herein), and the Kentucky statutes, in force in 1866, 1873, and 1878, defining the offense of cutting, stabbing, etc., an indictment for the offense of cutting and stabbing with intent to kill, committed at a place within the exclusive jurisdiction of the United States, situated within the State of Kentucky, which avers that the accused did willfully and unlawfully, in sudden heat and passion, and not in self-defense, cut, stab, and wound a certain person, without killing him, is sufficient. U. S. *v.* Tucker (D. C. 1903), 122 Fed. 518.

Punishment.—Punishment in the Federal courts as an offense against the United States, but only in the way and to the extent that such offense would have been punishable if the territory embraced by the Government reservation where the crime was committed had remained subject to the jurisdiction of the State, is what was intended by sec. 2, act of July 7, 1898 (30 Stat. 717), adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the State in which such places are situated now provide for a like offense, the punishment therefor not being otherwise provided for by any law of the United States. U. S. *v.* Press Pub. Co. (1911), 31 Sup. Ct. 212, 219 U. S. 1, 55 L. Ed. 65, 21 Ann. Cas. 942.

An act of Congress adopting the punishment fixed by a State law held valid. Hollister *v.* U. S. (1906), 145 Fed. 773, 76 C. C. A. 337.

433. Jurisdiction over offenses committed on the high seas.—The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought. *Sec. 41, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1100).*

Notes of Decisions.

"Offenses" within the statute.—"Offenses" means offenses against the United States. (1893) 20 Op. Atty. Gen. 590. Death as well as the mortal stroke must happen on the high seas in order to constitute murder there. When the death happens on shore the offense is not cognizable under the statute. U. S. *v.* McGill (C. C. 1806), Fed. Cas. No. 15,676, 4 Dall. 426, 429, 1 L. Ed. 894.

"High seas" defined.—See notes to 431, ante.

"Out of the jurisdiction of any particular State or district" within the statute.—The words "out of the jurisdiction of any particular State" mean out of the jurisdiction of any particular State of the United States. U. S. *v.* Furlong (1820), 5 Wheat. 184, 200, 204, 5 L. Ed. 64. If the officers of a foreign vessel, sailing from a United States port, which, after passing the three-mile limit, took aboard men and arms for an expedition in violation of the neutrality law, had prepared for sailing, and had taken aboard extra boats while in port, with knowledge of the proposed expedition, they were guilty of the crime in the district from which they sailed. Wiborg *v.* U. S. (1896), 16 S. Ct. 1127, 163 U. S. 632, 41 L. Ed. 289, modifying judgment U. S. *v.* Wiborg (D. C. 1896), 73 Fed. 159. A homicide committed on board of the hospital ship *Relief* while stationed at Olongapo, P. I., by the acting master of the vessel, who committed this act by order of the commanding officer of the ship, occurred "out of the jurisdiction of any particular State or district," and the parties accused may be tried in any judicial district either in a State or a Territory of the United States into which they shall be first brought. (1909) 28 Op. Atty. Gen. 24.

A vessel was en route to Alaska, and the prisoner was delivered to the United States marshal at Cordova, Alaska, the first American port touched after the affray. On motion of the United States district attorney for a warrant to remove the prisoner to the western district of Washington for trial, held, under this section, the defendant is triable in the district court of Alaska. U. S. *v.* Murphy (1910), 4 Alaska, 275.

This section does not exclude the jurisdiction of the consular tribunal in Japan given by treaty to try offenses committed in that country, where the offense was committed on an American vessel in the waters of such country. In re Ross (1891), 11 Sup. Ct. 897, 140 U. S. 453, 35 L. Ed. 581; affirmed, In re Ross (C. C. 1890), 44 Fed. 185.

"District" within the statute.—A district is a judicial district defined by act of Congress pursuant to the constitutional requirements that criminal prosecutions shall be in the State and district in which the offense shall have been committed, which district shall have been previously ascertained by law, but when the offense was

not committed within any State the trial shall be at such place or places as the Congress shall have directed. U. S. v. Newth (D. C. 1906), 149 Fed. 302. The word "district" includes every territory within which there are courts regularly organized and having jurisdiction over offenses against the United States. (1909) 28 Op. Atty. Gen. 24. And see In re Bollman (1807), 4 Cranch, 75, 135, 2 L. Ed. 554, holding that the act of 1790 not containing the words "or district" did not apply to offenses committed outside of a State but within territories having regularly established courts competent to try those offenses. And see Homicide Committed on Hospital Ship (1909), 28 Op. Atty. Gen. 24, holding that it was probably as a result of such decision that the words "or district" were added.

"Found" or "brought," within the statute.—To be "brought" into a district, within this section, one must be first apprehended, and it is not enough that he merely "arrive" in the district. Thus, where an offense was committed on the high seas, and the offender was not taken into custody until he was found and apprehended in one of the districts of California, he must be tried in that district, although the vessel on which the offense was committed had previously touched at Hawaii, and a complaint was filed and a warrant of arrest - which was returned unexecuted because of the offender's departure from the district of Hawaii before its attempted service - was issued there. Ferre Shaw (1905), 136 Fed. 61, 69 C. C. A. 69.

An offender is "found" within this section, where, having committed an offense on the high seas, he is apprehended after coming into port, while the word "brought" means taken into custody on the ship and carried into port. U. S. v. Townsend (D. C. 1915), 219 Fed. 761.

Jurisdiction of courts.—To give the court jurisdiction the offense must have been committed out of the jurisdiction of any particular State or district. U. S. v. Newth & Meadows Dye Co. (D. C. 1909), 173 Fed. 426. It must appear that accused was first apprehended in the district and that the offense was committed without the jurisdiction of any State and not within any other district of the United States. U. S. v. Johnson (1861), 1 Bond, 184, 186, 17 L. Ed. 225, U. S. v. Bird (D. C. 1855), Fed. Cas. No. 14,567.

Where a statute does not further state where it is to be tried, the United States has the right to constitute courts to try persons charged with the infraction of the statute. U. S. v. Burke (D. C. 1911), 218 Fed. 82.

A captain of a ship who assaulted a member of his crew on the high seas, and brought the ship to her port in the borough of Brooklyn, eastern district of New York, was not subject to prosecution in the southern district of New York, under Judicial Code, sec. 41. U. S. v. Townsend (D. C. 1915), 219 Fed. 761.

District court having jurisdiction.—This section gives the rule by which to locate the jurisdiction in criminal cases where the offenses are committed outside of any district. U. S. v. Wan Lee (D. C. 1890), 44 Fed. 707. An offense committed without the limits of the United States, on the high seas, must be tried in the district where the offender is apprehended, or into which he may be first brought in legal custody. Charge to Grand Jury, Treason and Piracy (C. C. 1861), Fed. Cas. No. 18,277; U. S. v. Bird (D. C. 1855), Id. 14,597; Charge to Grand Jury, Treason (D. C. 1863), Id. 18,274. Jurisdiction to try the offense attaches either to the district into which the offender is first brought or that in which he is apprehended. U. S. v. Thompson (C. C. 1832), Fed. Cas. No. 16,492. One who, on a vessel owned by citizens of the United States, committed on the high seas the offense of assault with a dangerous weapon, and who was put in irons for safe-keeping, and who, on the arrival of the vessel at the lower quarantine in the eastern district of New York, was delivered to officers of the State of New York, and who was by them carried into the southern district and there delivered to the marshal of the United States for that district, to whom a warrant to apprehend and bring him to justice was next issued, was triable in the southern district. U. S. v. Arwo (1870), 19 Wall. 486, 499, 22 L. Ed. 67. An indictment for murder committed on a guano island may be tried in the district into which the offender is first brought as provided by this section. Jones v. U. S. (1890), 11 Sup. Ct. 80, ss. 137 U. S. 202, 34 L. Ed. 691.

Under this section an offender is to be tried in the district where he is apprehended, unless he is taken into custody, where at once in which case he is to be tried in the district into which he is first brought. But to be "found" in a district, within the meaning of the statute, one must be first apprehended, and it is not enough that he merely "arrive" in the district. Thus, where an offense was committed on the high seas, and the offender was not taken into custody until he was found and apprehended in one of the districts of California, he must be tried in that district, although the vessel on which the offense was committed had previously touched at Hawaii and a complaint was filed and a warrant of arrest - which was returned unexecuted because of

the offender's departure from the district of Hawaii before its attempted service—was issued there. Kerr *v.* Shine (1905), 136 Fed. 61, 69 C. C. A. 69. A district court of the United States is not deprived of jurisdiction to try a defendant, arrested within the district, charged with the commission of an offense on board an American vessel on the high seas, under this section because such defendant was first arrested in Alaska, the courts of which are not vested with jurisdiction to try offenses not committed within their territorial jurisdiction. U. S. *v.* Newth (D. C. 1906), 149 Fed. 302. The District Court of the Eastern District of Wisconsin has no jurisdiction of an indictment for an assault committed on a vessel on Lake Huron within the boundary of the Eastern District of Michigan. U. S. *v.* Peterson (D. C. 1894), 64 Fed. 145.

The district court for the district of Oregon has jurisdiction to try a person charged with the commission of a crime in Alaska, where such person is found in the district of Oregon, or first brought there. U. S. *v.* Carr (D. C. 1875), Fed. Cas. No. 14730. The jurisdiction of the district court for the district of Oregon over offenses committed in Alaska does not extend to the crime of distilling spirits therein without paying a tax therefor. Act July 27, 1868, sec. 7. U. S. *v.* Seveloff (D. C. 1872), Fed. Cas. No. 16252. The District Court of the Eastern District of Wisconsin has no jurisdiction of an indictment for an assault committed on a vessel on Lake Huron within the boundary of the jurisdiction of the eastern district of Michigan. U. S. *v.* Peterson (D. C. 1894), 64 Fed. 145.

The high seas are within the jurisdiction of the district and circuit courts of the United States; and if American citizens violate the neutrality laws thereon, such courts will take notice of the offense in any district where the offenders may be found. (1793) 1 Op. Atty. Gen. 58.

Piracy committed on the high seas, or out of the jurisdiction of a particular State, should be prosecuted in the district where the offender is apprehended or first brought. (1815) 1 Op. Atty. Gen. 185. Americans who have participated in the slave trade in foreign ports are indictable in any district of the United States in which they may be found. (1851) 5 Op. Atty. Gen. 454. And see U. S. *v.* Baker (C. C. 1861), Fed. Cas. No. 14501, holding that a person captured on the high seas by a public armed vessel of the United States for an offense committed on the high seas, and transferred at Hampton Roads to another vessel, destined to New York, may be tried in either district, under act Mar. 3, 1825, sec. 14.

Upon the preliminary examination of defendant for aiding a military expedition in violation of Rev. St. sec. 5286, where there was evidence that the steamship of which defendant was captain, left New York and passed outside Sandy Hook, stopped 2 or 3 miles from shore; that two tugs approached, and put on board 35 men, with several boxes and three boats; that the boxes were opened, and guns and other arms taken out; that during the voyage the men so taken on board were constantly drilled; that said men spoke Spanish, and some of them said they were going to Cuba to fight; that the steamer approached the coast of Cuba at night, with her lights extinguished; that the men disembarked there, taking their arms with them, and using their own three boats and one lent by the steamer; and that, after their landing, the steamer proceeded on her voyage to Jamaica. Held, that all the acts constituting such offense were committed on the high seas—the taking on of provisions at New York, in addition to those required for the crew, not constituting an overt act in furtherance of the enterprise, or evidence of intention to commit such an act—and that defendant must be tried in the district where he was arrested, and could not be removed thence to the southern district of New York. U. S. *v.* Hughes (D. C. 1895), 70 Fed. 972.

Finding of jurisdictional facts.—Where the crew of an American vessel sailing on a whaling voyage were convicted of endeavoring to mutiny and revolt, and no objection was made at the trial, that no proof had been adduced in support of the averment in the indictment that the southern district of New York was the district court in which the prisoners were first brought and apprehended. Held, that although such objection might have availed on the trial, it was too late on a motion in arrest. U. S. *v.* Crawford (C. C. 1843), Fed. Cas. No. 14890.

That a criminal committed the offense in a ship on a voyage to a port in a particular judicial district, and that the prisoner is in custody in such port, will warrant the jury, in the absence of proof to the contrary, in finding that he was first brought into that district. U. S. *v.* Mingo (C. C. 1854), Fed. Cas. No. 15781.

434. Seizures on the high seas.—Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be

prosecuted in the district where the seizure is made, except in cases where it is otherwise provided. *Sec. 45, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1100).*

Notes of Decisions.

"High seas" defined.—See notes to 431, ante.

Lawful seizure essential to jurisdiction.—Lawful seizure is essential to sustain jurisdiction. U. S. v. Larkin (1908), 28 Sup. Ct. 417, 419, 208 U. S. 333, 52 L. Ed. 517.

Jurisdiction on restoration of property.—Where a seizure is voluntarily abandoned, and the property is restored before the libel or information is filed and allowed, the district court has no jurisdiction of the case. The Ann (1815), 9 Cranch, 289, 290, 3 L. Ed. 734.

District in which proceedings may be brought.—The trial of seizures under act Jan. 18, 1793, is to be in the judicial district in which the seizure was made without regard to the district where the forfeiture accrued. Keene v. U. S. (1809), 5 Cranch, 304, 3 L. Ed. 108.

The provision, as originally enacted in sec. 9 of the judiciary act of 1789, marks out the general jurisdiction of the district courts and of the several district courts in relation to each other in cases of seizures in waters of the United States, and, if made within the waters of one district, the jurisdiction attaches to the court of that district, but where the seizure is made on the high seas the jurisdiction is conferred on no particular district court, and it may be exercised by the court of any district into which the property is carried and there proceeded against. The Merino (1824), 9 Wheat. 391, 401, 6 L. Ed. 118.

Jurisdiction of a seizure on the high seas belongs to the court of the district into which the property is brought. The Abby (1818), Fed. Cas. No. 14; The Peterhoff (1863), Fed. Cas. No. 11,024, citing The Merino, 22 U. S. (9 Wheat.), 391.

A vessel lying, when seized, a half mile from shore off Collodon Point, Long Island, in Block Island Sound, is on the high seas and the court into whose district she is first carried has jurisdiction. The fact that persons were temporarily on shore at the time does not affect the jurisdiction. Godey v. L'Amistad (D. C. 1840), Fed. Cas. No. 5,504a.

Where an American vessel is seized within the territorial jurisdiction of a foreign power the law does not connect that seizure with a subsequent seizure by the same authority under the process of the federal court, so as to annul the proceedings of that court against the vessel. The Richmond v. U. S. (1815), 9 Cranch, 102, 104, 3 L. Ed. 670.

A libel in rem in the case of seizure and forfeiture of a vessel for violating the laws relating to the slave trade may be prosecuted in any district of the United States where the property is found. The Slavers (1864), 2 Wall. 383, 401, 17 L. Ed. 911; The Washington (D. C. 1855), Fed. Cas. No. 17,222.

The place of seizure, and not the place of committing the offense, gives the court jurisdiction in cases of forfeiture in rem. The Octavia (C. C. 1813), Fed. Cas. No. 10,422; U. S. v. Three Hundred and Ninety-six Barrels of Distilled Spirits (D. C. 1866), Fed. Cas. No. 16,502.

In a case of seizure, the place of seizure, and not that of the commission of the act on account of which the seizure is made, determines the jurisdiction; and the clause in sec. 4,499 of the Revised Statutes, that vessels offending in certain ways "may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense," does not change this rule; the court in whose district a seizure is made acquiring thereby jurisdiction of the subject matter or cause of suit. The Idaho (D. C. 1886), 29 Fed. 187.

The district court has no jurisdiction in cases of libel for seizures made in another district from that where the proceedings are instituted. The Little Ann (C. C. 1810), Fed. Cas. No. 8,397.

District Court of Alaska.—Under R. S. sec. 563, and this section, defining the admiralty jurisdiction of the district courts, and act May 17, 1884, establishing the District of Alaska, the District Court of Alaska has jurisdiction to declare a forfeiture of vessels guilty of taking fur seal in violation of R. S. sec. 1956, in any of the navigable waters acquired from Russia by the treaty of Mar. 30, 1867, over which the United States may lawfully exercise dominion. Ex parte Cooper (1892), 12 Sup. Ct. 453, 459, 143 U. S. 472, 36 L. Ed. 232.

Intervention by State authority.—United States courts have exclusive jurisdiction of all seizures under laws of the United States, and any intervention of a State authority is unlawful which might obstruct the exercise of this jurisdiction

by taking the thing seized out of the hands of the United States officer. Slocum *v.* Mayberry (1817), 2 Wheat. 1, 9, 4 L. Ed. 169.

Property subject to statute.—Act Aug. 6, 1861, extended to all property. Union Ins. Co. *v.* U. S. (1867), 6 Wall. 759, 763, 18 L. Ed. 879. A vessel begun to be fitted and equipped for a slave voyage in a port of the United States, then going to a foreign port, to evasively complete the fitting and equipping, and so completing it, and from such port continuing the voyage, is liable to seizure and condemnation when driven in its subsequent course into a port of the United States. The Slavers (1864), 2 Wall. 383, 395, 17 L. Ed. 911.

Procedure.—Though the proceedings may be shaped in general conformity to the practice in admiralty, they do not necessarily constitute a "cause in admiralty." Proceedings as to trial by jury and exceptions to evidence held required to conform to the course of proceedings by information on the common-law side of the court. Union Ins. Co. *v.* U. S. (1867), 6 Wall. 759, 766, 18 L. Ed. 879.

Trial by jury.—Issues of fact, on demand of either party, held triable by jury. Union Ins. Co. *v.* U. S. (1867), 6 Wall. 759, 764, 18 L. Ed. 879.

Appeal.—Where a proceeding to enforce forfeiture was carried on in a circuit court by libel monition, claim interposed, and testimony taken in conformity with admiralty practice, and without a jury anywhere, jurisdiction was taken by the Supreme Court on appeal only to reverse the decree as irregular and direct a new trial. Union Ins. Co. *v.* U. S. (1867), 6 Wall. 759, 765, 18 L. Ed. 879.

435. Condemnation of property captured on high seas, etc.—Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the Government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted. *Sec. 46, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1100).*

436. Jurisdiction over vessels entering closed port or coming from locality in insurrection.—Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such State or section, or of any vessels belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district. *Sec. 47, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1100).*

437. False claims against the United States, conspiracy, etc.—Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly

and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * * *Sec. 35, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1095), as amended by the act of Oct. 23, 1918 (40 Stat. 1015–1016).*

The amendment omits none of the provisions of the former statute, but makes additional provisions, especially that including any corporation in which the United States of America is a stockholder, increases the maximum fine from $5,000 to $10,000, and the maximum term of imprisonment from five years to ten.

Notes of Decisions.

Implied repeals.– R. S. sec. 5438 (embodied herein), was not repealed by R. S. sec. 4746. Edgington v. U. S. (1896), 17 Sup. Ct. 72, 164 U. S. 361, 41 L. Ed. 467.

The amendment of Oct. 23, 1918, did not impliedly repeal art. 94 of the Articles of War, ch. 32, post, although both relate to the same subject matter and both are applicable to civilians and military persons alike. U. S. v. Barry (D. C. 1919), 260 Fed. 51.

Military offenses. – For false claims against United States as military offenses see A. W. 94, and notes thereunder, ch. 32, post.

Making or presenting false claims. To constitute a crime under R. S. sec. 5438 (embodied herein) by presenting for payment a claim against the United States or a department thereof "knowing such claim to be false, fictitious, or fraudulent," it is not essential that the bill, voucher, or other thing used as the basis for the claim should in and of itself contain fraudulent or fictitious statements or entries, but whether the claim is genuine and honest, or false, fictitious, or fraudulent, must be determined in view of all the facts and circumstances surrounding it; and the offense is committed by presenting for payment a claim originally valid, but which the person presenting it knows has been paid, and is no longer a subsisting and just demand, or one which, although valid, he knows he is not authorized to receive payment on. Dimmick v. U. S. (1902), 116 Fed. 825, 54 C. C. A. 529, affirming Judgment U. S. v. Dimmick (D. C. 1901), 112 Fed. 350 and writ of certiorari denied (1903), 23 Sup. Ct. 850, 189 U. S. 509, 47 L. Ed. 923.

Declarations and affidavits sworn to and filed are "papers" within the meaning of act Mar. 3, 1823, which makes it an

offense to transmit false papers for the purpose of obtaining any sum or sums of money from the United States. United States *v.* Bickford (C. C. 1859), Fed. Cas. No. 14,591 [4 Blatchf. 337].

Under act Mar. 3, 1823 (3 Stat. 771), sec. 1, making it an offense to knowingly present a false paper in support of a claim against the United States, with intent to defraud the United States, it is not necessary that the claim should be one in favor of the person who presents the false claim in its support. United States *v.* Kohnstamm (C. C. 1864), Fed. Cas. No. 15,542 [5 Blatchf. 222].

Elements stated of the offense of conspiring to defraud the Government by obtaining allowance of false claims and by false affidavits. Act Mar. 2, 1863, secs. 1–3. U. S. *v.* Jennison (C. C. 1874), Fed. Cas. No. 15,475.

The making and the presenting of false claims against the United States are distinct offenses, under R. S. sec. 5438 (embodied herein). Ex parte Shaffenburg (C. C. 1877), Fed. Cas. No. 12,696.

A false account made by a marshal within the limits of Colorado, and presented to the court and approved in Colorado, and afterwards presented to the Treasury Department in Washington, is a complete offense as to the making in Colorado, for which the offender may be there indicted, under R. S. sec. 5438 (embodied herein). Id.

R. S. sec. 5438 (embodied herein), relating to the presenting of false claims against the Government, includes a false claim presented by a person as a pensioner, demanding money as a pensioner. U. S. *v.* Coggin (C. C. 1880), 3 Fed. 492.

In such case, where the pension certificate was genuine, but had been fraudulently obtained, each presentation of the certificate constituted a distinct offense within the meaning of the statute. Id.

To support a conviction under R. S. sec. 5438 (embodied herein), for making or using a false affidavit for the purpose of obtaining the payment or approval of certain claims against the Government, it must be shown, not only that the affidavit was false, but also that the claim, the payment of which was sought to be obtained by the use of the affidavit, was false, fictitious, or fraudulent. U. S. *v.* Miskell (C. C. 1883), 15 Fed. 369.

As R. S. sec. 5438 (embodied herein), makes it an offense to present for approval to "any person or officer" in the civil service any fraudulent claim against the United States, it is immaterial, on the prosecution of a deputy marshal for presenting such a claim to the marshal, that the marshal is not expressly authorized by law to approve a deputy's account. The fact that he is required to incorporate the deputy's account into his own, and to swear that the items therein charged are correct and legal, is sufficient to show that he must pass upon it, within the meaning of the statute. U. S. *v.* Strobach (C. C. 1883), 48 Fed. 902.

R. S. sec. 5438 (embodied herein), so far as it declares that every person who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining, or aiding to obtain, the payment or allowance of any false or fraudulent claim, shall be punished without requiring any act in furtherance of the conspiracy, is modified by R. S. sec. 5440, as amended by the act of Mar. 17, 1878, which declares that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to the penalty specified; so that a mere conspiracy, without some overt act in execution of it, is not an indictable offense. U. S. *v.* Reichert (C. C. 1887), 32 Fed. 142.

The word "affidavit," as used in R. S. sec. 5438 (embodied herein), relative to making false affidavits, relates to the form of a false paper, and not to its legal character. U. S. *v.* Ingraham (C. C. 1892), 49 Fed. 155; judgment affirmed, Ingraham *v.* U. S. (1894), 15 Sup. Ct. 148, 155 U. S. 434, 39 L. Ed. 213.

The word "conspire" in R. S. sec. 5440, means all that the three corresponding synonyms, "agreement, combination, or conspiracy," mean in R. S. sec. 5438 (embodied herein). U. S. *v.* Patterson (C. C. 1893), 55 Fed. 605, 640.

Act Mar. 3, 1823, was intended only for the punishment of those charged with defrauding the Government of sums of money, and a person can not be indicted under that act for defrauding the United States of a land warrant. United States *v.* Myler (D. C. 1850), Fed. Cas. No. 15,849.

Making a claim against the Government within R. S. sec. 5438 (embodied herein), punishing the making of false or fraudulent claims, consists in asking or demanding payment for services. U. S. *v.* Bittinger (D. C. 1875), Fed. Cas. No. 14,599.

Any person who makes or causes to be made, or presents or causes to be presented, any false claim against the United States, knowing the same to be false, or who, who, for the purpose of aiding another to obtain the payment of a false claim, by making or using, or causing to be made or used, any false bill, account, claim,

...ce, affidavit, or deposition, know... the same to be false, may be punished ...r the provisions of R. S. sec. 5438 (em... ...ied herein). U. S. v. Hull (D. C. 1882), ...Fed. 324.

The section above cited is not limited ...s operation to false claims presented ...the accused on his own behalf, but ...lies as well to such claims presented by ...ttorney, agent, officer, or other person ...sisting or aiding in the collection of ...lse claim, knowing it to be false. Id. ...he is guilty, under R. S. sec. 5438 (em...ied herein), who presents a claim which ...believes to be true and just, but which ...seeks to substantiate by affidavits, cer...ates, or depositions of persons who to ...knowledge depose or certify to ma...ial facts of which they know nothing. ...S. v. Jones (D. C. 1887), 32 Fed. 482.

...R. S. sec. 5440 provides that, "if two ...or more persons conspire, either to com...t any offense against the United States, ...to defraud the United States in any ...ter, or for any purpose, and one or ...re of such parties do any act to effect ...the object of the conspiracy, all the parties ...such conspiracy shall be liable," etc. ...R. S. sec. 4002 provides that railway com...nies shall be paid for carrying the mails ...on a basis of the average weight carried; ...h weight to be ascertained by actually ...ghing the mail carried during a certain ...ber of days, to be fixed by the Post...ter general. Held, that an indictment ...rging railway officials with conspiring ...deceive the postal officers and defraud ...United States by sending over the ...s a large amount of old newspapers, etc., ...order to increase the mails at a time ...en they were being weighed, is sufficient ...der sec. 5440, since it describes a con...acy to commit the "offense against the ...ited States" which is defined by R. S. ...5438 (embodied herein), providing a ...ishment for any persons combining to ...raud the United States by "obtaining, ...uding to obtain, the payment of any ...se or fraudulent claim." U. S. v. New...(D. C. 1891), 48 Fed. 218.

The entering into any agreement or com...nation to obtain or aid in the obtaining ...ment of a false or fraudulent claim ...the United States is declared by R. S. ...5438 (embodied herein), to be a crimi... defrauding of the United States. Id. ...The Court of Claims is not an officer, ...il or military," within the meaning ...R. S. sec. 5438 (embodied herein), pro...ting persons from presenting for pay...nt or approval any false or fraudulent ...im to any person or officer in the civil, ...itary, or naval service of the United ...tes. U. S. v. Moore (D. C. 1879), 3 ...Hughes, 226.

Act Mar. 3, 1891, creates the court of private land claims (sec. 14), authorizes it to render judgment against the United States for the value of lands which the United States may have granted or sold belonging to a claimant, and provides that such judgment shall be a charge on the treasury of the United States. Held, that a fraudulent claim presented to the court of private claims is within R. S. sec. 5438 (embodied herein). In re Peraltarenavis (1895), 8 N. M. 27, 41 Pac. 538.

Limitations.—R. S. 1044, as amended, act Apr. 13, 1876 (19 Stat. 32), providing for limitations of three years, is applicable to the offense mentioned in R. S. sec. 5438 (embodied herein). Greene v. U. S. (1907), 154 Fed. 401, 85 C. C. A. 251; certiorari denied (1907), 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357.

Sec. 3 of the act of Mar. 2, 1863, this section as originally enacted to prevent and punish frauds upon the Government, contemplated two proceedings, one civil and the other criminal, of which the former is subject to the limitation prescribed by the seventh section of that act (sec. 6415, ante), and the latter to that prescribed by the thirty-second section of the act of Apr. 30, 1790 (ch. 9). (1872) 14 Op. Atty. Gen. 54.

Indictment, proof, and variance.—Under R. S. 1024 it is proper to join in one indictment a count for willfully and unlawfully presenting a fraudulent claim against the United States, and a second count for willfully and unlawfully using a false affidavit in the presentation of the fraudulent claim against the United States. Ingraham v. U. S. (1894), 155 U. S. 434, 15 Sup. Ct. 148, 39 L. Ed. 213.

An indictment for a misdemeanor is not bad because it uses the participial form, as by charging that defendant committed the offense "by then and there executing and presenting" a false voucher to obtain payment of a pension. Pooler v. U. S. (1904), 127 Fed. 509, 62 C. C. A. 307.

Money lawfully in the hands of an officer of the United States, and for which he is accountable, is money of the United States, and may be so charged in an indictment. U. S. v. Watkins (C. C. 1829) Fed. Cas. No. 16,649.

The offense under R. S. sec. 5438 (embodied herein), is not sufficiently charged in the words of the statute; but the facts constituting it must be alleged with such particularity as to apprise the accused with reasonable certainty of the nature of the accusation against him. U. S. v. Green (C. C. 1879) Fed. Cas. No. 15,257.

An indictment under R. S. sec. 5438 (embodied herein), should aver the fraud with sufficient particularity to enable the

defendant to prepare his defense, and plead the judgment as a bar to a subsequent prosecution. U. S. *v.* Goggin (C. C. 1880) 1 Fed. 49, 53.

An indictment charging fraud should aver the fraud with sufficient particularity to enable defendant to prepare his defense, and plead the judgment as a bar to a subsequent prosecution. Id.

The indictment should charge that the claim was made for payment or approval. U. S. *v.* Ambrose (C. C. 1880), 2 Fed. 764. And that it was presented to an officer having authority to examine and approve it. U. S. *v.* Christopherson (D. C. 1919), 261 Fed. 225.

It is sufficient to charge a presentation of the claim to the first auditor of the Treasury, and it is not necessary that the different items of the account should be in separate counts for each false item, but all may be included in one count. U. S. *v.* Ambrose (C. C. 1880), 2 Fed. 764.

Under R. S. sec. 5438 (embodied herein), denouncing the offense of knowingly presenting for payment or approval to any officer in the civil, military, or naval service of the United States any false or fraudulent claim against the United States, an indictment averring the presentation of such a claim to "G. T., then late marshal of the United States, he being then and there an officer in the civil service of the United States," is not insufficient or repugnant since a marshal, after the expiration of his term, is still an officer for the purpose of serving process then in his hands, and for settling his accounts with the Government. Id.

It is no defense that the Army officer to whom the false claim was presented certified that the articles set out in the voucher and claim had been received by him in the quality and quantity specified. U. S. *v.* Christopherson (D. C. 1919), 261 Fed. 225.

An indictment charging the defendant with making a false deposition in order to enable another to obtain payment of a fraudulent pension claim, in violation of R. S. sec. 5438 (embodied herein), need not allege that the false deposition was ever used, or attempted to be used, or set out in full the commission or authority of the notary who administered the oath to the deposition, or aver that the claim had been presented and was pending before the Government at the time the deposition was made. U. S. *v.* Rhodes (C. C. 1887), 30 Fed. 431.

An indictment under R. S. sec. 5438 (embodied herein) is not bad for duplicity because it charges in the same count both the making and the presenting of a false claim against the United States; the gist of the offense being the obtaining, or attempting to obtain, money from the United States by means of a fraudulent claim, and the acts charged being but different steps in the commission of such offense, although either alone is made punishable. Bridgeman *v.* U. S. (1905), 140 Fed. 577, 72 C. C. A. 145.

An indictment for presenting a false claim or voucher against the United States sufficiently describes such claim or voucher, where it sets out the substance of the same with such particularity as to make any judgment in the case a bar to any subsequent prosecution for the same offense. Id.

An indictment which charges a willful attempt by defendant to obtain money from the United States by presenting a false, fictitious, and fraudulent claim, the false, fictitious, and fraudulent character of which was known to him necessarily imports an intent to defraud the Government, and such intent need not be specifically alleged. Id.

An indictment for the offense of presenting to any officer "in the civil, military, or naval service of the United States," a false claim is sufficiently certain in alleging that such claim was presented to the "third auditor of the Treasury Department of the United States." It need not allege that he is an officer in the civil service of the United States. U. S. *v.* Ingraham (C. C. 1892), 49 Fed. 155; judgment affirmed, Ingraham *v.* U. S. (1894), 15 Sup. Ct. 148, 155 U. S. 434, 39 L. Ed. 213.

An indictment under this section for knowingly making or presenting for approval to any officer of the United States any false, fictitious, or fraudulent claim is not bad for duplicity because it charges that the accused "made and presented" such a claim. U. S. *v.* Franklin (C. C. 1909), 174 Fed. 101.

In an indictment under R. S. sec. 5438 (embodied herein), for making and presenting to an officer for approval a false, fictitious, and fraudulent claim against the United States, which sets out the claim, showing it to be an itemized account, averments that certain sums charged therein "should have been" certain smaller sums stated sufficiently shows wherein the claim is false and fraudulent. Id.

An indictment, under R. S. sec. 5438 (embodied herein) for making and presenting to an officer for approval, a false, fictitious, and fraudulent claim against the War Department of the United States for supplies furnished the cadet mess at West Point, which describes such officer as a brigadier general in the Army and superintendent of the Military Academy at West Point, and alleges that he was an officer authorized to

prove such claim, held, on demurrer, to ...ently show such authority. Id.

...n indictment under R. S. sec. 5438 ...ended herein), making it criminal to ...er against the Government a demand ...en to be false, fictitious, or fraudulent, ...ndant was charged with attempting to ...ain pay and bounty by falsely represent... herself to be the widow of a soldier ...ed during the war. Held, that it must ...ar that defendant was not the widow ...ch soldier, and that she made her de... knowing this; but otherwise, if the ...m, though groundless, was made in good ...th, and in the belief that she had been ...e wife of the soldier and was his widow, ...d entitled to the pay and bounty due him ...e death. U. S. v. Route (D. C. 1887), ...Fed 246.

An indictment charged that defendant, a ...ety marshal, having a warrant for the ...est of a violator of the United States ...ates, served the same, and, for the pur... of obtaining approval and payment of ...false and fictitious claim against the ...ernment, caused to be made a false ...d fictitious account, affidavit, and ...her as to the number of miles traveled ...by him, and as to the employment of a ...an in such service, and as to the num... of meals furnished the prisoner. The ...count was set out in full, as were also ...e guard's receipt for fees, and the re... of the person furnishing the meals. ...he account was alleged to be false, and ...e fictitious items were designated spe...ally, and it was alleged that defendant ...new them to be false. Held, that the spe...ic acts constituting the offense of mak... the false account were set out with ...fficient particularity. U. S. v. Wall, ...(C. C. 1889), 40 Fed. 144.

The omission to allege the name of any ...rson to whom the account was to be pre...nted is a fatal defect to such an indict...ent. Id.

It is insufficient to allege that an account ...as from the United States to C., the ...nited States marshal, was presented to ...m, as the marshal could not audit or pay a ...im against the Government, due to him...lf. Id.

An indictment under R. S., sec. 5438 (em...ced herein), for conspiracy to defraud ...e Government of the United States by ...aining the allowance and payment of a ...se and fraudulent claim, which charges ...e overt act the presentation of such ...im, must state the particular facts show... the fraudulent character of the claim. ...general averment in the language of ...e statute that it was fraudulent is not ...fficiently specific. U. S. v. Greene (D. C. ...), 115 Fed. 343.

A count in an indictment for conspiracy to defraud the United States, which charges as an overt act done in pursuance of the conspiracy the knowing and willful presentation and payment of false and fraudulent claims against the United States, is not insufficient because it does not specify the particulars in which such claims were fraudulent; the only purpose of such count being to show that the unlawful agreement was carried into actual operation. Id.

On an indictment for presenting a false claim against the United States for back pay of a deceased soldier, claimed by the defendant to be his brother, the allegation of the indictment was that the brother was named "Major Dabney," and enlisted under the name of "George Bowen," whereas the proof was that defendant claimed to be the brother of George Bowen, who served under the name of Major Dabney. Held, that the variance was immaterial and the defendant properly convicted. U. S. v. Bowen (D. C. 1879), 3 MacArthur, 64.

Evidence.—On the trial of a defendant for knowingly receiving in pledge from a soldier an automatic pistol, the property of the United States, in violation of this section, the confession of the defendant was sufficiently corroborated to justify the submission of the case to the jury by evidence showing that the pistol was issued to a soldier, and that it was found in the possession of defendant, whose place of business was very near the reservation on which such soldier was stationed; and evidence that the pistol had been charged to the soldier was properly excluded, where the evidence did not show that he was the owner at the time it was pledged, but that the charge was made after its loss was known. Bolland v. U. S. (C. C. A. 1916), 238 Fed. 529.

On the trial of a defendant charged with having, as Indian agent, made and presented a false claim and voucher against the United States, knowing the same to be false and fictitious, testimony that it was a custom or practice of other Indian agents to sign and forward their accounts and vouchers as the same were prepared by the clerks, without reading them, was irrelevant, and properly excluded. Bridgeman v. U. S. (1905), 140 Fed. 577, 72 C. C. A. 145.

Evidence reviewed in the charge to the jury on trial of consolidated indictments and counts severally charging conspiracy to defraud the United States between contractors for public work and the Government engineer officer in charge of the same, the presentation of fraudulent claims against, and embezzlement from, the United States. U. S. v. Greene (D. C. 1906), 146

Fed. 803; judgment affirmed, Greene v. U. S. (C. C. A. 1907), 154 Fed. 401, 85 C. C. A. 251; writ of certiorari denied (1907), 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357.

Damages and forfeiture for violation of statute.—An action brought by a private prosecutor under R. S., secs. 3490–3494, to recover damages and forfeiture for a violation of R. S. sec. 5438 (embodied herein), is what was known at common law as a popular or qui tam action, and is under the full and exclusive control of such prosecutor subject to the restriction of his right to discontinue the same contained in R. S. sec. 3491, and his interest or share in any judgment obtained therein is his absolute private property, and the United States can not compromise, remit, or release the same by pardon or otherwise. U. S. v. Griswold (D. C. 1885), 24 Fed. 361, 365, affirmed (C. C. 1887), 30 Fed. 762, 763.

438. Bribery.—Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years. *Sec. 39, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1096).*

This section is similar to R. S. 5451, which was repealed by sec. 341 of the above act.

Notes of Decisions.

Prescription of official action.—The official action sought to be influenced by a bribe charged to have been given and accepted contrary to this section, and, post, 439, need not have been prescribed by statute; it is sufficient that it was governed by a lawful requirement of the executive department under whose authority the officer was acting; and such requirement need not have been prescribed by a written rule or regulation, but might also be found in an established usage which constituted the common law of the department, and fixed the duties of those engaged in its activities. U. S. v. Birdsall (1914), 34 Sup. Ct. 512, 233 U. S. 223, 58 L. Ed. 930.

Meaning of "lawful duty."—The phrase "lawful duty" in R. S. sec. 5451 (embodied herein), is not restricted to a duty imposed by statute, but is broad enough to cover a duty imposed by a lawful superior; and an indictment charging a conspiracy to induce an assistant statistician in the Department of Agriculture to furnish to the accused advance news of crop conditions, and to cause to be published false reports as to such conditions in violation of the rules of the department, to aid defendants in market speculations, by promising such employee a percentage of the profits of such speculations, charges a conspiracy to commit an offense against the United States under R. S. sec. 5440. U. S. v. Haas (C. C. 1908), 163 Fed. 908.

Official function in general.—A person employed by the United States as an assistant statistician in the Department of Agriculture, in the performance of the duties with which he is charged by the rules of the department, acts for the United States in an official function, within the meaning of this section, making it a criminal offense to bribe any such person to induce him to do or to omit to do any act in violation of his lawful duty. U. S. v. Haas (C. C. 1908), 163 Fed. 908.

The "official function" within this section is not necessarily a function belonging to an office held by one acting on behalf of the United States, and it may also be a function belonging to an office held by a superior, which function has been committed to a subordinate, whether an officer or a mere employee, for the purpose of being executed. U. S. v. Ingham (D. C. 1898) 97 Fed. 935.

Tendering check to affect official action.—The tendering by a person of his personal check, drawn on a bank and payable to an officer of the United States, to such officer, with intent thereby to affect his official action, does not constitute the crime of bribery, since a check made and delivered for such illegal purpose is void, and not within any of the classes of instruments enumerated in the statute. Green v. MacDougall (1905) 26 Sup. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

Payment or offer not relating to officer's duty. The crime of bribery can not be predicated upon the offer of a reward not to perform duties for the performance of which there was no legal or constitutional warrant. U. S. v. Boyer (D. C. 1898) 85 Fed. 425.

One paying money to a person acting for the United States in an official function to influence his official action in a matter over which he is not charged with any official or other duty is not guilty of bribery, under this section. U. S. v. Birdsall (D. C. 1912) 195 Fed. 980.

Offer in contemplation of probable performance of official function. An offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in the performance of such functions if he shall be so called, does not violate this section, making it a criminal offense to offer to bribe a person exercising any official function, with intent to influence his action in his official capacity. In re Yee Gee (D. C. 1897), 83 Fed. 145.

Paying money to officer in violation of R. S. 5501. One paying money to an officer of the United States in violation of R. S. 5501, post, 439, may be indicted under this section, though perhaps not strictly an accomplice. King v. U. S. (1902), 112 Fed. 988, 50 C. C. A. 647.

Procuring false certificate to increase pension. A conspiracy to procure, by bribery, the making of a false certificate by the board of examining surgeons, whereby the commissioner of pensions may be induced to allow a fraudulent increase of pension, is a conspiracy to defraud the United States, within the meaning of R. S. sec. 5440. U. S. v. Van Leuven (D. C. 1894), 62 Fed. 62.

Common-law offense as punishable by statute.—Congress in enacting this section intended to punish by statute what was punishable by common law, but which law could not be invoked against officers of the United States because there are no common law offenses against the United States. U. S. v. Green (D. C. 1905), 136 Fed. 618, 652; order affirmed (1905), 26 Sup. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

Evidence.—In a prosecution for alleged bribery of a Government officer in violation of this section, evidence held insufficient to warrant a finding that defendant made any promise or offer, or gave any money or other valuable thing to such officer in order to affect his official action. Vernon v. U. S. (1906), 146 Fed. 121, 76 C. C. A. 547.

439. Accepting a bribe.—Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States. *Sec. 117, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1109).*

Notes of Decisions.

Construction in general.—This section held highly penal, and must be construed at least with reasonable strictness. U. S. v. Van Wert (D. C. 1912), 195 Fed. 974; Same v. Brents (D. C. 1912), Id. 980.

Who are officers.—Under Const. art. 2, sec. 2, an "officer of the United States," within this section, is one who is either appointed by the President by and with the advice and consent of the Senate, or by the President alone, the courts of law, or heads of some executive department of the Government. United States v. Van Wert (D. C. 1912), 195 F. 974; Same v. Brents, Id. 980.

Accomplice.—One paying money to an officer of the United States, in violation of R. S., sec. 5501 (embodied herein), may be indicted under R. S., sec. 5451, ante, 438, though perhaps not strictly an accomplice. King v. U. S. (1902), 112 Fed. 988, 50 C. C. A. 647.

Necessity of official action being prescribed by statute.—The official action sought to be influenced by a bribe charged to have been given and accepted contrary to this section and, ante, 438, need not have been prescribed by statute; it is sufficient that it was governed by a lawful requirement of the executive department under whose authority the officer was acting; and such requirement need not have been prescribed by a written rule or regulation, but might also be found in an established usage which constituted the common law of the department, and fixed the duties of those engaged in its activities. U. S. v. Birdsall (1914), 34 Sup Ct. 512, 233 U. S. 223, 58 L. Ed. 930.

440. Witness accepting bribe.—Whoever, being, or about to be, a witness upon a trial, hearing, or other proceeding, before any court or any officer authorized by the laws of the United States to hear evidence or take testimony, shall receive, or agree or offer to receive, a bribe, upon any agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing, or other proceeding, or because of such testimony, or such absence, shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both. *Sec. 134, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1113).*

441. Extortion.—Every officer, clerk, agent, or employee of the United States, and every person representing himself to be or assuming to act as such officer, clerks, agent, or employee, who, under color of his office, clerkship, agency, or employment, or under color of his pretended or assumed office, clerkship, agency, or employment, is guilty of extortion, and every person who shall attempt any act which if performed would make him guilty of extortion, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both. *Sec. 85, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1104).*

Notes of Decisions.

Statute as in force in Alaska.—R. S., sec. 5481 (embodied herein), defining the crime of extortion under color of office, being passed after the cession of Alaska, is in force there from the time of its passage. U. S. v. Carr (D. C. 1875), Fed. Cas. No. 14,730.

Officers within meaning of statute.—A surgeon appointed by the Commissioner of Pensions under R. S. 4777, is not an officer. U. S. v. Germaine (1878), 99 U. S. 508, 25 L. Ed. 482; Hendee v. U. S. (1887), 22 Ct. Cl. 134.

Under Const., art. 2, sec. 2, cl. 2, providing that all officers shall be appointed by the President, by and with the advice of the Senate, or Congress may vest the appointment of such inferior officers as they think proper in the President alone, in the courts, or in the heads of departments, a special agent of the Land Department of the United States, appointed under appropriation act June 4, 1897 (30 Stat. 32), to meet the expenses of protecting timber on public lands, but providing no fixed salary, tenure of office, or person with power to appoint, was not an officer of the United States, within R. S. sec. 5481 (embodied herein). United States v. Schillerholz (D. C. 1905), 137 F. 616.

Extortion in general.—Laboring to exact fees from one party after having received them from another is not extortion. U. S. v. Chenault (C. C. 1813), Fed. Cas. No. 14,791.

Extortion is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due him, or

: r than is due, or before it is due. U. S. : Watts (D. C. 1876), Fed. Cas. No. 16,631.

The word "extortion" implies that the money paid was extorted on the part of the one receiving it, and was paid unwillingly by the one paying it, and the mere taking of legal fees by an officer of the United States is not extortion. U. S. v. Harned (D. C. 1890), 43 Fed. 376, 377.

Offense dependent on knowledge.—An officer is not guilty of extortion in collecting greater fees than those allowed by law, unless he did so with knowledge that he was violating the law. U. S. v. Highleyman (D. C. 1876), Fed. Cas. No. 15,361.

Evidence.—On prosecution of a United States officer for extortion, under this section, proof that money in excess of legal fees was received by defendant, and that in receiving the money he acted in an official capacity and corruptly, is not sufficient to warrant a conviction, without evidence tending to prove that the excess was exacted by the defendant, and not paid voluntarily. U. S. v. Harned (D. C. 1890), 43 Fed. 376.

442. Deprivation of rights.—Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. *R. S. 1979.*

443. Obstructing justice.—Every person, who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both. *R. S. 5399.*

443. Conspiracy.—First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. *R. S. 1980.*

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror, each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment. *R. S. 5506.*

Notes of Decisions.

Limitations.—An action under this section for an assault committed in attempting to prevent plaintiff from voting, in violation of the civil rights act, is governed as to limitations by the statutes of the State where brought. O'Sullivan *v.* Felix (1912), 194 Fed. 88, 114 C. C. A. 166.

Elements of conspiracy.—In order to establish a conspiracy to commit an offense against the United States in violation of this section, there must not only be an agreement or combination to commit a crime or unlawful purpose, but also an overt act apart from the conspiracy, done to carry into effect the object of the original combination. U. S. *v.* Cole (D. C. 1907), 153 Fed. 801.

Necessity of indictment.—The crime of conspiring to injure or intimidate citizens in the exercise of their civil rights is an infamous crime, which must be proceeded against by indictment, and not by information. U. S. *v.* Butler (C. C. 1876), Fed. Cas. No. 14,701.

Jurisdiction of Federal courts—Pleading.—See U. S. *v.* Bell (1905), 135 Fed. 336, 339, 68 C. C. A. 144.

444. Neglect to prevent conspiracy.—Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may

recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. *R. S. 1981.*

Jurisdiction of all suits which may be brought under this section was given to the district courts, by par. 13, sec. 24, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1092)

445. Speedy trial.—Whenever the President has reason to believe that offenses have been, or are likely to be committed against the provisions of chapter seven of the Title CRIMES, within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons so charged, and it shall be the duty of every judge or other officer, when any such requisition is received by him, to attend at the place and for the time therein designated. *R. S. 1988.*

446. Fees of officials of the United States courts.—The district attorneys, marshals, their deputies, and the clerks of the courts of the United States and Territorial courts shall be paid for their services, in cases under the foregoing provisions, the same fees as are allowed to them for like services in other cases; and where the proceedings are before a commissioner he shall be entitled to a fee of ten dollars for his services in each case, inclusive of all services incident to the arrest and examination. *R. S. 1986.*

447. Subpœnas for witnesses to make depositions.—Any head of a Department or Bureau in which a claim against the United States is properly pending may apply to any judge or clerk of any court of the United States, in any State, District, or Territory, to issue a subpœna for any witness being within the jurisdiction of such court, to appear at a time and place in the subpœna stated, before any officer authorized to take depositions to be used in the courts of the United States, there to give full and true answers to such written interrogatories and cross-interrogatories as may be submitted with the application, or to be orally examined and cross-examined upon the subject of such claim. *R. S. 1847.*

In addition to the authority conferred by this section, like provision was made for the issue of subpœnas for witnesses, upon the application of the Commissioner of Pensions, on investigation or examination into the merits of pension claims, by act July 25, 1882, sec. 3.

Notes of Decisions.

Authority to require witnesses in support of claims. It seems that, whenever the law imposes upon an officer the duty to examine, adjust, and settle claims against the Government, it gives him authority to require that those claims shall be established, or supported at least, by the oaths of witnesses. (1874) 14 Op. Atty. Gen., 410, 422. See U. S. v. Bailey (1835), 9 Pet. 238, 253, 9 L. Ed. 113.

Act Feb. 14, 1871, incorporated in this section and the three sections next following, assumed the existence of authority in heads of departments and bureaus to require oaths in cases of claims against the Government, and provided them with a very efficient means for enforcing it. (1874) 14 Op. Atty. Gen. 420.

448. Witness fees. Witnesses subpœnaed pursuant to the preceding section shall be allowed the same compensation as is allowed witnesses in the courts of the United States. *R. S. 1847.*

Fees allowed witnesses in United States courts were prescribed by R. S. sec. 848, and act May 27, 1908 (35 Stat. 317).

Notes of Decisions.

Payment of fees from judiciary fund.—The fees of witnesses provided for by this section, who were subpœnaed on application of the Pension Bureau, to testify before a United States commissioner, and also the fees of the commissioner by whom their testimony is taken, may properly be allowed out of the judiciary fund, appropriated for expenses of the United States courts, etc., and should be paid by the marshal of the district on the certificate or order of the commissioner. (1881) 17 Op. Atty. Gen. 247.

449. Compelling testimony.—If any witness, after being duly served with such subpœna, neglects or refuses to appear, or, appearing, refuses to testify, the judge of the district in which the subpœna issued may proceed, upon proper process, to enforce obedience to the subpœna, or to punish the disobedience, in like manner as any court of the United States may do in case of process of subpœna ad testificandum issued by such court. *R. S. 186.*

450. Concurrent jurisdiction of Federal courts over claims.—The district courts shall have original jurisdiction as follows: * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: * * *Par. 20, sec. 24, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1093).*

Notes of Decisions.

See post 451, and notes thereunder.

Suits against Government in general.—Since the United States is not suable of common right, a party who institutes such suit must bring same within the authority of some act of Congress, or the court can not exercise jurisdiction over it. U. S. *v.* Clarke (1834), 8 Pet. 436, 444, 8 L. Ed. 1001.

The judiciary act does not authorize a suit against the United States in any of the Federal courts. U. S. *v.* Tillou (1867), 73 U. S. (6 Wall.) 484, 18 L. Ed. 920; Id. (1867), 3 Ct. Cl. 454.

The United States can not be sued without its consent. Cunningham *v.* Macon & B. R. Co. (1883), 3 Sup. Ct. 292, 296, 109 U. S. 446, 27 L. Ed. 992.

The Government is not liable to be sued for the torts, misconduct, misfeasance, or laches of its officers or employees, unless its consent thereto is given in some act of Congress. Bigby *v.* U. S. (1903), 23 Sup. Ct. 468, 471, 188 U. S. 400, 47 L. Ed. 519; Occidental Const. Co. *v.* U. S. (C. C. A. 1917), 245 Fed. 817.

Since a sovereign can be sued only by his own consent, he may prescribe the conditions on which he will be sued. Treat *v.* Farmers' Loan & Trust Co. (1911), 185 Fed. 760, 108 C. C. A. 98, affirming judgments Central Trust Co. of New York *v.* Treat (C. C. 1909), 171 Fed. 301, and Farmers' Loan & Trust Co. *v.* Same, Id. 302.

Right to sue the United States in their own courts is strictly limited by the statutes granting the consent (Tucker Act), which can not be extended by the courts. Reid Wrecking Co. *v.* U. S. (D. C. 1913), 202 Fed. 314.

Suits against Federal officers or agents.—That the defendant is an officer of the United States, and claims to have been acting under an act of Congress in doing the acts complained of, does not give a Federal court original jurisdiction under judiciary act Mar. 3, 1887, secs 1, 2. City of Stanfield *v.* Umatilla River Water Users' Ass'n (C. C. 1911), 192 Fed. 596.

A suit against Government officers to restrain acts claimed to be without authority of law, by which complainant will be deprived of rights accorded to him by the law, is not one against the United States. Baker *v.* Swigart (D. C. 1912), 196 Fed. 569; decree reversed (1912), 199 Fed.

807, 118 C. C. A. 313, which is reversed (1913), 33 S. Ct. 645, 229 U. S. 187, 57 L. Ed. 1143.

Claims against Government in general.—Acts 1792, conferring on the circuit courts power to adjudicate pension claims, did not authorize the judges of those courts to exercise out of court, and in the character of commissioners, the powers conferred by the act. U. S. v. Todd (1851), 54 U. S. (13 How.) 52, note, 14 L. Ed. 47.

Act Mar. 3, 1887, having given jurisdiction to the circuit court of all claims against the United States exceeding $1,000, founded on contracts, express or implied, or for damages, liquidated or unliquidated, in cases not sounding in tort, if claimant's petition shows that the claim is not founded upon torts of officers of the Government, but on acts of theirs authorized by legislation of Congress, it is immaterial whether the petition claims compensation as on an implied contract or as for damages. Chappell v. U. S. (C. C. 1888), 34 Fed. 673.

The district courts have jurisdiction to hear and determine claims against the United States. Swigett v. U. S. (D. C. 1896), 78 Fed. 456, 458, 460; affirmed (1897), 83 Fed. 97, 27 C. C. A. 465.

Jurisdictional amount.—A claim against the United States was not beyond the jurisdiction of a circuit court, as exceeding $10,000, under the Tucker Act of Mar. 3, 1887, sec. 2 (24 Stat. 505), where plaintiff in his petition limited his claim to $10,000, and expressly waived all right to recover a larger sum. Hill v. U. S. (C. C. 1889), 39 Fed. 441, 442.

Suit by assignee of claim.—Under the act of 1887 (24 Stat. 505), the assignee of a claim against the United States may sue thereon in his own name. Emmons v. U. S. (C. C. 1891), 48 Fed. 43.

Claims by aliens.—The Tucker Act of Mar. 3, 1887, authorizes suits against the United States as respects the claims specified therein by aliens as well as citizens. U. S. v. New York & O. S. S. Co. (C. C. A. 1914), 216 Fed. 61.

An alien being entitled to sue the United States in the Court of Claims under R. S. sec. 1059, a Federal district court had concurrent jurisdiction of the subject matter under Tucker Act, sec. 2. New York & O. S. S. Co. v. U. S. (D. C. 1912), 202 Fed. 311.

Actions of tort.—The United States has never, either by act of Mar. 3, 1887 (24 Stat. 505), or by any other law, permitted itself to be sued for torts committed by its officers, as, for instance, a trespass on private lands; and the settled distinction in this respect can not be evaded by framing the claim so as to count upon an implied contract to compensate for use and occupation. Hill v. U. S. (1893), 13 Sup. Ct. 1011, 1013, 149 U. S. 593, 37 L. Ed. 862, reversing judgment (C. C. 1889) 39 Fed. 172; Occidental Const. Co. v. U. S. (C. C. A. 1917), 245 Fed. 817.

Where a Government employee, having property in his possession for a certain purpose, by consent of the owner, uses it by order of his superior officer for another purpose, and the owner recovers judgment for conversion of the property against the employee, the latter can not sue the United States for indemnification, since act Mar. 3, 1887, sec. 1, giving the Court of Claims jurisdiction of all claims on any contract, express or implied, with the United States, expressly excepts cases sounding in tort. Carpenter v. U. S. (C. C. 1891), 45 Fed. 341.

An action may not be maintained against the United States for injuries received by reason of a defective elevator in a Federal building. Bigby v. U. S. (C. C. 1900), 103 Fed. 597; affirmed (1903) 23 Sup. Ct. 468, 188 U. S. 400, 47 L. Ed. 519.

Tucker Act, Mar. 3, 1887 (24 Stat. 505), authorizing suits against the United States does not authorize a recovery of damages for a consequential injury to property not amounting to a taking and for which recovery could be had only in an action of tort. Coleman v. U. S. (C. C. 1910), 181 Fed. 599.

Implied contract in general.—The United States does not, by undertaking to carry a passenger in an elevator in one of its public buildings, impliedly contract that its employees in charge of it will exercise due care, so as to confer jurisdiction on a Federal court, under Tucker Act Mar. 3, 1887 (24 Stat. 505), of an action to recover damages for personal injuries sustained by reason of the negligence of such employees, on the theory that such action is upon a "contract, express or implied, with the Government of the United States," within the meaning of that act; but the case is one "sounding in tort," which by that act is excluded from judicial cognizance. Bigby v. U. S. (1903), 23 Sup. Ct. 468, 188 U. S. 400, 47 L. Ed. 519, affirming judgment (C. C. 1900), 103 Fed. 597.

Implied contract defined. Bigby v. U. S. (C. C. 1900), 103 Fed. 597; affirmed (1903), 23 Sup. Ct. 468, 188 U. S. 400, 47 L. Ed. 519.

Army Regulations, par. 1452, provides that when medical attendance is required by an officer or enlisted man on duty and the attendance of a medical officer can not be had, the officer, or, in his absence such enlisted man, may employ a civilian physician, and a just account for his services and necessary medicines will be paid by the Medical Department. Par. 1457 requires that accounts for board, lodg-

ing, nursing, and medical attendance of sick soldiers in private hospitals shall be sent to the Surgeon General for settlement. Held, that where a corporal was taken sick while detached on recruiting service, and required immediate medical attention, which could not be afforded by the department, and he was sent to a private hospital by his captain in command, who requested that board, lodging, medical attendance, etc., be furnished to him, an implied contract was thereby created, which entitled plaintiff to recover against the United States for the reasonable value of the services so furnished. Davis *v.* U. S. (D. C. 1903), 120 Fed. 190.

Claim or suit for salvage.—Act Mar. 3, 1887 (24 Stat. 505), gives jurisdiction to the Court of Claims, inter alia, on any contract, express or implied with the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. Sec. 2 gives the Federal district and circuit courts concurrent jurisdiction with the Court of Claims as to matters named in the preceding section, except that the district courts have jurisdiction not to exceed $1,000, and the circuit courts between $1,000 and $10,000. Held, that a claim against the United States for salvage in the sum of $10,000 is within the jurisdiction of the circuit court. U. S. *v.* Morgan (1900), 99 Fed. 570, 39 C. C. A. 653.

A tug which went to the assistance of a United States vessel having on board ammunition for delivery to a warship, in answer to her signal for help, and aided in putting out a fire which had broken out on such vessel, at considerable risk to the tug and crew on account of the nature of the cargo, the service lasting half an hour, held entitled to a salvage on an implied contract. Hartford & N. Y. Transp. Co. *v.* U. S. (C. C. 1905), 138 Fed. 618.

A claim for salvage is founded on an implied contract, and where it does not exceed $1,000, a suit thereon may be maintained against the United States in a district court, under the Tucker Act of Mar. 3, 1887, secs. 1–7 (24 Stat. 505, 506), which provide for suits in either the Court of Claims or a circuit or district court on "all claims founded upon * * * any contract, express or implied, with the Government of the United States * * * in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable." Cornell Steamboat Co. *v.* U. S. (D. C. 1904), 130 Fed. 480; decree affirmed, U. S. *v.* Cornell Steamboat Co. (1905), 137 Fed. 455, 69 C. C. A. 603, and (1906), 26 Sup. Ct. 648, 202 U. S. 184, 50 L. Ed. 927.

Action by contractor for extra work and damages.—Under act Mar. 3, 1887, which allows suits to be brought against the United States "upon contract, expressed or implied, or for damages in cases not sounding in tort," an action may be brought by a contractor for extra work done by him under the direction of the Government's agent, and for damages for an improper interference by such agent with the fulfillment of the contract. Bowe *v.* U. S. (C. C. 1890), 42 Fed. 761.

Ejectment against one holding possession as agent or in official capacity.—The circuit court has jurisdiction of an ejectment suit by a landowner against an agent of the United States in charge of a public improvement alleged to be built on plaintiff's land; and if defendant relies on the Government's title the court may determine whether it is the superior one, but its judgment will not conclude the United States, since the latter is not a party, and can not be made one without its own consent. Scranton *v.* Wheeler (1893), 57 Fed. 803, 6 C. C. A. 585, 16 U. S. App. 152.

One claiming title and denying that the Government has any title may maintain ejectment against one holding possession in his official capacity and representing the right of the Government. Sawyer *v.* Osterhaus (D. C. 1912), 195 Fed. 655.

Suit by entryman to recover money paid.—An entryman whose entry is canceled may sue in the Federal courts to recover the money paid by him. Emmons *v.* U. S. (C. C. 1890), 42 Fed. 26.

Suit for destruction of value of real property.—A circuit court of the United States had jurisdiction of a suit against the United States to recover compensation for the alleged total destruction of the value of real property as a necessary result of the acts of its officers and agents in improving navigation, where the Government did not deny plaintiff's title, and admitted that the work done was authorized by Congress, but denied that such work produced the alleged injury and destruction. U. S. *v.* Lynah (1903), 23 S. Ct. 349, 356, 188 U. S. 445, 47 L. Ed. 539; Same *v.* Williams (1903), 23 S. Ct. 363, 188 U. S. 485, 47 L. Ed. 554.

Claims for fees, salary, or compensation of officers.—The term "official services" means only those services which are peculiar to the office of an officer of the United States and which they are by law authorized to perform. Scully *v.* U. S. (C. C. 1910), 193 Fed. 185.

Official determination of claims in general.—As to effect of officers' determination upon claims. Stanton v. U. S. (C. C. 1889), 37 Fed. 252, 254, modified (1895) 70 Fed. 890, 17 C. C. A. 475.

Rejection of claims or reporting the same adversely.—Act of Mar. 3, 1887, gave to United States circuit courts jurisdiction of claims against the United States, except claims "heretofore rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." Held that, the Comptroller of the Treasury having charge of the adjustment of accounts against the Government, a rejection of an account by him is a rejection by a department authorized to hear and determine the same. Bliss v. U. S. (C. C. 1888), 34 Fed. 781.

Act Mar. 3, 1887 (24 Stat. 505), sec. 2, gave the circuit and district courts concurrent jurisdiction, within certain limits as to amount, of all matters which by sec. 1 "the Court of Claims shall have jurisdiction to hear and determine," including all claims founded on any law of Congress, except for pensions, or on any contract with the Government: "*Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims * * * which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." By R. S. sec. 269, it is made the duty of the First Comptroller of the Treasury "to superintend the adjustment and preservation of the public accounts, subject to his revision." R. S. 191 provides that "the balances which may from time to time be stated by the auditor, and certified to the heads of departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts." Held, that the proviso must be limited to a rejection on a claim, or an adverse report thereon, by a court, department, or commission which determines the rights of parties, and that therefore the disallowance of a marshal's account for fees by the First Comptroller of the Treasury was not within the proviso, as his decision was conclusive only within the executive department. Harmon v. U. S. (C. C. 1890), 43 Fed. 560; judgment affirmed, U. S. v. Harmon (1893), 14 S. Ct. 527, 147 U. S. 268, 37 L. Ed. 164.

Under act Mar. 3, 1887, forbidding district courts to entertain claims against the Government, "which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same," the court must dismiss a claim rejected by the Comptroller of the Treasury. Preston v. U. S. (D. C. 1888), 37 Fed. 417, following Bliss v. Same (C. C. 1888), 34 Fed. 781, and Rand v. Same (D. C. 1888), 36 Fed. 671.

Act Feb. 22, 1875 (18 Stat. 333), which requires that the accounts of district attorneys, clerks, marshals, etc., shall be forwarded, "when approved," "to the proper accounting officers of the Treasury," does not make presentation to such officers a condition precedent to a right of action, nor is rejection of a claim by the accounting officers of the Treasury such a determination of a "commission or department authorized to hear and determine," within the meaning of the act of Mar. 3, 1887 (24 Stat. 505), as will bar an action in the proper courts. Erwin v. U. S. (D. C. 1889), 37 Fed. 470, 2 L. R. A. 229.

Set-offs and counterclaims.—See secs. 458, 464, post.

While no direct suit can be maintained against the United States, a party against whom suit is brought by the United States to recover money may set up any claim he has to such money. U. S. v. Ringgold (1834), 8 Pet. 150, 163, 8 L. Ed. 899.

The difference in quality and fuel value between the coal called for by the contract and a cargo of inferior coal furnished to the Government and paid for may be set off against the Government's liability to the same contractors under a later contract, where the parties agreed that the acceptance of the inferior coal should be a purchase outside the contract, and the contractors were notified before delivery that they would be charged with the difference if the coal proved inferior. Barry v. U. S. (1913), 33 S. Ct. 681, 229 U. S. 47, 57 L. Ed. 1069, affirming judgment Peabody v. Same (1910), 45 Ct. Cl. 532.

Under act Mar. 3, 1887 (24 Stat. 505, 508), providing for the bringing of suits against the United States, the court has power to render judgment for the United States for any balance found due on a set-off or counterclaim. U. S. v. Saunders (1897), 79 Fed. 407, 24 C. C. A. 611.

The Tucker Act, conferring on Federal district courts jurisdiction over certain suits against the United States, does not authorize a recovery of demands against the United States on counterclaim. U. S. v. Nipissing Mines Co. (1916), 206 U. S. 421, 124 C. C. A. 313, modifying judgment (D. C. 1912), 202 Fed. 803.

Limitations.—A right of action against the Government, under a contract for cartage of imported goods in its custody, accrues as soon as the money becomes due, without a prior presentation of the claim to the executive department for allowance; and hence the six years limitation in the act of Mar. 3, 1887, begins to run from that time, and is not interrupted by such presentation of the claim, or while it is under investigation or in course of auditing by executive officers. U. S. *v.* Utz (1897), 80 Fed. 848, 26 C. C. A. 184, reversing judgment Utz *v.* U. S. (C. C. 1896), 75 Fed. 648.

One suing the Government, under the act of Mar. 3, 1887, providing for bringing suits against the United States, is barred as to any part of his demand arising over six years before filing his petition. Timmonds *v.* U. S. (1898), 84 Fed. 933, 28 C. C. A. 570.

451. Jurisdiction over claims against the United States.—The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same. *Par. 1, sec. 145, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1136).*

That from and after the passage and approval of this Act the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States based upon or growing out of the destruction of any property or damage done to any property by the military or naval forces of the United States during the war for the suppression of the rebellion; nor to any claim for stores and supplies taken by or furnished to or for the use of the military or naval forces of the United States, nor to any claim for the value of any use and occupation of any real estate by the military or naval forces of the United States during said war; nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provisions of any law of the United States. *Sec. 5, act of Mar. 4, 1915 (38 Stat. 996).*

See ante, 450 and notes.

452. Filing claim prohibited while suit is pending in another court.—No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. *Sec. 154, Judicial Code, Mar. 3, 1911 (36 Stat. 1138).*

Notes of Decisions.

Claims pending in other courts.—A suit pending in a United States circuit court, no matter in what part of the country, can not be treated as pending in a court of foreign jurisdiction. All courts of the United States are within the territorial jurisdiction of the Court of Claims. Peterson *v.* U. S. (1890), 26 Ct. Cl. 93.

453. Time limit for filing claims.—Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition

setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. *Sec. 156, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1139).*

454. Form of petition to the Court of Claims.—The claimant shall in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney. *Sec. 159, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1139).*

455. Petition to the Court of Claims must show ground for relief.—When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein. *Sec. 165, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1140).*

456. Burden of proof of loyalty of a claimant.—Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to forces or Government of the late Confederate States during the Civil War, the claimant asserting the loyalty of any such person to the United States during such Civil War shall be required to prove affirmatively that such person did, during said Civil War, consistently adhere to the United States and did give no aid or comfort to persons engaged in said Civil War. *Sec. 161, Judicial Code, act of March 3, 1911 (36 Stat. 1139).*

Notes of Decisions.

Power of Congress.—Where a claimant's rights, if any, are created by the statute which refers the claim, it is within the constitutional authority of Congress to specify as a condition to relief that he be found loyal in fact. Austin v. U. S. (1890), 25 Ct. Cl. 437.

Congress may require proof of loyalty in fact as distinguished from innocence in law as a condition precedent to the jurisdiction of courts, without regard to pardon. Lincoln v. U. S. (1914), 49 Ct. Cl. 300.

Construction and operation in general.—This statute, being an enactment of former statutes, is to be construed as the original statutes were construed by the Supreme Court. Lincoln v. U. S. (1914), 49 Ct. Cl. 300. And this section must be executed with the limitations previously imposed by the Supreme Court. The proceedings go on under the Code just as under the original statutes relating to loyalty. Duncan v. U. S. (1913), 48 Ct. Cl. 488.

"Aid or comfort" to rebellion in general.—"Aid or comfort" defined. Young v.

U. S. (1877), 97 U. S. 39, 24 L. Ed. 992. A loyal person surrounded by contending armies is not bound to abandon his family; and removing it to a retired place of safety, though within the Confederate lines, is not aid and comfort. Hayden *v.* U. S. (1868), 4 Ct. Cl. 475. Involuntary patrol duty in the "home guard" of Mobile, not military, but in the nature of police duty, is not "aid or comfort." Miller *v.* U. S. (1868), 4 Ct. Cl. 288. It is not aid or comfort to the rebellion for an alien, resident abroad, to purchase the products of the insurrectionary districts for ordinary business purposes through a commercial house within the rebel lines, and to accept and pay drafts abroad drawn for the purchase price of the products. Harrison *v.* U. S. (1870), 6 Ct. Cl. 323. The mere writing of a letter during the rebellion by a British subject resident within the insurrectionary districts, addressed to the head of the rebel Government, unaccompanied by the sending, uttering, or publishing thereof, is not an act of aid or comfort to the rebellion, though it contain proffer of services. But the writing and sending of such a letter is aid and comfort to the rebellion, in violation of the alien's proper neutrality. Medway *v.* U. S. (1870), 6 Ct. Cl. 421. To unite in forming a copartnership for the purpose of running the blockade, shipping cotton, and bringing into the insurrectionary States articles suited to the wants of the people, the sanction of the Government to be first given, and nothing in fact being done by the copartnership, does not constitute aid or comfort to the rebellion. Austell *v.* U. S. (1871), 7 Ct. Cl. 599. The bombardment of Sumter was the beginning of the Rebellion, and if from that event a citizen did faithfully and consistently adhere to the United States, his previous errors should not be deemed sufficient to attach to him the infamy of treason. Culliton *v.* U. S. (1869) 5 Ct. Cl. 627. See Lynch *v.* U. S. (1867) 3 Ct. Cl. 392.

Presumptions and burden of proof.—The presumptions of loyalty are in favor of a claimant residing before and during the Rebellion in a loyal State, though he continue to own and work a plantation in Louisiana, as they are against one residing in a disloyal State. Turner *v.* U. S. (1867), 3 Ct. Cl. 400; Wayne *v.* U. S. (1868), 4 Ct Cl. 426; Fordham *v.* U. S. (1868), 4 Ct. Cl. 469. But see Thomas *v.* U. S. (1867), 3 Ct. Cl. 52, as to presumptions as to a colored freeman residing in insurgent States.

The residence of a citizen of a loyal State, for the purpose of gain, in a territory where the Rebel force holds sway, is prima facie evidence of giving aid and comfort. Stark *v.* U. S. (1868), 4 Ct. Cl. 280. But where a claimant shows that his residence within the insurrectionary States during a part of the Rebellion was involuntary, and establishes his loyalty for the remainder, a presumption exists in favor of his loyalty. Ealer *v.* U. S. (1868), 4 Ct. Cl. 372. The presumption of disloyalty does not attach to the citizen of a loyal State who was temporarily in the South at the outbreak of the Rebellion, and, being aged, infirm, and poor, was unable to escape. Spain *v.* U. S. (1869), 5 Ct. Cl. 598. The court will regard with suspicion the loyalty of a person who held Confederate bonds, or who embarked in the organization of a company designed to purchase steamers with a view to import and export merchandise. Claussen *v.* U. S. (1867), 3 Ct. Cl. 253.

A claimant should establish the fact that he did not give aid and comfort by his intimate associates, or at least by witnesses of whom some knowledge exists that they themselves were loyal, and not by his employees, or those interested in the property, the value of which is claimed. Id. And must show that he complied with the rigid requirements of the law in relation to allegiance and conduct during the Rebellion. Grossmeyer *v.* U. S. (1868), 4 Ct. Cl. 1. Direct and positive proof of loyalty is required. Dothage *v.* U. S. (1868), 4 Ct. Cl. 208. Claimants held required to prove affirmatively their loyalty. Zellner *v.* U. S. (1868), 4 Ct. Cl. 480. Testimony of a single witness negative in its character, is not satisfactory proof of loyalty, where the claimant voluntarily resided during the Rebellion within the insurrectionary districts, and had friends and neighbors who might testify as to his conduct during the war. Patterson *v.* U. S. (1870), 6 Ct. Cl. 40.

It is sufficient for a body corporate to show that it never gave aid or comfort to the Rebellion, by showing that it was incorporated for a lawful purpose, and that it never applied any part of its funds to aid the Rebellion. Hebrew Congregation Benai Berith Jacob *v.* U. S. (1870), 6 Ct. Cl. 241. Loyalty which a claimant may seek to establish must be shown both negatively and positively—that he never gave aid or comfort to the Rebellion, that he has consistently adhered to the United States. Wylie *v.* U. S. (1870), 6 Ct. Cl. 295.

See, also, Dereef *v.* U. S. (1867), 3 Ct. Cl. 163 [C. S. p. 1524].

Amnesty.—The proclamation of Dec. 25, 1868, relieves a citizen coming within its terms from making proof of loyalty. Witkowski *v.* U. S. (1871), 7 Ct. Cl. 393; Waring *v.* U. S. (1871), 7 Ct. Cl. 501. See U. S. *v.* Padelford (1869), 9 Wall. 531, 19 L. Ed. 788. And see Pargoud *v.* U. S. (1868), 4 Ct. Cl. 337.

The Court of Claims will take judicial notice of this proclamation. Lincoln v. U. S. (1914), 49 Ct. Cl. 300.

Stipulations.—A stipulation between a claimant's attorney and the Attorney General that ex parte affidavits may be taken instead of depositions can not be upheld by the court, so as to dispense with competent evidence which it deems material. Jones & Laughlin v. U. S. (1907), 42 Ct. Cl. 178.

Loyalty proved.—The provision requiring a claimant to allege that he had never given aid to rebellion, is met by allegation and proof of pardon for any acts of disloyalty committed during the Civil War, and for that purpose the general amnesty granted Dec. 25, 1868, furnishes sufficient proof. Lincoln v. U. S. (1914), 49 Ct. Cl. 300.

Expressed sentiments of loyalty, going beyond the Confederate lines, acts of kindness to Union prisoners, rendering services to United States military forces, or freeing slaves held proof of loyalty. Foley v. U. S. (1867). [C. S. p. 1525].

Loyalty not proved.—Gearing v. U. S. (1867), 3 Ct. Cl. 165. [C. S. p. 1525].

457. Claim dismissed on account of disloyalty.—The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the Government may be traversed by the Government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed. *Sec. 160, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1139).*

Notes of Decisions.

Construction and operation in general.—This statute, being an enactment of former statutes, is to be construed as the original statutes were construed by the Supreme Court. Lincoln v. U. S. (1914), 49 Ct. Cl. 300. And must be executed with the limitations previously imposed by the Supreme Court. The proceedings go on under the Code just as under the original statutes relating to loyalty. Duncan v. U. S. (1913), 48 Ct. Cl. 488. If one member of a business firm within the insurrectionary districts give aid or comfort to the rebellion, it defeats a recovery as to all of the firm, for the court can not sever the copartners, nor ascertain their individual interests. Betsinger v. U. S. (1870), 6 Ct. Cl. 350. But where the joint owners of captured property bring a joint suit for the proceeds, and the one establishes his loyalty and the other fails to do so, judgment will be rendered in favor of the one to the extent of his joint interest in the fund, and the petition of the other will be dismissed. Meldrim v. U. S. (1871), 7 Ct. Cl. 595. R. S., sec. 1073 (embodied herein), does not require an executor to prove the loyalty of his testator, for only proof of the loyalty of him who sues is required. White v. U. S. 1884), 19 Ct. Cl. 436.

Issues.—When a party sells goods to one whom he alleges to be the agent of a quartermaster, and all of the allegations of the petition are traversed, he must prove the appointment of both the quartermaster and of his agent. Calkins v. U. S. (1865), 1 Ct. Cl. 382.

458. Jurisdiction of the Court of Claims over demands by the United States.—The Court of Claims shall have jurisdiction to hear and determine the following matters: • • •

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office. *Par. 2, sec. 145, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1137).*

Notes of Decisions.

Set-off.—The right of set-off did not exist at common law, and is everywhere founded upon statutory regulation. Tillou *v.* U. S. 1 Ct. Cl. 220; 2 id. 588, and U. S. *v.* Eckford, 6 Wall. 484.

State laws.—State laws in such a case do not constitute the rule of decision, but the question arises, exclusively, under the act of Congress; and no local law nor usage can have any influence in its determination. Tillou *v.* U. S. (1865), 1 Ct. Cl. 220; 2 id. 588; Reeside *v.* Walker (1850), 11 How. 272, 290.

459. Jurisdiction of the Court of Claims over petition for relief from responsibility.—The Court of Claims shall have jurisdiction to hear and determine the following matters: * * *

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible. *Par. 3, sec. 145, Judicial Code, act of March 3, 1911 (36 Stat. 1137).*

Notes of Decisions.

Construction and operation in general.—The provision is prospective, and gives jurisdiction in cases which might occur, as well as in cases which had occurred at the time of its passage. Glenn *v.* U. S. (1868), 4 Ct. Cl. 501. Gives disbursing officers a right to relief which they did not possess before. Boggs *v.* U. S. (1909), 44 Ct. Cl. 367. Is not limited to times of war. Penrose *v.* U. S. (1906), 42 Ct. Cl. 29.

Disbursing officers within statute.—This provision is not limited to officers of the Army and Navy, but extends to disbursing officers of the executive departments. Hobbs *v.* U. S. (1881), 17 Ct. Cl. 189. The term "other disbursing officer" must be confined to the class of disbursing officers previously described. Henderson *v.* U. S. (1907), 42 Ct. Cl. 449. An acting commissary of subsistence intrusted with Government funds is within the statute. Wood *v.* U. S. (1889), 25 Ct. Cl. 98. The officer intrusted with a company fund is as responsible for it as for any other money confided to his care as a disbursing officer. Wood *v.* U. S. (1913), 48 Ct. Cl. 80.

Losses within statute.—"Losses by capture or otherwise" are losses by capture, robbery, theft, fire, or unavoidable accident, but not losses suffered through forgeries committed by the officer's clerk, as to which he would have recourse against the depositary. Hall *v.* U. S. (1873), 9 Ct. Cl. 270. The words "or otherwise" apply to losses occurring in any other way than by capture. Stevens *v.* U. S. (1906), 41 Ct. Cl. 344. An officer is entitled to credit for money taken from him, during his absence on duty, by a raiding party of rebels; he having left it safely locked in a chest in a building where other disbursing officers kept their funds, the building being in the charge of a sergeant detailed for duty in the office. Prime *v.* U. S. (1867), 3 Ct. Cl. 209. An officer in the receipt of public money, who is daily called on to disburse the same, should receive credit therefor, where his vouchers were captured by the enemy; it appearing that the return was prevented by incessant duty of the officer and his clerk, the danger of capture not having been supposed to be imminent. Murphy *v.* U. S. (1867), 3 Ct. Cl. 212. A disbursing officer, who in good faith deposited money in a designated depository, is not liable for loss through the bank's failure. Hobbs *v.* U. S. (1881), 17 Ct. Cl. 189. And an officer who gives receipts and accepts cash from his predecessor assumes responsibility for the correctness of the balances transferred to him, and if he does not verify them is responsible for any resulting loss. Boggs *v.* U. S. (1909), 44 Ct. Cl. 367. In an action of trover in the United States circuit court against an ex-Secretary of the Treasury for the value of certain cotton, it appeared that, so far as defendant was concerned, the cotton was seized in good faith as captured or abandoned property. Held that, irrespective of whether or not it was captured or abandoned property, the action is barred by R. S. sec. 1059, embodied herein. Lamar *v.* McCulloch (1885), 6 S. Ct. 1, 115 U. S. 163, 29 L. Ed. 360. See Hobbs *v.* U. S. (1881), 17 Ct. Cl. 189, holding that provision extends to losses caused by the failure of a designated depository. And see

Hill v. U. S. (1873), 9 Ct. Cl. 270, holding that losses suffered through forgeries by a clerk as to which the officer had a recourse against the depositary was not within statute. And see post, 465, and notes thereunder.

Jurisdiction.—Jurisdiction is acquired by claimant appearing and filing his petition for relief. Boggs v. U. S. (1909), 44 Ct. Cl. 367. But a petition does not become a claim until there has been on the part of the Government some authoritative demand for payment or a refusal to allow credit. Scott v. U. S. (1882), 18 Ct. Cl. 1. The power given to accounting officers to duplicate lost checks is not exclusive, and does not affect the jurisdiction of the court. Becker v. U. S. (1891), 26 Ct. Cl. 172.

Burden of proof.—The burden of proof rests on the officer. Boggs v. U. S. (1909), 44 Ct. Cl. 367. And his testimony alone is insufficient, when there were disinterested parties cognizant of all the circumstances. Patten v. U. S. (1867), 3 Ct. Cl. 397. And see Clark v. U. S. (1911), 46 Ct. Cl. 416, holding that an officer's precautionary measures were insufficient.

Findings.—The court should set forth in its findings the amount of loss, if any, which the petitioner has sustained. U. S. v. Clark (1876), 94 U. S. 73, 75, 24 L. Ed. 67.

Rules regulating appeals.—Act May 9, 1866 (14 Stat. 44), incorporated into his provision, does not dispense with the requirements of the Supreme Court rules regulating appeals from the Court of Claims. U. S. v. Clark (1876), 94 U. S. 73, 75, 24 L. Ed. 67.

Limitations.—It was held by the Supreme Court in U. S. v. Smith (14 Ct. Cls. 114, and 105 U. S. 620) that the statute of limitation applied to cases arising under this section.

460. Procedure in the Court of Claims where debtor alleges no settlement within three years.—Whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer or agent or contractor so indebted, or that he or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States had arisen and exists, and that he or the person he represents has applied to the proper department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application, and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the Attorney General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court; and unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred. The provisions of section one hundred and sixty six shall apply to cases under this section. *Sec. 180, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1141).*

Sec. 166 above referred to provides for the examination of claimant before commissioner and the action on failure to testify.

Notes of Decisions.

Construction in general.—The object of the statute is to secure a speedy and final settlement of the Government's demands. Gerding v. U. S. (1891), 26 Ct. Cl. 319.

Jurisdiction and power of court.—The court, on proper petition, may adjudicate and settle matters unadjusted in the department in which claimant does not demand a judgment or claim an indebtedness to him, but concedes that he is or has been indebted to the United States as an officer or agent. There can be no affirmative judgment in favor of the claimant. Gerding v. U. S. (1891), 26 Ct. Cl. 319. And the utmost that the court can determine in favor of the claimant is that he owes nothing. Gerding v. U. S. (1893), 28 Ct. Cl. 531.

Pleadings.—The petition must allege that there is or has been an indebtedness to the United States, and other facts disclosing jurisdiction. The allegation "that it has been claimed that the said W. V., under his said office, and upon his said accounts, is indebted to the United States," is not sufficient, if it is likewise alleged that the claimant never was indebted to the Government, and that the Government, in fact, was indebted to him. Gerding v. U. S. (1891), 26 Ct. Cl. 319.

461. Court of Claims may call on a department for information.—The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest. *Sec. 164, Judicial Code, act of Mar. 3, 1911 (36 Stat., 1140).*

Notes of Decisions.

Rules of court.—A rule of the Court of Claims requiring parties to present their claims to an executive department before suing in the court is unauthorized as a condition of presenting a claim in that court, in view of the act requiring the Attorney General to obtain from the proper department and the department to furnish such facts and evidence as it may be in possession of in relation to any claim prosecuted in the Court of Claims. U. S. v. Clyde (1871), 13 Wall. 38, 39, 20 L. Ed. 479.

Authority of court to call for information or papers.—The court has discretion to determine whether the evidence sought for is necessary or admissible. Woolverton v. U. S. (1891), 26 Ct. Cl. 215. And will not call for evidence presumptively in the hands of claimant. In re Calls for Evidence (1898), 33 Ct. Cl. 354. That papers are on file in a department will not give a party a right to have them brought into court. Woolverton v. U. S. (1891), 26 Ct. Cl. 215. The Auditor of the Treasury for the Post Office Department is an officer of the Treasury Department and accounts of postmasters in his custody are in the Treasury Department, within this section. (1894) 20 Op. Atty. Gen. 677.

Nature and requisites of calls.—A call on a department is in the nature of a subpœna duces tecum and can not be turned into a bill of discovery. In re Calls for Evidence (1898), 33 Ct. Cl. 354.

Calls on the departments are for "information and papers," and not for acknowledgments and promises. Leonard v. U. S. (1883), 18 Ct. Cl. 382. See In re Calls for Evidence (1898), 33 Ct. Cl. 354, for requisites of a call.

There must be sufficient particularity in a call to enable an intelligent clerk in the ordinary discharge of his duty to find the record. The responsibility of determining what is relevant can not be thrown upon the department. The evidence must appear on the face of the call to be relevant, material, and competent. A call for correspondence between the departments and its agents may be allowed, to show that other contractors were guilty of the delay and that claimant was compelled to wait for them. Calls should not be allowed where they are so general that they throw the responsibility of selecting the evidence upon the clerks or where they are presumably in the party's possession. Robinson v. U. S. (1913), 48 Ct. Cl. 454.

Authority and duty of departmental heads.—Replies to calls can not admit or waive any valid defense to a claim, nor create a cause of action. Leonard v. U. S. (1883), 18 Ct. Cl. 382. The head of a department is not at liberty to furnish on call information or papers, when to do so would, in his opinion, be injurious to the public interest. (1871) 13 Op. Atty. Gen. 539. And see also (1905) 25 Op. Atty. Gen. 320, holding that he may de-

case to furnish papers in a cause between private persons, when in his judgment the production thereof may prejudice the Government or the public interest, and may protect the chief of a bureau from producing official records, citing Boske v. Comingore (1900), 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846.

The head of a department is not legally bound, in obedience to a subpœna of a court, to appear in a suit between private parties and testify to facts which have come to his knowledge officially; but he may appear and give such testimony as he shall deem proper. (1905) 25 Op. Atty. Gen. 326.

Evidence.—Official letters of public officers have always been received as legal testimony. Savage v. U. S. (1864), 1 Ct. Cl. 170. Ex parte affidavits and other matter which may be transmitted to the court with claimant's petition by Congress, and be printed as a part of the record in the case, are not thereby made evidence. Clark v. U. S. (1865), 1 Ct. Cl. 246.

462. Evidence furnished by a department to the Court of Claims.—In all suits brought against the United States in the Court of Claims founded upon any contract, agreement, or transaction with any Department, or any Bureau, officer, or agent of a Department, or where the matter or thing on which the claim is based has been passed upon and decided by any Department, Bureau, or officer authorized to adjust it, the Attorney-General shall transmit to such Department, Bureau, or officer, a printed copy of the petition filed by the claimant, with a request that the Department, Bureau, or officer, shall furnish to the Attorney-General all facts, circumstances, and evidence touching the claim in the possession or knowledge of the Department, Bureau, or officer. Such Department, Bureau, or officer shall, without delay, and within a reasonable time, furnish the Attorney-General with a full statement, in writing, of all such facts, information, and proofs. The statement shall contain a reference to or description of all such official documents or papers, if any, as may furnish proof of facts referred to in it, or may be necessary and proper for the defense of the United States against the claim, mentioning the Department, office, or place where the same is kept or may be procured. If the claim has been passed upon and decided by the Department, Bureau, or officer, the statement shall succinctly state the reasons and principles upon which such decision was based. In all cases where such decision was founded upon any act of Congress, or upon any section or clause of such act, the same shall be cited specifically; and if any previous interpretation or construction has been given to such act, section, or clause by the Department, Bureau, or officer, the same shall be set forth succinctly in the statement, and a copy of the opinion filed, if any, shall be annexed to it. Where any decision in the case has been based upon any regulation of a Department, or where such regulation has, in the opinion of the Department, Bureau, or officer transmitting such statement, any bearing upon the claim in suit, the same shall be distinctly quoted at length in the statement. But where more than one case, or a class of cases, is pending, the defense to which rests upon the same facts, circumstances, and proofs, the Department, Bureau, or officer shall only be required to certify and transmit one statement of the same, and such statement shall be held to apply to all such cases, as if made out, certified, and transmitted in each case respectively. *R. S. 188.*

463. Costs of taking evidence paid by a claimant.—When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the Government, such fees shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose. *Sec. 171, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1151).*

464. Judgment of the Court of Claims.—Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced. *Sec. 146, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1137).*

Notes of Decisions.

Validity of statute.—The provision that on the trial of any cause in which any set-off or counterclaim is set up by the Government the court shall hear and determine the claim and demand for and against the Government and claimant and render proper judgment is valid. McElrath *v.* U. S. (1880), 102 U. S. 426, 26 L. Ed. 189.

Claims available as set-off or counterclaim.—Money paid to a public officer on the settlement of his accounts can not ordinarily be recovered back; but if he opens the settlement by bringing a suit for compensation, which at the time it was supposed he was not entitled to receive, he opens the whole case, and the defendants can maintain a counterclaim for moneys erroneously paid him. Yoes *v.* U. S. (1896), 31 Ct. Cl. 293. Money paid a mate in the Navy for mileage, in violation of law, may be recovered on a counterclaim. Baxter *v.* U. S. (1897), 32 Ct. Cl. 75. The action of accounting officers in approving and allowing the accounts of a contractor does not preclude defendants from disputing their correctness by setting up a counterclaim to recover back illegal or unauthorized payments. Ceballos *v.* U. S. (1907), 42 Ct. Cl. 318. And see Heinzel *v.* U. S. (1908), 43 Ct. Cl. 331, following Barnes *v.* District of Columbia (1887), 22 Ct. Cl. 366, holding that, while moneys illegally paid by a public officer may be recovered back, moneys legally paid, though in error of judgment, can not be recovered. And see McCallum *v.* U. S. (1909), 44 Ct. Cl. 194, holding that, where the Secretary of State agreed to pay $1,500 extra compensation for editing the laws of an extraordinary session of Congress and Congress appropriated the money, it can not be recovered back upon the ground that it exceeded the compensation fixed by the original contract, or that it comes within the rule that money paid in mistake of fact can be recovered back.

465. Decree of the Court of Claims in case of loss by a disbursing officer.—Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts. *Sec. 147, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1137).*

Notes of Decisions.

Construction and operation in general.—This statute is prospective in its operation and gives jurisdiction in cases which might occur or in cases which had occurred. Glenn *v.* U. S. (1868), 4 Ct. Cl. 501. It is not limited to times of war. Penrose *v.* U. S. (1906), 42 Ct. Cl. 29. It was intended to be auxiliary to the general system of the Treasury, which enables the accounting officers to secure the immediate payment of balances due from disbursing officers and yet open and readjust their accounts at any time. Smith *v.* U. S. (1878), 14 Ct. Cl. 114. And to give disbursing officers a right to relief which they did not possess before. And though the legal liability of disbursing officers remains unchanged, the court can award specific redress where the officer can show that his conduct was faultless. Boggs *v.* U. S. (1909), 44 Ct. Cl. 367.

Officers entitled to relief.—An acting commissary of subsistence, intrusted with Government funds, is entitled to relief from responsibility for their loss. Wood v. U. S. (1890), 25 Ct. Cl. 98. See Morrison v. U. S. (1877), 13 Ct. Cl. 1; affirmed on appeal (1877), 96 U. S. 232, 24 L. Ed. 688; Overton v. U. S. (1885), 20 Ct. Cl. 486. And see also, Scott v. U. S. (1882), 18 Ct. Cl. 1; Boyle v. U. S. (1886), 21 Ct. Cl. 300. And see ante, 450, and notes thereunder.

Jurisdiction of court. The court has jurisdiction of every loss which was without fault or negligence of the officer. Penrose v. U. S. (1906), 42 Ct. Cl. 29. And see ante, 450 and notes thereunder.

Limitations. Limitations do not begin to run until demand of payment, or refusal by accounting officers to allow a credit. Scott v. U. S. (1882), 18 Ct. Cl. 1.

Failure of officer to give bond as affecting right to relief. The failure of a disbursing officer to give a bond does not preclude him from relief for lost funds. Wood v. U. S. (1890), 25 Ct. Cl. 98.

Fault or negligence. The words "without fault or negligence" must be taken in their common signification. The former imports error; the latter, omission. The degree of care and diligence which the law requires is that which a prudent man would exact of his agent in a like manner. Magee v. U. S. (1869), 5 Ct. Cl. 486. Cases must be examined by the light of surrounding circumstances. What should be exacted from a disbursing officer as prudential decision in his situation, necessities, and conduct. What might excuse the conduct of a party at one time or place would not suit another state of facts. What cautions and wariness might require sometimes would not be necessary at others. Glenn v. U. S. (1870), 4 Ct. Cl. 501; Martin v. U. S. (1902), 37 Ct. Cl. 527. An officer having money in his possession must exercise the care and diligence of an intelligent and careful business man in his specialty. Martin v. U. S. (1902), 37 Ct. Cl. 527. Negligence precludes relief. Woog v. U. S. (1913), 48 Ct. Cl. 80.

Where a disbursing officer carries money in the way such officers generally carry it on similar occasions, and the money is lost, but lost amid circumstances utterly free from suspicion, and is accompanied by the most diligent efforts to recover it, the disbursing officer will be entitled to a decree relieving him from responsibility. Whittlesey v. U. S. (1869), 5 Ct. Cl. 452.

Where a paymaster sends a package of money to a Treasury depository in the same place, for safe keeping, by an orderly who has been detailed for service in his office, and the package is stolen by or from the orderly before it is received by the depository, and the loss is not discovered by the paymaster for some days, it can not be held to have been "without fault or negligence." Holmes v. U. S. (1875), 11 Ct. Cl. 642.

If a disbursing officer in good faith, without knowledge or suspicion of a bank's insolvency, and without the expectation of gain or other private motive, withdrew public moneys from the Treasury and deposited them with the bank, a designated depository, and the deposits being at that time authorized by law, the loss of the moneys through the failure of the bank can not be imputed to the fault or negligence of the officer. Hobbs v. U. S. (1881), 17 Ct. Cl. 189.

For a paymaster to allow a messenger carrying money to pass out of his sight, and, on finding him, to receive back the satchel in which the money had been placed without examination, held to be negligence. Stevens v. U. S. (1906), 41 Ct. Cl. 344.

Where a disbursing officer did not verify the monthly statements, and his omission enabled his clerk to use the receipts belonging to one quarter so as to show a false balance existing at the beginning of another quarter, it can not be held that the loss was "without fault or negligence"; and the fact that the Navy Regulations require pay officers to be responsible for the character of the clerks they nominate, and that the claimant retained a clerk of his successor and relied upon recommendations of character, does not relieve him from responsibility, where he is himself negligent. Boggs v. U. S. (1909), 44 Ct. Cl. 367.

Officer's precautionary measures held insufficient to entitle him to the benefit of the statute. Clark v. U. S. (1911), 46 Ct. Cl. 416.

Embezzlement by clerk.—A disbursing officer held responsible for a loss caused by the embezzlement of his clerk in abstracting money from a safe. Where a quartermaster's clerk embezzles money from the quartermaster, and transmits money to the Treasury to make good the account of another quartermaster, the first quartermaster is not entitled to a decree directing that the money in the Treasury be credited to himself. Penrose v. U. S. (1906), 42 Ct. Cl. 29.

Larceny by clerk.—The act extends to the case of an officer of Engineers, whose chief clerk, having a key and access to the office safe, steals money therefrom and absconds; it at the same time being shown that the officer found the chief clerk in the position when he assumed the duties of the office, and that the clerk has borne a good character, and that the officer exercised prudence in the care of the money and diligence to recover it. Howell v. U. S. (1871), 7 Ct. Cl. 512. See, also, Glenn v. U. S.

(1868), 4 Ct. Cl. 501, allowing relief from loss by theft.

Robbery.—A paymaster in the Army, traveling under orders to pay troops, attacked and robbed of Government funds by a highwayman, is entitled to relief. Broadhead *v.* U. S. (1883), 19 Ct. Cl. 125. See Wood *v.* U. S. (1889), 25 Ct. Cl. 98, holding that an assistant commissary was entitled to relief for loss by robbery.

Reward for recovery of stolen funds.—Money judiciously paid by a paymaster as a reward for the recovery of Government funds stolen from him without fault on his part should not fall on him. Glenn *v.* U. S. (1868), 4 Ct. Cl. 501.

Payment of loss as affecting right to relief.—Where a paymaster, without protest, pays over to the Treasury a deficiency found against him, and his account is settled and closed, it is too late for him to seek relief under act May 9, 1866; and his payment of the deficiency will conclude him, although it was made under the pressure of his suspension, the stoppage of his pay, and his liability to be court-martialed and dismissed. Hall *v.* U. S. (1873), 9 Ct. Cl. 270. But the accounts of paymasters in the Army never being closed, the court may render a decree for a credit, though claimant has been required to make good the loss. Stevens *v.* U. S. (1906), 41 Ct. Cl. 344.

Presumption and burden of proof.—Where a paymaster's petition seeking relief avers that he drew checks, which his clerk fraudulently raised, it will be presumed that the checks were drawn on some bank or banker, against whom the paymaster would have recourse for the wrongful payment. Hall *v.* U. S. (1873), 9 Ct. Cl. 270.

The burden of proof rests on the officer. Boggs. *v.* U. S. (1909), 44 Ct. Cl. 367.

Amount of loss.—Where it is clearly shown that a loss occurred, for which a disbursing officer was not responsible and with which he should not be charged, and that it is absolutely impossible to establish the precise amount of the loss by positive evidence, and the claimant has produced all the circumstantial evidence that the nature of the case admits of, the court will decree relief for the amount which it is satisfied was actually lost. Clark *v.* U. S. (1875), 11 Ct. Cl. 698. Circumstantial evidence, being all that the circumstances of the case admit of, supported by evidence of the officer's good character, is sufficient to establish the amount of the funds otherwise shown to have been captured. Christian *v.* U. S. (1871), 7 Ct. Cl. 431.

Witnesses, competency of.—A disbursing officer, seeking relief by suit, is a competent witness to prove the amount of money lost, if the loss be established by other testimony. Hoyle *v.* U. S. (1886), 21 Ct. Cl. 300. See Christian *v.* U. S. (1871), 7 Ct. Cl. 431, holding that a commissary bringing a suit can not be a witness on his own behalf to prove the contents of the captured package, or the amount of the captured funds.

466. No interest allowed before judgment.—No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. *Sec. 177, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1141).*

Notes of Decisions.

Construction and operation of statute in general.—Under this section interest is not recoverable against the United States on unpaid accounts or claims, in the absence of a stipulation to pay interest, or a statute allowing it. U. S. *v.* Sargent (1908), 162 Fed. 81, 89 C. C. A. 81. And can not be allowed on any claim except "upon a contract expressly stipulating for the payment of interest." Tillou *v.* U. S. (1865), 1 Ct. Cl. 220. The statute does not extend to a case coming into the court under a special act and resting on a treaty providing for payment of interest. Western Cherokee Indians *v.* U. S. (1891), 27 Ct. Cl. 1. See Rice *v.* U. S. (1887), 7 S. Ct. 1377, 122 U. S. 611, 30 L. Ed. 793, as to applicability of section to cases under subsequent special acts and to those under the captured or abandoned property act. And see, also, U. S. *v.* Barber (1896), 74 Fed. 483, 486, 20 C. C. A. 616, holding that act Mar. 3, 1887, sec. 10, does not repeal or modify this section.

Right to interest in general.—Generally interest is not allowable on claims against the Government, unless it has stipulated to pay it or it is given by statute. National Home for Disabled Volunteer Soldiers *v.* Parrish (1912), 194 Fed. 940, 114 C. C. A. 576; decree affirmed (1913), 33 S. Ct. 944, 229 U. S. 494, 57 L. Ed. 1296. And none can be recovered on unpaid accounts or claims, though they are just and allowed by the Treasury Department. Baxter *v.* U. S. (1892), 51 Fed. 671, 675, 2 C. C. A. 411. And can be awarded against the United States only by congressional war-

rant Treat v. Farmers' Loan & Trust Co. (1911), 185 Fed. 760, 108 C. C. A. 98, affirming judgment Central Trust Co. of New York v. Treat (C. C. 1909), 171 Fed. 301. Interest can be recovered from a sovereign only by the sovereign's consent; and where a sovereign consents to pay interest it means simple interest only. Ute Indians v. U. S. (1910), 45 Ct. Cl. 440. Interest as damages is controlled by the statute, though the action be authorized by a special act. Ely v. U. S. (1884), 19 Ct. Cl. 68. The exceptions to the rule that interest is not allowable on claims against the Government are found only in cases where the demands are made under special contracts, or special laws, expressly or by very clear implication providing for the payment of interest. (1855) 7 Op. Atty. Gen. 523; (1857) 9 Op. Atty. Gen. 57; (1862) 17 Op. Atty. Gen. 315. Where money is due and payable on a contract at a specific time and is withheld, the creditor is entitled to demand and receive interest at the rate prevailing in the forum where suit is brought, except as against the Government of the United States and sovereign States (1898) 22 Op. Atty. Gen. 172.

Claims on which interest is allowed.—Where Congress removed the bar of time as to a claim, with directions to the Court of Claims to be "governed by the rules and regulations heretofore adopted by the United States in settlement of like cases," and the claim was like others in which interest was to be allowed under an act of Congress the claimant was entitled to interest. U. S. v. McKee (1875), 91 U. S. 440, 23 L. Ed. 326. Where demand of interest on a claim founded on contract was a subject of difference, while negotiations are being carried on, the determination of which is provided for, interest is recoverable. U. S. v. Old Settlers (1892), 12 Sup. Ct. 650, 671, 148 U. S. 427, 37 L. Ed. 509. Interest on annuity under treaty with the Ohio Shawnees, Aug. 8, 1831, art. 7, held rightly allowed as "being a contract expressly stipulating for the payment of interest." U. S. v. Blackfeather (1894), 15 Sup. Ct. 64, 69, 155 U. S. 180, 39 L. Ed. 114. Interest included in the account of the sums due the Indians under treaty stipulation, transmitted by the Secretary of the Interior to the Cherokee Nation pursuant to the agreement for the cession to the United States of the Cherokee Outlet, made between the United States and the Cherokee Nation on Dec. 19, 1891, and ratified by Congress in act Mar. 3, 1893 (27 Stat. 641), is properly allowed notwithstanding this section, where the question of interest was a subject of difference while the negotiations were being carried on the determination of which was provided for in the agreement itself. U. S. v. Cherokee Nation (1906), 26 Sup. Ct. 588, 598, 202 U. S. 101, 50 L. Ed. 949.

Interest paid by New York on moneys borrowed by it to raise and supply troops in suppressing the rebellion included in the "costs, charges and expenses properly incurred" for that purpose, for which the acts of July 27, 1861, and March 8, 1863, obliged the United States to indemnify the respective States. Under such acts the State is entitled to reimbursement of interest paid by it on moneys borrowed for the purpose of suppressing the rebellion from its canal fund. U. S. v. New York (1896), 16 Sup. Ct. 402, 410, 160 U. S. 598, 40 L. Ed. 551. [C. S. p. 1539].

Where by private act the court is directed to hear a claim arising out of the treaty obligations with Mexico, and is authorized to use evidence taken before the commission which sat under the provisions of the treaty, the court must be regarded as taking the place of the commission. And where the private act conferring jurisdiction limits the relief to the unexpended balance of a fund derived from Mexico for the satisfaction of such claims, the suit must be regarded as against Mexico and not as against the Government and the court is not prohibited from awarding interest, and interest will be allowed if it was allowed by the commission in such cases. Atocha's Admx. v. U. S. (1872), 8 Ct. Cl. 427.

See U. S. v. Verdier (1896), 17 Sup. Ct. 42, 164 U. S. 213, 41 L. Ed. 407, as to allowance of interest on final settlement of a postmaster's account. See, also, Conant v. Kinney (C. C. 1908), 162 Fed. 581; judgment affirmed, Kinney v. Conant (1909), 166 Fed. 720, 92 C. C. A. 410; writ of certiorari denied (1909), 29 Sup. Ct. 703, 214 U. S. 526, 53 L. Ed. 1068, allowing interest from date of payment of legacy tax illegally exacted.

Claims on which interest is not recoverable.—Under a special statute requiring the court to investigate a claim and "ascertain, determine, and adjudge the amount equitably due such firm if any, for such loss or damage," no interest is allowable to claimant. Tillson v. U. S. (1879), 100 U. S. 43, 46, 25 L. Ed. 543.

On recovery of reasonable value of labor and materials furnished in constructing cofferdams, interest can not be allowed. Harvey v. U. S. (1885), 5 Sup. Ct. 465, 468, 113 U. S. 243, 28 L. Ed. 987.

Interest can not be allowed on a claim against the United States arising under a contract, unless provided for by the contract or by statute. Scully v. U. S. (D. C. 1912), 197 Fed. 827.

From a legal obligation created solely by statute no obligations to pay interest will arise. Wightman *v.* U. S. (1888), 23 Ct. Cl. 144.

Interest can not be recovered where a judgment is the cause of action. New York Cent. & H. R. R. Co. *v.* U. S. (1888), 24 Ct. Cl. 22.

A contractor can not recover interest paid on loans necessitated by the act of defendants in suspending the work. Myerle *v.* U. S. (1896), 31 Ct. Cl. 105. A contractor, forced by delay of the Government to borrow money, can not recover back interest paid. Myerle *v.* U. S. (1897), 33 Ct. Cl. 1.

The United States is under no obligation to allow interest on the awards made by the Florida judges in cases of claims of Spanish subjects under the ninth article of the treaty with Spain in 1819. (1884) 17 Op. Atty. Gen. 644.

In view of the general rule that interest is not recoverable against the United States, and the statute prohibiting the allowance of interest against it by the Court of Claims, interest can not be allowed by a court of admiralty on a claim for damages for the sinking of a vessel in collision by a United States gunboat, referred to such court by a special act of Congress, unless such act expressly authorizes it, and a provision that the proceedings including "the measurement of damages," shall be the same as in other admiralty cases, can not be considered such express authority. Pennell *v.* U. S. (D. C. 1908), 162 Fed. 75.

Time for and manner of computation of interest.—Act Mar. 3, 1887, sec. 10, does not authorize the recovery of interest on judgments of the Court of Claims from their rendition until an appropriation is made for their payment. U. S. *v.* Barber (1896), 74 Fed. 483, 486, 20 C. C. A. 616. Interest on a judgment in favor of a claimant begins to run when a certified copy is presented for payment, and ceases to run when the mandate of affirmance is issued or ordered to be issued. Hobbs *v.* U. S. (1884), 19 Ct. Cl. 220. But interest on a judgment appealed from can only be recovered when the same is affirmed. Pacific Railroad *v.* U. S. (1891), 26 Ct. Cl. 564. And see (1898) 22 Op. Atty. Gen. 172, holding that in an action for use and occupation or for mesne profits, where the recovery is of a sum in the nature of rent, interest is allowed on each annual sum from the end of the year.

Jurisdiction of courts to award interest.—The circuit court can not allow interest in a suit, no contract having stipulated for interest. Marvin *v.* U. S. (C. C. 1890), 44 Fed. 405, 410, appeal dismissed (1893), 13 Sup. Ct. 1053, 149 U. S. 789, 37 L. Ed. 961. It has no jurisdiction to award interest on a judgment which was rendered by the Court of Claims without making any provision for interest, and which has been paid. Walton *v.* U. S. (C. C. 1894), 61 Fed. 486. Interest can not be recovered in the United States circuit court on a judgment rendered in the Court of Claims; the question being incidental to the original suit, and the Court of Claims being the proper forum for its determination. Bunton *v.* U. S. (C. C. 1894), 62 Fed. 171.

467. Payment under judgment of the Court of Claims.—The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy. *Sec. 178, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1141).*

Notes of Decisions.

Construction in general.—The statute implies that the claim will not be discharged unless both judgment and interest be paid. Hobbs *v.* U. S. (1884), 19 Ct. Cl. 220. Interest on judgments is regulated by act Sept. 30, 1890, and not by Tucker Act, sec. 10, Pacific Coast S. S. Co. *v.* U. S. (1897), 33 Ct. Cl. 36; Mosby *v.* U. S. (1897), 33 Ct. Cl. 58. And can not lawfully be paid on a judgment against the United States where no appropriation is made therefor. (1892) 20 Op. Atty. Gen. 423.

Payment, when authorized.—Where a judgment against the United States was recovered in the Court of Claims, and a stipulation was made, which is of record in the case, that neither plaintiff nor defendant would take an appeal from such judgment, there is no legal objection to payment of the judgment before the expiration of the time allowed for taking an appeal (1889) 19 Op. Atty. Gen. 281.

Payment, to whom made.—It is proper to make a payment direct to the judgment creditor in a judgment against a collector of internal revenue in satisfaction of a judgment where payment has not been made by the officer. U. S. *v.* Frerichs (1888), 8 Sup. Ct. 514, 124 U. S. 315, 31 L. Ed. 471. Payment to a judgment cred-

ment of a claim against the Government in favor of the judgment debtor, if made without the consent of the latter, is unauthorized by law. (1884) 17 Op. Atty. Gen. 675.

Where a contractor with the Quartermaster's Department failed to perform certain work and an arrangement was effected whereby his bondsmen should take charge of and complete the work, the contractor executing and delivering to them a power of attorney by which they were authorized to receive and receipt for the money due on the contract, the department could recognize the power of attorney, and payment to the bondsmen on their receipted vouchers thereunder would discharge the Government. (1889) 19 Op. Atty. Gen. 239.

Payment, effect of.- Persons having claims against the United States which are disputed by the officers authorized to adjust the same may compromise the same and accept a smaller sum than the contract price, and when that is done the claimant can not subsequently recover for any part of the claim voluntarily relinquished in the compromise. Mason v. U. S. (1872), 17 Wall. 67, 70, 21 L. Ed. 504. A claimant voluntarily entering into a compromise and accepting a smaller sum and executing a discharge for the whole claim is bound thereby. Sweeny v. U. S. (1872), 17 Wall. 75, 77, 21 L. Ed. 575. A payment of a judgment satisfies the demand. U. S. v. Frerichs (1888), 8 Sup. Ct. 514, 124 U. S. 315, 37 L. Ed. 471; Vaughn v. U. S. (1899), 34 Ct. Cl. 342. The statute precludes the court from correcting the amount of a judgment after it has been satisfied. Russell v. U. S. (1879), 15 Ct. Cl. 168; Vaughn v. U. S. (1899), 34 Ct. Cl. 342. And see (1849) 5 Op. Atty. Gen. 176, determining that a claim having been disposed of by payment can not be reexamined to correct errors.

A claim investigated by the court and paid by Congress on the statutory condition that the receipt of the amount awarded by the court shall be "a full and final discharge" of the claim is extinguished and barred, and can not be reexamined by the court by virtue of a second reference. Pilkington v. U. S. (1901), 36 Ct. Cl. 357. Receiving the sum allowed by the decisions and awards estops claimant from questioning that such allowance and payment constituted a full and final satisfaction of his entire claim. (1849) 5 Op. Atty. Gen. 122. Good faith demands that money should not be taken except as a discharge. And a claimant is concluded by his receipt of the award. (1849) 5 Op. Atty. Gen. 176.

468. Final judgment of the Court of Claims to bar further demand.—Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy. *Sec. 179, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1141).*

Notes of Decisions.

Finality of judgments.—A judgment of the Court of Claims from which no appeal is taken is as conclusive under existing laws as the judgment of the Supreme Court until it is set aside on motion for new trial. U. S. v. O'Grady (1874), 22 Wall. 641, 22 L. Ed. 772. The finality of a judgment can not be contested by defendant on account of the filing of amended findings of fact, where this was done at his own request in connection with a motion for new trial, and he also subsequently took an appeal from the judgment after his motion for new trial was overruled. An amendment of its findings of fact may properly be made by the Court of Claims in order to make its findings conform to the truth, though final judgment has already been entered, but while its record has not yet passed out of its control by the allowance of an appeal. U. S. v. St. Louis & M. V. Transp. Co. (1902), 22 Sup. Ct. 350, 351, 184 U. S. 247, 46 L. Ed. 520. This section refers to judgments on the merits, and merely attaches to the final judgments of the court the conclusiveness which the common law ascribes to the final judgments of all courts of competent jurisdiction. Spicer v. U. S. (1869), 5 Ct. Cl. 34. A judgment under the court's general jurisdiction, which stands unvacated and unreversed, is final, though founded upon an erroneous ruling of law. Adams v. U. S. (1901), 36 Ct. Cl. 104. And is obligatory on the Government and claimant, and is a guide and precedent for executive departments. Meigs v. U. S. (1885), 20 Ct. Cl. 181. But a judgment appealed from, while the appeal is pending, is not final. Green v. U. S. (1883), 18 Ct. Cl. 93. And see Osborn v. U. S. (1873), 9 Ct. Cl. 153, holding that a final judgment in the Court of Claims can not be evaded by a second action on the same cause; and, notwithstanding the Supreme Court in a similar suit has reversed the doctrine of the Court of Claims, still the former recovery against the present claimant determines the rights

of the parties, and, if pleaded by the defendants, bars his second action. And see Green *v.* U. S. (1883), 18 Ct. Cl. 93, holding that a judgment of dismissal for want of jurisdiction is not final. And see, also, Belt's Ex'x *v.* U. S. (1879), 15 Ct. Cl. 92, holding that a judgment of the court as formerly organized was not final under act 1855, 10 Stat. 613, sec. 8, until confirmed by Congress.

469. Officers, etc., not to prosecute claims against the United States.—Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both. *Sec. 109, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1107).*

Notes of Decisions.

Retired Army officer as within statute.—A retired officer of the Army is "an officer of the United States," and so can not be an attorney for claimants in the Court of Claims. Tyler's Motion *v.* U. S. (1883), 18 Ct. Cl. 25; in re Winthrop (1805), 31 Ct. Cl. 35.

Commissioners of deeds for District of Columbia.—Commissioners of deeds for the District of Columbia are prohibited under the provisions of sections 109 and 113 of the Criminal Code from acting as agents or attorneys in the prosecution of pension claims against the United States. (1910) 28 Op. Atty Gen. 131.

Such commissioners are officers of the United States within the meaning of such sections. Id.

Internal revenue storekeeper.—An internal revenue storekeeper is an officer within the meaning of the act of Congress making it a criminal offense for any officer to act as attorney or agent in the prosecution of a claim against the United States. Angell *v.* Rowlett's Adm'r (1883), 4 Ky. Law Rep. (abstract) 909.

Appearing and arguing case as supporting claim.—To appear and argue a case for a claimant would be to support a claim against the United States, and would subject the officer to the penalty prescribed by statute. Tyler's Motion *v.* U. S. (1883), 18 Ct. Cl. 25.

470. Prosecution of claims by former officers and employees unlawful.—It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employee in any of the Departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee. *R. S. 190.*

* * * That it shall be unlawful for any person who, as a commissioned officer of the Army, or officer or employee of the United States, has at any time since April 6, 1917, been employed in any Bureau of the Government and in such employment been engaged on behalf of the United States in procuring or assisting to procure supplies for the Military Establishment, or who has been engaged in the settlement or adjustment of contracts or agreements for the procurement of supplies for the Military Establishment, within two years next

after his discharge or other separation from the service of the Government, to solicit employment in the presentation or to aid or assist for compensation in the prosecution of claims against the United States arising out of any contracts or agreements for the procurement of supplies for said Bureau, which were pending or entered into while the said officer or employee was associated therewith. A violation of this provision of this chapter shall be punished by a fine of not more than $10,000 or imprisonment for not more than one year, or both: *Provided*, That all Acts or parts of Acts inconsistent with any of the provisions of this Act are hereby repealed. *Chap. IV, act of July 11, 1919 (41 Stat. 131), making appropriations for the support of the Army.*

Notes of Decisions.

Claims pending in any department included. R. S. 190 is not limited to claims which were pending in the same department in which the ex-employee was employed but by the words "pending in either of said departments" it was made applicable to all claims which were pending in any of the departments while the employee was employed in one of them. 20 Op. Atty. Gen. 605.

Departments and officers, etc., thereof within the section.—An officer in the Army is not by virtue of that fact alone an officer in the War Department within the meaning of R. S. 190. But where Congress creates an office or bureau in the department and authorizes the appointment of an Army officer to the office or in the bureau, such officer then becomes an officer in the department, within the section. (1919) 31 Op. Atty. Gen. 471. R. S. 190 applies to employees of the Department of Justice, being persons receiving regular employment who take oath of office and have power to administer oaths to witnesses, although they hold no office known to the statute law but are employed and paid under a general appropriation for detection of crimes etc. (1894) 20 Op. Atty. Gen. 606.

The Civil Service Commission is not an executive department within the meaning of this section, and its officers, clerks, etc., are not within the inhibitions contained therein. (1903) 25 Op. Atty. Gen. 6.

Counsel before departments not to act as notaries.—The proviso in act June 29, 1906 (34 Stat. 622), amending sec. 558 of the Code of the District of Columbia, which provides that no notary public shall be authorized to take acknowledgments, etc., or perform any official act in connection with matters in which he is employed as counsel, etc., before any of the executive departments, applies not only to local attorneys but to all notaries who practice before the departments. (1907) 26 Op. Atty. Gen. 236.

Collection of claims by any means prohibited.—This section prohibits not merely the prosecution of claims by lawsuit but the collection of such claims in any manner. Van Metre v. Nunn (Minn. 1912), 133 N. W. 1012.

Suspension or disbarment of agents or attorneys prosecuting claims, etc., before department. It is competent to the head of a department, as a measure for the protection of the public interests committed to his charge, to decline to recognize, or to suspend the transaction of business with, an agent or attorney for frauds and fraudulent practices attempted or committed by him in the prosecution of claims before the department and whose character is such that a reasonable degree of confidence can not be placed in his integrity and honesty in dealing with the Government. (1869) 13 Op. Atty. Gen. 151; (1880) 16 Op. Atty. Gen. 488.

The head of a department, however, is not invested with any authority over the professional conduct of claim agents for the correction of mere private grievances, corresponding with that possessed by the courts of law over attorneys practicing before them. (1869) 13 Op. Atty. Gen. 151.

471. **Fraudulent claim not allowed.**— No claim shall be allowed by the accounting officers under the provisions of the Act of Congress approved June sixteenth, eighteen hundred and seventy-four, or by the Court of Claims, or by Congress, to any person where such claimant, or those under whom he claims, shall willfully, knowingly, and with intent to defraud the United States have claimed more than was justly due in respect of such claim, or presented any

false evidence to Congress, or to any department or court, in support thereof. *Sec. 178, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1141).*

The provisions of sec. 2, act of June 16, 1874 (18 Stat. 75), mentioned in this section, relate to claims arising out of the Civil War, and as they are practically obsolete are not given in this work.

472. Court of Claims may allow costs in certain cases.—If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court. *Sec. 152, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1138).*

473. Cost of printing record of case in the Court of Claims.—There shall be taxed against the losing party in each and every cause pending in the Court of Claims the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerk of said court and paid into the Treasury of the United States. *Sec. 176, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1141).*

474. New trial by the Court of Claims.—The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law. *Sec. 175, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1141).*

475. Right of appeal from the Court of Claims.—An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two. *Sec. 242, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1157).*

476. Appeal from the Court of Claims within ninety days.—All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct. *Sec. 243, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1157).*

477. Appeal from the Court of Claims if settlement be delayed.—The plaintiff or the United States, in any suit brought under the provision of the section last preceding, shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed. *Sec. 181, Judicial Code, act of Mar. 3, 1911 (36 Stat. 1142).*

For sec. 180 of Judicial Code, see 460, ante.

Notes of Decisions.

Powers of Treasury Department.—R. S., sec. 236, ante, 329, does not give that department power to go behind or revise judgments of the Court of Claims, or operate to deny an appeal to the United States Supreme Court; the claims mentioned in 329 referring to a different class from those passed on by the Court of Claims, and R. S., sec. 1089, making it the duty of the Secretary of the Treasury to pay judgments of the Court of Claims, "on presentation of a copy of said judgment

tified according to law." U. S. v. ... (1886), 119 U. S. 477, 7 Sup. Ct. ... 30 L. Ed. 440.

Judgments reviewable.—The appeal allowed by this section extends only to judgments. Sanborn v. U. S. (1892), 27 Ct. Cl. 5. An appeal lies on behalf of the Government from a judgment against it in a district court under act Mar. 3, 1887, though the amount is only $25 and costs. ... v. Davis (1889), 9 Sup. Ct. 657, 131 U. S. 36, 30 L. Ed. 93. The findings of fact and conclusions of law which the court makes and transmits to a department in any "claims or matter" referred to it by such department with the claimant's consent, under this section, is advisory only, and is not a judgment subject to review in the Supreme Court. In re Sanborn (1893), 13 Sup. Ct. 577, 579, 148 U. S. 222, 37 L. Ed. 429, affirming (1892), 27 Ct. Cl. 485. The right of appeal is the same right as is given to aggrieved parties to appeal from the Court of Claims. Reid v. U. S. (1909), 29 Sup. Ct. 171, 211 U. S. 529, 53 L. Ed. 313. See In re U. S. (1873), 17 Wall. 439, 445, 21 L. Ed. 696, holding that act Feb. 14, 1865, directing the court to examine into the claim of an individual, with power to fix and determine the amount of the damage sustained by the individual, makes the decision of the court final, and no appeal lies to the Supreme Court. And see also In re U. S. (1873), 17 Wall. 439, 443, 21 L. Ed. 696, holding that the act of 1863 granted an appeal. And see also (1903) 5 Op. Atty. Gen. 692, holding that the United States need not compensate parties neglecting to prosecute appeals. And see ante, 475.

Manner of obtaining review.—Judgments held reviewable by writ of error. Chase v. U. S. (1894), 15 Sup. Ct. 174, 155 U. S. 489, 39 L. Ed. 284.

CHAPTER 6.

DEPARTMENT OF THE NAVY AND THE MARINE CORPS.

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478. Detail of naval officers with the War Department.—The President may detail, temporarily, three competent naval officers for the service of the War Department in the inspection of transport vessels, and for such other services as may be designated by the Secretary of War. *R. S. 1537.*

479. Duty on shore by the Marine Corps.—The Marine Corps shall be liable to do duty in the forts and garrisons of the United States, on the sea-coast, or any other duty on shore, as the President, at his discretion, may direct. *R. S. 1619.*

480. Medical personnel of the Navy subject to the Articles of War when serving with the Army. Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and articles of war prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving. *Act of Aug. 29, 1916 (39 Stat. 573), making appropriations for the naval service.*

481. Marine Corps subject to rules and Articles of War when serving with Army.—The Marine Corps shall, at all times, be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President; and when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army. *R. S. 1621.*

See art. 2, Articles of War, ch. 53, post.

Notes of Decisions.

Marine Corps serving with Army.—Under this section a private in a brigade of the Marine Corps is not, while the brigade is detached for service with the Army, subject to the laws and regulations of the Navy, and a naval court-martial has no jurisdiction over him. U. S. v. Waller (D. C. 1905), 225 Fed. 673.

The Marine Corps is a part of the naval establishment, and is subject to the laws and regulations for the government of the Navy, save in the single instance when it has been "detached for service with the Army by order of the President." (1909) 28 Op. Atty. Gen. 15.

When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the President detaching it for service with the Army, the case is one of cooperation and not of incorporation, and in such a case no officer of the Marine Corps can exercise command over the Army any more than a naval officer can when some

part of the Navy is cooperating with the Army; and the converse is true of Army officers cooperating with the Marine Corps. Id.

Liability of an officer of the corps of marines to trial by Navy court-martial depends upon whether his misconduct took place while he was employed in the land service or whether it took place while he was employed with the Navy. (1817) 5 Op. Atty. Gen. 706.

482. Rations for Marine Corps on shore duty.— * * * Hereafter no law shall be construed to entitle enlisted men on shore duty to any rations or commutation therefor other than such as are now or may hereafter be allowed enlisted men in the Army: *Provided*, That when it is impracticable or the expense is found greater to supply marines serving on shore duty in the island possessions and on foreign stations with the Army ration, such marines may be allowed the Navy ration or commutation therefor. *Act of March 4, 1917 (39 Stat. 1189), making appropriations for the naval service: Provisions, Marine Corps.*

483. Camp equipage and transportation.—The officers of the Quartermaster's Department shall, upon the requisition of the naval or marine officer commanding any detachment of seamen or marines under orders to act on shore, in cooperation with land troops, and during the time such detachment is so acting or proceeding to act, furnish the officers and seamen with camp equipage, together with transportation for said officers, seamen, and marines, their baggage, provisions, and cannon, and shall furnish the naval officer commanding any such detachment, and his necessary aids, with horses, accouterments, and forage. *R. S. 1135.*

Similar provisions that the officers of the Subsistence Department should furnish rations to naval and marine detachments were made by R. S. 1143, post, 920.

Notes of Decisions.

Service of Marine Corps with Army.— When the Marine Corps is detached for service with the Army, and put on duty in forts and garrisons, it receives stores from the quartermaster for the Army. Reid *v.* U. S. (1883), 18 Ct. Cl. 625.

CHAPTER 7.

DEPARTMENT OF WAR.

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484. Secretary of War.—There shall be at the seat of Government an Executive Department to be known as the Department of War, and a Secretary of War, who shall be the head thereof. *R. S. 214.*

Notes of Decisions.

Acts establishing department.—The Department of War was created, with "a principal officer therein, to be called the Secretary for the Department of War," by act Aug. 7, 1789 (1 Stat. 49). In re Hennen (1839), 13 Pet. 230, 259, 10 L. Ed. 138; (1855) 7 Op. Atty. Gen. 453, 461.

Nothing was said in the act creating the department as to the method of appointing the Secretary; the matter was left to the provision of the Constitution, art. 2, sec. 2, which vests the power of appointment in the President. (1884), 18 Op. Atty. Gen. 58.

Powers and Duties of Secretary.—The powers and duties of all officers of the United States are limited and defined by the Constitution and laws of Congress, and on the question of the authority of the Secretary of War, the court must look mainly to the acts of Congress. Pierce v. U. S. (1868), 7 Wall. 666, 677, 19 L. Ed. 169.

485. Acting Secretary of War.—* * * * *Provided*, That the President may authorize and direct the commanding general of the Army or the chief of any military bureau of the War Department to perform the duties of the Secretary of War under the provisions of section one hundred and seventy-nine of the Revised Statutes, and section twelve hundred and twenty-two of the Revised Statutes shall not be held or taken to apply to the officer so designated by reason of his temporarily performing such duties. *Act of Aug. 5, 1882 (22 Stat. 238), making appropriations for legislative, executive and judicial expenses.*

R. S. sec. 179, ante, 171, referred to in this section, empowered the President, in case of the death, resignation, absence, or sickness of the head of any department, except the Attorney General, to authorize the head of any other department, or any civil officer in either department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform temporarily the duties of the vacant office.

R. S. sec. 1222, post, 2373, also referred to in this section, provided that no officer of the Army on the active list should hold any civil office.

486. Assistant Secretary of War.—Hereafter, in addition to such other duties as may be assigned him by the Secretary of War, the Assistant Secretary of War, under the direction of the Secretary of War, shall be charged with supervision of the procurement of all military supplies and other business of the War Department pertaining thereto and the assurance of adequate provision for the mobilization of matériel and industrial organizations essential to war-time needs. The Assistant Secretary of War shall receive a salary of $10,000 per annum. There shall be detailed to the office of the Assistant Secretary of War from the branches engaged in procurement such number of officers and civilian employees as may be authorized by regulations approved by the Secretary of War. The offices of Second Assistant Secretary of War and Third Assistant Secretary of War are hereby abolished. * * * *Sec. 5a, added to the act of June 3, 1916, by sec. 5, act of June 4, 1920 (41 Stat. 764–765).*

Act of Mar. 5, 1890 (26 Stat. 17), provided as follows:

"There shall be in the Department of War an Assistant Secretary of War, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of four thousand five hundred dollars a year, payable monthly, and who shall perform such duties in the Department of War as shall be prescribed by the Secretary or may be required by law."

This act was amended by act of Apr. 6, 1918 (40 Stat. 515), providing that "There shall be in the Department of War an Assistant Secretary, a Second Assistant Secretary, and a Third Assistant Secretary, each of whom shall be appointed by the President, by and with the advice and consent of the Senate. The Assistant Secretary shall be entitled to a salary of $5,000 per annum, payable monthly, and the Second Assistant Secretary and Third Assistant Secretary shall each be entitled to a salary of $4,500 per annum, payable monthly, and shall perform such duties in the Department of War as shall be prescribed by the Secretary or as may be required by law."

A previous provision for the appointment of an Assistant Secretary, made by act Aug. 5, 1882, sec. 1 (22 Stat. 237), was repealed by act July 7, 1884, sec. 1 (23 Stat. 179).

See ante, 169 and 171, with their notes.

Notes of Decisions.

Effect of act upon previous provision for conferring powers on chief clerk.—The act, by providing for an Assistant Secretary, required by R. S., sec. 177, ante, 169, to perform the duties of the Secretary during his temporary absence, did not wholly supersede the provision of act Mar. 4, 1874, post, 488, for authorizing the chief clerk during such absence of the Secretary to sign requisitions, etc., and the chief clerk may still be authorized, during the temporary absence of both the Secretary and the Assistant Secretary, to sign requisitions, etc., as provided by said act. (1903) 24 Op. Atty. Gen. 646.

487. Assistant and chief clerk.—Section two hundred and fifteen is amended by adding at the end of the section the following: "There shall be in the said Department an inferior officer, to be appointed by the said principal officer, to be employed therein as he shall deem proper, and to be called the chief clerk in the Department of War, and who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy, have the charge and custody of all records, books, and papers, appertaining to the said Department." *Act of Feb. 27, 1877 (19 Stat. 241), amending R. S. 215.*

Provisions applicable to all the departments, relating to the duties of chief clerks were made by R. S. secs. 173, 174, 176, ante, 106, 108.

See also R. S. sec. 177, ante, 169.

488. Requisitions signed by the chief clerk.—That when, from illness or other cause, the Secretary of War is temporarily absent from the War Department, he may authorize the chief clerk of the Department to sign requisitions upon the Treasury Department, and other papers requiring the signature of said Secretary; the same, when signed by the chief clerk during such temporary absence, to be of the same force and effect as if signed by the Secretary of War himself. *Act of Mar. 4, 1874 (18 Stat. 19).*

Notes of Decisions.

Effect of creation of office of Assistant Secretary.—This act was not wholly superseded by act Mar. 5, 1890 (see note to 786, ante), which provided for an Assistant Secretary of War, authorized by law to perform the duties of the Secretary during his temporary absence; and during the temporary absence from the department of both the Secretary and the assistant, the Secretary is empowered to authorize the chief clerk to sign requisitions, etc., this act being still in force, at least within the limited scope stated. (1903) 24 Op. Atty. Gen. 646.

489. Duties of the Secretary of War.—The Secretary of War shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to military commissions, the military forces, the warlike stores of the United States, or to other matters respecting military affairs; and he shall conduct the business of the Department in such manner as the President shall direct. *R. S. 216.*

Provisions applicable to the War Department with other departments, requiring commissions of all officers under direction and control of the Secretary to be made out and recorded in the department, and the department seal affixed thereto, were made by act June 26, 1896, sec. 1, post, 2259.

Notes of Decisions.

Previous provisions.—Before the passage of act May 8, 1792 (1 Stat. 279), sec. 5 of which provided that contracts and purchases for supplying the Army, etc., should be made by or under the direction of the Treasury Department, it would seem that the Secretary of War had a general supervision of such purchases and contracts, under the direction of the President, as properly falling within the scope of the duties devolving upon him by sec. 1 of act Aug. 7, 1789 (1 Stat. 49), creating the Department of War. (1870) 13 Op. Atty. Gen. 314, 319.

Secretary representative of President.—The orders of the Secretary, in the business of the department, are presumed to have been issued in the manner directed by the President, except when subject to special regulations of statute law, or where duties of a personal or judicial nature are intrusted to the President. In re Billings (1898), 33 Ct. Cl. 166, 176; Truitt v. U. S. (1898), 33 Ct. Cl. 398; (1855) 7 Op. Atty. Gen. 453; (1862), 10 Op. Atty. Gen. 171, 172. And see Wilcox v. Jackson (1839), 13 Pet. 498, 512, 10 L. Ed. 264.

The Secretary of War is the regularly constituted organ of the President for the administration of the Military Establishment of the Nation; and rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such be binding upon all within the sphere of his legal and constitutional authority. U. S. v. Eliason (1842), 16 Pet. 291, 301, 10 L. Ed. 968; Maxwell v. U. S. (1914), 49 Ct. Cl. 262; (1881) 17 Op. Atty. Gen. 13, 19.

The action of the President in approving the proceedings and confirming the sentence of a court-martial, as required by the Articles of War, although judicial in its nature, need not be attested by his sign manual; an order authenticated by the Secretary of War is sufficient. U. S. v. Page (1891), 11 Sup. Ct. 219, 137 U. S. 673, 34 L. Ed. 828; U. S. v. Fletcher (1893), 13 Sup. Ct. 552, 148 U. S. 84, 37 L. Ed. 378 (distinguishing Runkle v. U. S. [1887], 7 Sup. Ct. 1141, 122 U. S. 543, 30 L. Ed. 1167); Runkle v. U. S. (1884), 19 Ct. Cl. 396.

The Secretary of War, under general authority from the President, may exercise a discretionary power given to the President to allow additional rations to officers having a separate command. Parker v. U. S. (1828), 1 Pet. 293, 296, 7 L. Ed. 150.

A reservation of public lands, made at the request of the Secretary, for military purposes, must be considered as made by the

President. Wilcox *v.* Jackson ex dem. McConnel (1839), 13 Pet. 498, 513, 10 L. Ed. 264.

An order issued, "by direction of the Secretary of War," by the Major General of the Army, assigning an officer to staff duty, could not be regarded as the order of the President, under act Apr. 22, 1898, sec. 10 (30 Stat. 362), which provided that the President might assign officers to staff duty "in his discretion." Truitt *v.* U. S. (1903), 38 Ct. Cl. 398.

The expenditure of money appropriated by Congress to purchase a site for and construct defenses for a city is directly embraced within the President's executive functions, and such expenditure can only be made by the Secretary of War as the agent of the President. The President's deliberate and recorded disapproval of a particular purchase at a certain price effectually arrested and abrogated any proceedings for such purchase, even though they had approached a complete contract. (1862) 10 Op. Atty. Gen. 171, 182.

The action of the President, in matters relating to the Army, which require his approval and direction, may in general be signified through and authenticated by the head of the Department of War; and where the latter acts in such matters, he, in contemplation of law, acts under the direction of the President, and is to be regarded as the mere organ of the Executive will. (1877) 15 Op. Atty. Gen. 290.

An order issued by the Secretary by direction of the President need not be authenticated by the President's sign manual, where his signature is not required by statute or Army regulation; especially where the order, instead of resting upon the implication of authority from their official relations, expressly recites that it is issued by direction of the President. (1881) 17 Op. Atty. Gen. 13, 19.

Military commissions.—There being no statutory provision requiring a specified form of military commission, a letter of appointment from the Secretary of War may constitute such a commission and be conclusive evidence of appointment by the President. O'Shea *v.* U. S. (1893), 28 Ct. Cl. 392, 400.

Rules for administration of military establishment.—Rules and orders publicly promulgated through the Secretary of War, as the regularly constituted organ of the President for the administration of the military establishment of the Nation, must be received as the acts of the Executive, and as such be binding upon all within the sphere of his legal and constitutional authority. Such regulations can not be questioned or denied because they may be thought unwise or mistaken. U. S. *v.* Eliason (1842), 16 Pet. 291, 301, 10 L. Ed. 968.

The power of the Secretary of War, under the President, to establish rules for the government of the Army is necessarily limited, and does not extend to the repeal or contradiction of existing statutes, nor to the making of provisions of a legislative nature. (1906) 26 Op. Atty. Gen. 6.

Employment of agents, etc., and their compensation.—The Secretary of War, in the execution of his public duties, can not, in view of the provisions of act Aug. 23, 1842 (incorporated in R. S. sec. 1765, ante, 69), against extra compensation to public officers, employ and compensate collectors, etc., in the revenue service, for disbursing moneys appropriated for topographical purposes. (1845) 4 Op. Atty. Gen. 401.

But he was vested with a discretion which authorized him to allow to the subagent for the Indians west of the Rocky Mountains, for such expenditures, not previously authorized, as he might have previously authorized as proper. (1846) 4 Op. Atty. Gen. 477.

It was within the discretion of the Secretary of War to fix 30 days as the limit of the temporary duty to which a civilian clerk was assigned. Maxwell *v.* United States (1914), 49 Ct. Cl. 262.

Obligations and expenditures.—The Secretary of War has no general or unlimited power to bind the Government by indorsing or accepting negotiable paper. Peirce *v.* U. S. (1865), 1 Ct. Cl. 270.

The War Department had authority to send a surgeon to the International Medical Congress, at London, at the expense of the Government. It was a military service which the surgeon could be required to render. In re Billings (1888), 23 Ct. Cl. 166. But see Preston *v.* U. S. (1901), 37 Ct. Cl. 39.

Personal military service of Secretary, and expenses thereof.—The Secretary of War is not required to perform duties in the field. He does not compose any part of the Army, and has no service to perform that may not be done at the seat of Government. If he leaves the seat of Government for the seat of war, by order of the President, for military purposes, he may be paid the expenses of the tour; otherwise not. (1821) 1 Op. Atty. Gen. 457.

It is immaterial who proposed such service; if the President adopted the measure the Secretary should be paid the expenses. (1821) 1 Op. Atty. Gen. 493.

490. Custody of property for the War Department.—The Secretary of War shall have the custody and charge of all the books, records, papers, furniture, fixtures, and other property appertaining to the Department. *R. S. 217.*

See post, 1083 and notes thereto.

The transfer of military rolls and records of the Civil War and prior wars from other departments to the War Department was provided for by act July 27, 1892 (27 Stat. 275), act Aug. 18, 1894, sec. 1, res. Apr. 28, 1904, No. 35, and act Mar. 2, 1913, post 521.

Notes of Decisions.

Funds involved in controversy.—Where funds in the hands of the Secretary of War are involved in a controversy between parties, pending under different forms of procedure in different jurisdictions, they should be retained by him until a final adjudication of the whole matter by the tribunal to which the parties may last resort. (1896) 21 Op. Atty. Gen. 447.

Military reservations and property thereon.—The Secretary's long-continued exercise of power to grant licenses to use Government reservations without legislative objection implies the tacit assent of Congress to this custom, but it can not be maintained upon any ground except that of benefit to the public interests. (1890) 19 Op. Atty. Gen. 628; (1898) 22 Op. Atty. Gen. 240.

This section and R. S. sec. 161, ante, 175, do not authorize the granting of licenses for the occupation of parts of military reservations for the erection of hotels, church edifices, etc. (1897) 21 Op. Atty. Gen. 537.

The Secretary of War has no power to accept, for the Government, a donation of property, as a church edifice, for use in perpetuity of Roman Catholics. Id.

491. Flags captured in war.—The Secretary of War shall from time to time cause to be collected and transmitted to him, at the seat of Government, all such flags, standards, and colors as are taken by the Army from the enemies of the United States. *R. S. 218.*

Provisions for the disposition of certain Union and Confederate battle flags, in the custody of the department, were made by res. Feb. 28, 1905, No. 22 (33 Stat. 1284), and res. June 29, 1906, No. 43 (34 Stat. 837), but are omitted as temporary merely, and executed.

492. War Council.—The Secretary of War, the Assistant Secretary of War, the chief of staff of the Army, and the Chief of Staff shall constitute the War Council of the War Department, which council shall from time to time meet and consider policies affecting both the military and munitions problems of the War Department. Such questions shall be presented to the Secretary of War in the War Council, and his decision with reference to such questions of policy, after consideration of the recommendations thereon by the several members of the War Council, shall constitute the policy of the War Department with reference thereto. *Sec. 5b, added to the act of June 3, 1916, by sec. 5, act of June 4, 1920 (41 Stat. 765).*

493. Militia Bureau.—The Militia Division of the War Department shall hereafter be known as the Militia Bureau of the War Department. * * * *Sec. 81, act of June 3, 1916 (39 Stat. 203), as amended by sec. 4, act of June 4, 1920 (41 Stat. 782).*

For the creation and functions of the Division of Militia Affairs see Comp. G. O., Circular Bul. 1915, par. 168.

The National Militia Board, consisting of five officers on the active list of the Organized Militia, is referred to in sec. 81, act of June 3, 1916 (39 Stat. 203), as having been created by sec. 11, act of May 27, 1908 (35 Stat. 403), amending sec. 20, act of Jan. 21, 1903 (32 Stat. 779), although the board was not specifically designated therein by that title. The National Militia Board was abolished by said sec. 81, which, in addition to a provision like the above section, contained a declaration that the Militia Bureau, like other bureaus of the War Department, should be under the immediate supervision of the Secretary of War, and should not form a part of any other bureau, office, or organization.

Notes of Decisions.

Power of President.—The President held to have no power to establish a Bureau of Militia in the War Department without an act of Congress authorizing such bureau. (1861) 10 Op. Atty. Gen. 1.

494. Chief of the Militia Bureau.—* * * After January 1, 1921, the Chief of the Militia Bureau shall be appointed by the President, by and with the advice and consent of the Senate, by selection from lists of present and former National Guard officers, recommended by the Governors of the several States and Territories as suitable for such appointment, who hold commissions in the Officers' Reserve Corps, who have had ten or more years commissioned service in the National Guard, at least five of which have been in the line, and who have attained at least the grade of major. He shall hold office for four years, unless sooner removed for cause, and shall have the rank, pay and allowances of a major general of the Regular Army during his tenure of office, but shall not be entitled to retirement or retired pay. While serving as chief, his reserve commission shall continue in force, and shall not be terminated except for cause assigned. Until the chief is appointed, as provided in this section, the President may assign an officer of the Regular Army, not below the grade of colonel, to perform the duties of chief * * * *Sec. 81, act of June 3, 1916 (39 Stat. 203), as amended by sec. 44, act of June 4, 1920 (41 Stat. 782),* [illegible]

The Chief of the Militia Bureau was ex officio a member of the General Staff Corps until the enactment of sec. 5, act of June 4, 1920 (41 Stat. 762).

495. Assignment to the Militia Bureau.—* * * * For duty in the Militia Bureau and for the instruction of the National Guard the President shall assign such number of officers and enlisted men of the Regular Army as he may deem necessary. * * * *Sec. 81, act of June 3, 1916 (39 Stat. 203), as amended by sec. 44, act of June 4, 1920 (41 Stat. 782).*

496. Composition of the Finance Department.—There is hereby created a Finance Department. The Finance Department shall consist of one Chief of Finance with the rank of brigadier general, one hundred and forty-one officers in grades from colonel to second lieutenant, inclusive, and nine hundred enlisted men. * * * *Sec. 9a, added to the act of June 3, 1916, by sec. 9, act of June 4, 1920 (41 Stat. 766).*

On June 12, 1918, the financial activities of the Office of the Quartermaster General were consolidated under an assistant to the Acting Quartermaster General in charge of finance. Two divisions were organized under this officer, known as the Finance and Accounts Division and the Central Disbursing Division, the latter taking over functions formerly exercised by the depot quartermaster, Washington, D. C., in the settlement of transportation accounts and accounts for expressage. The Finance Service was organized as an independent operating bureau of the War Department by Supply Circular No. 98, dated Oct. 11, 1918, and a memorandum from the Assistant Chief of Staff (Director of Purchase, Storage, and Traffic), dated Apr. 11, 1919, in part is as follows:

"1. An assistant to the Director of Purchase, Storage, and Traffic, as Director of Finance, shall have responsibility and authority over the preparation of estimates, disbursements, money accounts, property accounts, finance reports, and pay and mileage of the Army.

"2. The Director of Finance shall assume authority over and responsibility for the activities, personnel, and equipment of the several finance and accounts divisions, branches, and offices of the General Staff, and of the supply corps of the Army, and shall assume authority over and responsibility for the finances of the Army, including the accounting for funds and property. The Director of Finance shall issue directions as to the order of such consolidation, together with such other instructions, regulations, and orders as shall be necessary to carry out the provisions of this circular."

Par. 1 of the above order was modified, Apr. 11, 1919, to the extent of making the Finance Service an operating service, and not a branch of the Purchase, Storage, and Traffic Division.

The duties and functions of the Finance Service were defined in General Order No. 104, W. D., Aug. 18, 1919, superseding General Order No. 72, W. D., June 5, 1919. Fourteen territorial zones, with headquarters in large cities, each in charge of a zone finance officer, were established to take charge of all financial activities in the respective zones.

The above section is the first recognition by Congress of the Finance Service (now the Finance Department).

497. Duties of the Chief of Finance.—The Chief of Finance, under the authority of the Secretary, shall be charged with the disbursement of all funds of the War Department, including the pay of the Army and the mileage for officers and the accounting therefor; and with such other fiscal and accounting duties as may be required by law, or assigned to him by the Secretary of War: • • • *Sec. 9a, added to the act of June 3, 1916, by sec. 5, act of June 4, 1920 (41 Stat. 766).*

497½. Civilian force, Finance Department.—For employees in the office of the Chief of Finance, $325,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding $1,800 per annum except the following: One at $5,000, one at $3,000, two at $2,750 each, one at $2,400, one at $2,250, four at $2,000 each; auditors for Red Cross accounts—one $3,500, one $3,000, four at $2,750 each. *Act of Mar. 3, 1921 (41 Stat. 1278), making appropriations for legislative, executive, and judicial expenses: Office of Chief of Finance.*

For personal services in the office of the Director of Finance, War Department, $183,000, which may be expended notwithstanding the third proviso of the paragraph entitled "Temporary employees, War Department," contained in the legislative, executive, and judicial appropriation act for the fiscal year 1921.—*Act of June 5, 1920 (41 Stat. 893), making appropriations for sundry civil expenses: War Department, temporary employees.*

498. Superintendent of State, War and Navy Building.—The President is hereby authorized and directed to designate from the Engineer Corps of the Army or the Navy, an officer well qualified for the purpose, who shall be detailed to act as superintendent of the completed portions of the State, War, and Navy Department building, under direction of the Secretaries of State, War, and Navy, who are hereby constituted a commission for the purposes of the care and supervision of said building, as hereinafter specified. Said officer shall have charge of said building, and all the engines, machinery, steam and water supply, heating, lighting, and ventilating apparatus, elevators, and all other fixtures in said building, and all necessary repairs and alterations thereof, as well as the direction and control of such force of engineers, watchmen, laborers, and others engaged about the building or the apparatus under his supervision; of the cleaning of the corridors and water closets; of the approaches, side-walks, lawns, court-yards, and areas of the building, and of all rooms in the sub-basement which contain the boilers and other machinery, or so much of said rooms as may be indispensable to the proper performance of his duties as herein provided. *Act of Mar. 3, 1883 (22 Stat. 553), making appropriations for legislative, executive, and judicial expenses.*

499. Annual report of the American National Red Cross.—That the said American National Red Cross shall as soon as practicable after the first day of July of each year make and transmit to the Secretary of War a report of its proceedings for the fiscal year ending June thirtieth next preceding, including a full, complete, and itemized report of receipts and expenditures of what-

ever kind, which report shall be duly audited by the War Department, and a copy of said report shall be transmitted to Congress by the War Department. *Sec. 6, act of Jan. 5, 1905 (33 Stat. 602), as amended by act of Feb. 27, 1917 (39 Stat. 946).*

The American National Red Cross annually shall reimburse the War Department for auditing the accounts of the American National Red Cross, as required by the act approved February 27, 1917, and the sum so paid shall be covered into the Treasury of the United States as a miscellaneous receipt.—*Act of May 29, 1920 (41 Stat. 658), making appropriations for legislative, executive, and judicial expenses.*

500. History of an organization furnished to the Governor of a State.—* * * and the Secretary of War, shall, upon the application of the Governor of any State, furnish to such Governor a transcript of the military history of any regiment or company of his State, under such regulations as the Secretary of War may prescribe, at the expense of such State. *Act of May 28, 1896 (29 Stat. 161), making appropriations for legislative, executive and judicial expenses: Record and Pension Office.*

For provisions of the act of June 5, 1920 (41 Stat. 951) as to records of the drafted forces in the World War, see post, 2257.

CHAPTER 8.

BUREAU OF INSULAR AFFAIRS.

Independent bureau established, 501.
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Chief of the bureau, 503.
Assistant to the chief of the bureau, 504.
Additional assistant to the chief, 505.

501. Independent bureau established.—That the Division of Insular Affairs of the War Department, organized by the Secretary of War, is hereby continued until otherwise provided, and shall hereafter be known as the Bureau of Insular Affairs of the War Department. The business assigned to said Bureau shall embrace all matters pertaining to civil government in the island possessions of the United States subject to the jurisdiction of the War Department. * * * *Sec. 87, act of July 1, 1902 (32 Stat. 712).*

The "Division of Customs and Insular Affairs" was created in the War Department by the Acting Secretary of War on Dec. 13, 1898, the title being changed to "Division of Insular Affairs" on Dec. 10, 1900.

502. Composition.—The officers of the Bureau of Insular Affairs shall be one Chief of the Bureau with the rank of brigadier general, and two officers below the grade of brigadier general: *Provided*, That during the tenure of office of the present Chief of the Bureau of Insular Affairs he shall have the rank of major general. *Sec. 14, act of June 3, 1916 (39 Stat. 176), as amended by sec. 11, act of June 4, 1920 (41 Stat. 769).*

Sec. 14, as originally enacted, merely provided that existing laws should not be construed as repealed by that act.

503. Chief of the Bureau.—That the Chief of the Bureau of Insular Affairs of the War Department shall hereafter be appointed by the President for the period of four years, unless sooner relieved, with the advice and consent of the Senate, and while holding that office he shall have the rank, pay, and allowances of a brigadier general. *Act of June 25, 1906 (34 Stat. 456).*

504. Assistant to the Chief of the Bureau.—* * * *Provided*, That the Secretary of War is hereby authorized to detail an officer of the Army, whom he may consider especially well qualified, to act as principal assistant to the Chief of the Bureau of Insular Affairs of the War Department, and said principal assistant while acting under said detail shall have the rank, pay, and allowances of a major: *And provided further*, That the provisions of section twenty-seven of the Act of February second, nineteen hundred and one, with reference to the transfer of officers of the line to the departments of the staff for tours of service, shall apply to the vacancy created by this Act and to the return of the officer so detailed to the line of the Army. *Act of Mar. 2, 1907 (34 Stat. 1162), making appropriations for the support of the Army: Bureau of Insular Affairs.*

Act Feb 2, 1901, sec. 27, mentioned in this section, is set forth post, 2288. But see 2233 and 2231, post.

505. Additional assistant to the Chief of the Bureau.—The Secretary of War is hereby authorized to detail one additional officer of the army as assistant to the Chief of the Bureau of Insular Affairs, under the same provisions of law

in regard to the vacancy in the line thus created and return to the line as govern in the case of the assistant authorized by the Act of March second, nineteen hundred and seven; and the assistant herein authorized while serving in this capacity shall have the rank, pay, and allowances of colonel; and both officers detailed in the Bureau of Insular Affairs shall hereafter be designated, while on this duty, as assistants to the chief of the bureau. *Act of Mar. 23, 1910* (*36 Stat. 248*), *making appropriations for the support of the Army.*

No officer holding a permanent commission in the Army with rank below that of major shall be detailed as assistant to the Chief of the Bureau with rank of colonel, by a provision of act Aug. 24, 1912, sec. 1, post, 2349. But see 2353 and 2331, post.

CHAPTER 9.

GENERAL STAFF CORPS.

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  Period of detail, 509.
Duties:
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  Policies affecting National Guard and Reserves, 512.
  Recommendations for legislation, 513.
  General Staff with troops, 514.
  Chief of Staff, 515.

HISTORICAL NOTE.

Sec. 3, act of Feb. 14, 1903 (32 Stat. 831), originally prescribed the composition of the General Staff Corps, providing that it was to consist of 1 Chief of Staff, 2 general officers, 4 colonels, 6 lieutenant colonels, 12 majors, and 20 captains, detailed from the Army at large for periods of four years, unless sooner relieved. It was superseded in part by sec. 5, act of Aug. 24, 1912, which provided that the General Staff Corps should consist of 2 general officers, one of whom was to be Chief of Staff, 4 colonels, 6 lieutenant colonels, 12 majors, and 12 captains. Sec. 5, act of June 3, 1916 (39 Stat. 167), which the above section superseded, provided that the General Staff Corps should consist, in time of peace, of a Chief of Staff, detailed from major generals of the line, 2 assistants to the Chief of Staff, who should be general officers of the line (one not above the grade of brigadier general, to be president of the Army War College), 10 colonels, 10 lieutenant colonels, 15 majors, and 17 captains.

By the act of May 12, 1917 (40 Stat. 46), amending sec. 5, act of June 3, 1916 (39 Stat. 167), it was provided that during the World War the General Staff Corps should consist of 1 Chief of Staff, who should be a general officer of the line and take rank and precedence over all other officers of the Army, 2 assistants to the Chief of Staff, who should be general officers of the line (one of whom should be president of the Army War College), 10 colonels, 12 lieutenant colonels, 32 majors, and 34 captains.

The Chief of Coast Artillery (formerly the Chief of Artillery), was an additional member of the General Staff Corps by sec. 5, act of Feb. 14, 1903 (32 Stat. 831), secs. 1, 2, act of Jan. 25, 1907, and sec. 5, act of June 3, 1916 (39 Stat. 168).

The Chief of the Militia Bureau was ex officio a member of the General Staff Corps by sec. 81, act of June 3, 1916 (39 Stat. 203).

506. The corps established.—That there is hereby established a General Staff Corps, to be composed of officers detailed from the Army at large, under such rules as may be prescribed by the President. *Sec. 1, act of Feb. 14, 1903 (32 Stat. 830).*

But see 507, post.

Provisions relating to clerks and other civilian employees in the office of the General Staff, and forbidding details, etc., of clerks or other employees to or from the War Department, made by act June 22, 1906, sec. 1, are set forth, ante, 41. Similar provisions forbidding the assignment to duty with any bureau in the War Department of clerks or other employees at the office of the Chief of Staff, made by act June 5, 1920, are also set forth ante, 40.

507. Composition.—The General Staff Corps shall consist of the Chief of Staff, the War Department General Staff and the General Staff with troops. The War Department General Staff shall consist of the Chief of Staff and four assistants to the Chief of Staff selected by the President from the general

officers of the line, and eighty-eight other officers of grades not below that of captain. The General Staff with troops shall consist of such number of officers not below the grade of captain as may be necessary to perform the General Staff duties of the headquarters of territorial departments, armies, army corps, divisions, and brigades, and as military attachés abroad. * * * *Sec. 5, act of June 3, 1916 (39 Stat. 167), as amended by sec. 5, act of June 4, 1920 (41 Stat. 762–763).*

508. Selection of officers for eligible list.—* * * and such details shall be limited to officers whose names are borne on the list of General Staff Corps eligibles. The initial eligible list shall be prepared by a board consisting of the general of the Army, the commandant of the General Staff College, the commandant of the General Service Schools, and two other general officers of the line, selected by the Secretary of War, who are not then members of the General Staff Corps. This board shall select and report the names of all officers of the Regular Army, National Guard, and Officers' Reserve Corps of the following classes who are recommended by them as qualified by education, military experience, and character for General Staff duty;

(a) Those officers graduated from the Army Staff College or the Army War College prior to July 1, 1917, who, upon graduation, were specifically recommended for duty as commander or chief of staff of a division or higher tactical unit, or for detail in the General Staff Corps;

(b) Those officers who, since April 6, 1917, have commanded a division or higher tactical unit, or have demonstrated by actual service in the World War that they are qualified for General Staff duty.

After the completion of the initial General Staff Corps eligible list, the name of no officer shall be added thereto unless upon graduation from the General Staff School he is specifically recommended as qualified for General Staff duty, and hereafter no officer of the General Staff Corps except the Chief of Staff shall be assigned as a member of the War Department General Staff unless he is a graduate of the General Staff College or his name is borne on the initial eligible list. The Secretary of War shall publish annually the list of officers eligible for General Staff duty, and such eligibility shall be noted in the annual Army Register. If at any time the number of officers available and eligible for detail to the General Staff is not sufficient to fill all vacancies therein, majors or captains may be detailed as acting General Staff Officers under such regulations as the President may prescribe: *Provided*, That in order to insure intelligent cooperation between the General Staff and the several noncombatant branches officers of such branches may be detailed as additional members of the General Staff Corps under such special regulations as to eligibility and redetail as may be prescribed by the President; but not more than two officers from each such branch shall be detailed as members of the War Department General Staff. * * * *Sec. 5, act of June 3, 1916 (39 Stat. 167), as amended by sec. 5, act of June 4, 1920 (41 Stat. 763).*

It was provided by sec. 5, act of June 3, 1916 (39 Stat. 168) that no officer, other than the Chief of Staff and the general officers, should be detailed to the General Staff Corps except upon the recommendation of a board of five officers not below the rank of colonel, whose recommendation, to be effective, must be acted upon within one year from the time when made or prior to the convening of another board.

509. Period of detail.—* * * In time of peace the detail of an officer as a member of the General Staff Corps shall be for a period of four years, unless sooner relieved, * * * *Sec. 5, act of June 3, 1916 (39 Stat. 167), as amended by sec. 5, act of June 4, 1920 (41 Stat. 763).*

510. Duties.—That the duties of the General Staff Corps shall be to prepare plans for the national defense and for the mobilization of the military forces in time of war; to investigate and report upon all questions affecting the efficiency of the Army and its state of preparation for military operations; to render professional aid and assistance to the Secretary of War and to general officers and other superior commanders, and to act as their agents in informing and coordinating the action of all the different officers who are subject under the terms of this Act to the supervision of the Chief of Staff; and to perform such other military duties not otherwise assigned by law as may be from time to time prescribed by the President. *Sec. 2, act of Feb. 14, 1903 (32 Stat. 831).*

* * * The duties of the War Department General Staff shall be to prepare plans for national defense and the use of the military forces for that purpose, both separately and in conjunction with the naval forces, and for the mobilization of the manhood of the Nation and its material resources in an emergency, to investigate and report upon all questions affecting the efficiency of the Army of the United States, and its state of preparation for military operations; and to render professional aid and assistance to the Secretary of War and the Chief of Staff. * * * *Sec. 5, act of June 3, 1916 (39 Stat. 167), as amended by sec. 5, act of June 4, 1920 (41 Stat. 763).*

511. Duties limited.—* * * Hereafter, members of the General Staff Corps shall be confined strictly to the discharge of duties of the general nature of those specified for them in this section and in the Act of Congress approved February 14, 1903, and they shall not be permitted to assume or engage in work of an administrative nature that pertains to establish bureaus or offices of the War Department, or that, being assumed or engaged in by members of the General Staff Corps, would involve impairment of the responsibility or initiative of such bureaus or offices, or would cause injurious or unnecessary duplication of or delay in the work thereof. *Sec. 5, act of June 3, 1916 (39 Stat. 165), as amended by sec. 5, act of June 4, 1920 (41 Stat. 764).*

512. Policies affecting the National Guard and reserves.—* * * All policies and regulations affecting the organization, distribution and training of the National Guard and the Organized Reserves, and all policies and regulations affecting the appointment, assignment, promotion, and discharge of reserve officers, shall be prepared by committees of appropriate branches or divisions of the War Department General Staff, to which shall be added an equal number of reserve officers, including reserve officers who hold or have held commissions in the National Guard, and whose names are borne on lists of officers suitable for such duty, submitted by the governors of the several States and Territories. For the purposes specified herein, they shall be regarded as additional members of the General Staff while so serving: *Provided*, That prior to January 1, 1921, National Guard officers who do not hold reserve commissions, if recommended by the governors of the several States and Territories, may be designated by the President as members of the committees herein provided for, and while so serving such officers shall receive the pay and allowances of their corresponding grades in the Regular Army. * * * *Sec. 5, act of June 3, 1916 (39 Stat. 167), as amended by sec. 5, act of June 4, 1920 (41 Stat. 763-764).*

513. Recommendations for legislation. * * * Whenever any plan or recommendation involving legislation by Congress affecting national defense or the reorganization of the Army is presented by the Secretary of War to Congress, or to one of the committees of Congress, the same shall be accompanied, when not incompatible with the public interest, by a study prepared in the

appropriate division of the War Department General Staff, including the comments and recommendations of said division for or against such plan, and such pertinent comments for or against the plan as may be made by the Secretary of War, the Chief of Staff, or individual officers of the division of the War Department General Staff in which the plan was prepared. * * * *Sec. 5, act of June 3, 1916 (39 Stat. 167), as amended by sec. 5, act of June 4, 1920 (41 Stat. 764).*

514. Duties with troops.—* * * The duties of the General Staff with troops shall be to render professional aid and assistance to the general officers over them; to act as their agents in harmonizing the plans, duties, and operations of the various organizations and services under their jurisdiction, in preparing detailed instructions for the execution of the plans of the commanding generals, and in supervising the execution of such instructions. * * * *Sec. 5, act of June 3, 1916 (39 Stat. 167), as amended by sec. 5, act of June 4, 1920 (41 Stat. 764).*

515. Duties of the Chief of Staff.—* * * The Chief of Staff shall preside over the War Department General Staff and, under the direction of the President, or of the Secretary of War under the direction of the President, shall cause to be made, by the War Department General Staff, the necessary plans for recruiting, organizing, supplying, equipping, mobilizing, training, and demobilizing the Army of the United States and for the use of the military forces for national defense. He shall transmit to the Secretary of War the plans and recommendations prepared for that purpose by the War Department General Staff and advise him in regard thereto; upon the approval of such plans or recommendations by the Secretary of War, he shall act as the agent of the Secretary of War in carrying the same into effect. * * * *Sec. 5, act of June 3, 1916 (39 Stat. 167), as amended by sec. 5, act of June 4, 1920 (41 Stat. 764).*

The principal duties of the Chief of Staff, as prescribed by sec. 4, act of Feb. 14, 1903 (32 Stat. 831), where they were first laid down, were the supervision, under the direction of the President or of the Secretary of War, under the direction of the President, of all troops of the line and of the staff corps and departments; he was also a member of the Board of Ordnance and Fortification and was to perform such other military duties as might be assigned to him by the President.

When by the act of Apr. 23, 1904 (33 Stat. 262), the Adjutant General's Department (except The Adjutant General) and the Record and Pension Office were merged, the officers of the consolidated department were made subject to the Chief of Staff in all matters pertaining to command, discipline or administration.

CHAPTER 10.

ADJUTANT GENERAL'S DEPARTMENT.

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HISTORICAL NOTE.

The office of Adjutant General, which had existed during the Government under the Articles of Confederation, was created by sec. 7 of the act of Mar. 5, 1792 (1 Stat. 241), which made provision for an adjutant who was to do the duty of an inspector; sec. 3 of the act of May 30, 1796 (id. 483), contained a similar provision for an inspector who was to do the duty of adjutant general, but who was to continue in service until Mar. 4, 1797, and no longer. Temporary provision seems to have been made for the performance of the duties of the department from Mar. 4, 1797, until May, 1798, when, in anticipation of war with France, an increase of the military establishment was authorized and provision made in sec. 6 of the act of May 28, 1798 (id. 559), for the appointment of an adjutant general with the rank and pay of a brigadier general. Sec. 14 of the act of Mar. 3, 1799 (id. 749), contained the requirement that the adjutant general of the Army should be, ex officio, assistant inspector general, and that deputy inspectors general should be, ex officio, deputy adjutants general, and should perform the duties of adjutant general in the armies to which they might be assigned. These officers were disbanded on June 15, 1800, in pursuance of a requirement to that effect contained in the act of May 14, 1800 (2 id. 85). Sec. 3 of the act of Mar. 16, 1802 (id. 132), provided for an adjutant and inspector of the Army, who was to be taken from the field officers. Sec. 4 of the act of Jan. 11, 1812 (id. 671), created the office of Adjutant General, with the rank and pay of a brigadier general, which continued to exist until the close of the war when it was discontinued in the reduction accomplished by the act of Mar. 3, 1815 (3 id. 224). The duties of the department were again performed by officers temporarily detailed for the purpose for a little more than a year, when, by the act of Apr. 24, 1816 (3 id. 297), the temporary establishment was made permanent and the strength of the department was fixed at 1 adjutant and inspector general (brigadier general), 1 assistant adjutant general (colonel) for each division, and 1 assistant adjutant general (major), for each brigade. At the general reduction of 1821 the department was reduced to a single officer—an adjutant general of the Army—with the rank of a colonel of Cavalry. By sec. 7 of the act of July 5, 1838 (5 id. 256), 2 assistant adjutants general (brevet majors) and 4 brevet captains were added to the department. By sec. 6 of the act of June 18, 1846 (9 id. 17), 4 assistant adjutants general were added for the period of the existing

war; by sec. 2 of the act of Mar. 3, 1847 (id. 184), 1 lieutenant colonel and 2 brevet captains were authorized under the same restriction as to tenure of office. By sec. 3 of the act of July 19, 1848 (id. 247), the limitation contained in the two acts last cited was removed, and the establishment, as it existed at the close of the war with Mexico, was made permanent; the vacancies were not to be filled, however, until the further order of Congress; but, by sec. 4 of the act of Mar. 2, 1849 (id. 351), this restriction was repealed and the President was authorized to make appointments and promotions in the department as then constituted by law.

At the outbreak of the War of the Rebellion the department was reorganized, its composition being fixed by the act of Aug. 3, 1861 (12 Stat. 287), at 1 brigadier general, 1 colonel, 2 lieutenant colonels, 4 majors, and 12 captains. By sec. 22 of the act of July 17, 1862 (id. 597), 1 colonel, 2 lieutenant colonels, and 9 majors were added to the establishment, with the requirement that vacancies in the grade of major should thereafter be filled by selections from captains in the Army. By sec. 10 of the act of July 28, 1866 (14 id. 338), the composition of the department was fixed as follows: One brigadier general, 2 colonels, 4 lieutenant colonels, and 13 majors. The grade of captain not being provided for in this enactment was thenceforward discontinued. This statute contained the requirement that vacancies in the office of adjutant general should thereafter be filled by selection from the officers of the department. By sec. 2 of the act of Mar. 3, 1869 (15 id. 318), promotions and appointments in the department were forbidden until the further order of Congress, but by Joint Resolution No. 12, of Apr. 10, 1869 (16 id. 53), this statute was suspended in its operation as to vacancies which had existed on Mar. 3, 1869. By the act of Mar. 3, 1873 (17 id. 578), the appointment of 1 major to the department was authorized, and, by the act of Mar. 3, 1875 (18 id. 478), the restriction upon appointments and promotions imposed by the act of Mar. 3, 1869, was removed and the composition of the department fixed at 1 brigadier general, 2 colonels, 4 lieutenant colonels, and 10 majors. By the act of Feb. 28, 1887 (24 id. 434), the grades of rank of the officers constituting the department were rearranged so far as to consist of 1 brigadier general, 4 colonels, 6 lieutenant colonels, and 6 majors, the vacancies created by the act to be filled by promotion according to seniority. By the act of Aug. 6, 1894 (28 id. 234), the number of majors in the department was reduced to 4. By the act of May 18, 1898 (30 id. 419), the appointment of 1 colonel and 1 major was authorized, with the proviso that upon the muster out of the volunteer forces no promotions or appointments should be made until the number of officers of the above grades had been reduced to that authorized by the law in force prior to the passage of the act. By sec. 3 of the act of June 6, 1900 (31 id. 655), the rank of major general was conferred upon the adjutant general "during the service of the present incumbent." All these provisions were superseded by act Feb. 2, 1901, sec. 13 (31 Stat. 751), which provided that the Adjutant General's Department should consist of 1 adjutant general with the rank of major general, but that when a vacancy should occur in the office on the expiration of the service of the then incumbent by retirement or otherwise the adjutant general should thereafter have the rank and pay of a brigadier general, 5 assistant adjutants general with the rank of colonel, 7 assistant adjutants general with the rank of lieutenant colonel, and 15 assistant adjutants general with the rank of major. Said act Feb. 2, 1901, sec. 13 (31 Stat. 751), was superseded by sec. 6, act of June 3, 1916 (39 Stat. 169), which provided that the Adjutant General's Department should consist of The Adjutant General with the rank of brigadier general, 7 adjutants general with the rank of colonel, 13 adjutants general with the rank of lieutenant colonel, and 30 adjutants general with the rank of major. This act in turn was superseded by sec. 6, act of June 4, 1920, post, 517.

Subsequent to said act Feb. 2, 1901, the Adjutant General's Department, and the officers thereof, except The Adjutant General, were consolidated with the Record and Pension Office, and the officers thereof, to constitute the Military Secretary's Department of the Army and the Military Secretary's office of the War Department, by provisions of act Apr. 23, 1904 (33 Stat. 362). By a proviso of said act, when the office of Adjutant General should become vacant, the vacancy so created on the active list of the Army should not be filled; and by further provisions of that act and of act Mar. 2, 1905 (33 Stat. 830), the titles of the offices of Assistant Adjutant General and of Assistant Chief of the Record and Pension Office were changed to Military Secretary. But by provisions of act Mar. 2, 1907 (34 Stat. 115–118), the Military Secretary's Department was to be known as the Adjutant General's Department, the senior in rank of the officers of that department was to be designated The Adjutant General, the other officers of the department were to be designated adjutants general, and the Military Secretary's office of the War Department was to be known as the Adjutant General's office.

Said subsequent provisions superseded to some extent those of said act Feb. 2, 1901, sec. 13 particularly in regard to the title and rank of the Adjutant General, who was designated "The Adjutant General," the title of the other officers, which was changed from "assistant adjutant general" to "adjutant general," and the number of such officers with the rank of major, which was reduced from 15 to 10, which were in turn provided by this section as to the number of the adjutants general.

Said subsequent provisions of act Apr. 23, 1904 (33 Stat. 302), also superseded those of sec. 25 of said act Feb. 21, 1901 (31 Stat. 754), relating to the rank of the Chief Clerk, Assistant Chief of the Record and Pension Office of the War Department, by consolidating said officers, with the officers of the Adjutant General's Department, one department of the Army, and making the Adjutant General's office and the Record and Pension Office, a consolidated bureau of the War Department, and regulating the rank, etc., of the officers so consolidated.

Appointments and promotions in the department other than to fill vacancies provided for in this section were regulated by sec. 28 of said act of Feb. 2, 1901, post, 2336 Appointments from officers of volunteers to fill original vacancies in the department were authorized by a provision of act Mar. 2, 1901 (31 Stat. 900), omitted here as temporary in effect.

The assistant adjutants general, subsequently designated "adjutants general," were required to perform the duties of assistant inspectors general when the convenience of the service required them to do so by R. S., sec. 1130, post, 520.

516. The department established.— * * * *Provided*, That hereafter the Military Secretary's Department of the Army shall be known as the Adjutant-General's Department, the senior in rank of the officers of said department shall be designated by the title of The Adjutant-General, the other officers of the department shall be designated by the title of Adjutant-General, and The Military Secretary's Office of the War Department shall be known as the Adjutant-General's Office. *Act of March 2, 1907 (34 Stat. 1158), making appropriations for the support of the Army.*

517. Composition.—The Adjutant General's Department shall consist of The Adjutant General with the rank of major general, one assistant with the rank of brigadier general, who shall be Chief of the Personnel Bureau, and one hundred and fifteen officers in grades from colonel to captain, inclusive. * * * *Sec. 5, act of June 3, 1916 (39 Stat. 169), as amended by sec. 6, act of June 4, 1920, (41 Stat. 765).* [illegible].

518. Promotion to the rank of lieutenant-colonel.—* * * *Provided*, That when a vacancy of lieutenant-colonel shall occur in the list of either permanent or detailed officers of that grade in The Military Secretary's Department, the officer now holding a permanent appointment with the rank of major in that department may be promoted to such vacancy. *Act of March 2, 1907 (34 Stat. 1161), making appropriations for the support of the Army.*

See sec. 2279, post.

519. Temporary employees. Not exceeding $500,000 of the appropriation of $3,500,000 for the care and custody of the draft records and for the employment of clerical assistance for the purpose of furnishing to adjutants general of States statements of service of soldiers who served in the war with Germany shall be available for the employment of clerical assistance necessary for the purpose of furnishing such information from the records of the demobilized army as may be properly furnished to public officials, former soldiers, and other persons entitled to receive it: *Provided*, That the Secretary of War shall reallot the appropriation of $4,000,000 for temporary employees in the War Department in such manner as will provide an allotment of $174,000 for the office of The Adjutant General in addition to the allotments already made for that office for the current fiscal year for work in connection with records of the demobilized army. *Act of March 6, 1920 (41 Stat. 509).*

For additional employees in the Office of The Adjutant General, $797,210: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding $1,800 per annum except the following: Six at $2,400 each, two at $2,000 each. *Act of Mar. 3, 1921 (41 Stat. 1277), making appropriations for legislative, executive, and judicial expenses: Adjutant General's Office.*

For appropriation for draft records, see 2257, post.

520. Inspection by assistant adjutants-general.—Assistant adjutants-general shall, in addition to their own duties, perform those of assistant inspectors-general, when the convenience of the service requires them to do so. *R. S. 1130.*

The assistant adjutants general were to be entitled adjutants general by a provision of act Mar. 2, 1907, ante, 516.

521. Records of the Revolutionary War and the War of 1812.—That all military records, such as muster and pay rolls, orders, and reports relating to the personnel or the operations of the armies of the Revolutionary war and of the war of eighteen hundred and twelve, now in any of the Executive Departments, shall be transferred to the Secretary of War to be preserved, indexed and prepared for publication. *Act of Aug. 18, 1894 (28 Stat. 403).*

That, within the limits of the appropriation herein made, the Secretary of War is hereby authorized and directed to collect or copy and classify, with a view to publication, the scattered military records of the Revolutionary War, including all troops acting under State authority, and the Secretary of the Navy is hereby authorized and directed to collect or copy and classify, with a view to publication, the scattered naval records of the Revolutionary War. *Sec. 1, act of March 2, 1913 (37 Stat. 723).*

That all such records in the possession or custody of any official of the United States shall be transferred, the military records to the War Department and the naval records to the Navy Department. *Sec. 2, act of March 2, 1913 (37 Stat. 723).*

The act of July 27, 1892 (27 Stat. 275), had contained the requirement that "the military records of the American Revolution and of the war of eighteen hundred and twelve, now preserved in the Treasury and Interior Departments, be transferred to the War Department, to be preserved in the Record and Pension Division of that Department, and that they shall be properly indexed and arranged for use."

522. Military records prior to the Civil War.—That the military rolls and records of the Indian wars or any other wars prior to the civil war, now preserved in the Interior or other Departments, be transferred to the War Department, to be preserved in the Record and Pension Office of that Department, and that they shall be properly indexed and arranged for use. *Joint Res. 34, Apr. 28, 1904 (33 Stat. 591).*

This was a joint resolution, entitled "Joint resolution providing for the transfer of certain military rolls and records from the Interior and other Departments to the War Department."

A similar provision for the transfer to the Navy Department of naval records, rolls, etc., of wars, down to the War of the Rebellion, was made by act Apr. 27, 1904, sec. 1.

523. Records of militia and volunteer forces.—That all returns and muster rolls of organizations of the volunteer forces and of militia organizations while in the service of the United States shall be rendered to The Adjutant General of the Army, and upon the muster out of such organizations the records pertaining to them shall be transferred to and filed in The Adjutant General's Office. And regimental and all other medical officers serving with volunteer troops, or with militia organizations in the service of the United States, in the field or

elsewhere, shall keep a daily record of all soldiers reported sick or wounded, as shown by the morning calls or reports, and shall deposit such reports, with other reports provided for in this section, in The Adjutant General's Office, as provided for herein for other reports, returns, and muster rolls. *Sec. 9, act of April 25, 1914 (38 Stat. 350).*

No provision for volunteer organizations is made in sec. 1, national defense act as amended by act of June 4, 1920, post, 2113.

Transcript of military history of regiment or company may be furnished governor of a State. See ante, 500.

524. Roll of the military telegraph corps in the Civil War.—That the Secretary of War is hereby authorized and directed to prepare a roll of all persons who served not less than ninety days in the operation of military telegraph lines during the late civil war, and to issue to each, upon application, unless it appears that his service was not creditably performed, or to the representatives of those who are dead, suitable certificates of honorable service in the military telegraph corps of the Army of the United States, stating the service rendered, the length of such service, and the dates, as near as may be, between which such service was performed: *Provided*, That this law shall not be construed to entitle the persons herein mentioned to any pay, pension, bounty, or rights not herein specifically provided for. *Act. of Jan. 26, 1897 (29 Stat. 497).*

525. Duties of the Personnel Bureau.—* * * The Personnel Bureau shall be charged, under such regulations as may be prescribed by the Secretary of War, with the operating functions of procurement, assignment, promotion, transfer, retirement, and discharge of all officers and enlisted men of the Army: *Provided*, That territorial commanders and the chiefs of the several branches of the Army shall be charged with such of the above-described duties within their respective jurisdictions as may be prescribed by the Secretary of War. *Sec. 6, act of June 3, 1916 (39 Stat. 169), as amended by sec. 6, act of June 4, 1920 (41 Stat. 765).*

This Bureau apparently takes over the functions of two divisions existing, at the time of the passage of this section, in the Adjutant General's Office: the Officers' Division, having charge of the appointment, promotion, elimination, and assignment of both permanent and temporary officers, the custody of records pertaining to the same, and the organization of new units so far as officers are concerned, and the Enlisted Division, having charge of recruiting for the Army and all correspondence relative to individual enlisted men of the Army.

526. United States Disciplinary Barracks replaced the Military Prison.—* * * *Provided*, That the United States military prison at Fort Leavenworth, Kansas, shall hereafter be known as the United States Disciplinary Barracks and the branches of said prison as branches of such barracks. *Act of Mar. 4, 1915 (38 Stat. 1074), making appropriations for the support of the Army: Quartermaster Corps, Incidental expenses.*

The United States Military Prison, Fort Leavenworth, Kansas, shall hereafter be known as the United States Disciplinary Barracks. *Par. 1, sec. 2, act of Mar. 4, 1915 (38 Stat. 1084), amending Chap. 6, Title XIV, Revised Statutes.*

Ch. 6, supra, consisted of R. S. secs. 1344–1361.

The United States Military Prison was established by R. S. sec. 1344, as amended by act May 21, 1874 (18 Stat. 48), said amendatory act fixing the location of the prison at Fort Leavenworth, Kans., instead of at Rock Island, Ill., as provided in the original act. Said amendatory act, though passed before the enactment of the Revised Statutes, became effective as a subsequent statute, and as repealing any portion of the Revised Statutes inconsistent therewith, by virtue of R. S. sec. 5601. Thereafter provisions for the transfer of the military prison at Fort Leavenworth from the Department of War to the Department of Justice, to be known and used as a United States penitentiary,

were made by act. Mar. 2, 1895, sec. 1. Subsequent provisions for the erection of a United States penitentiary on a site on the Fort Leavenworth Reservation, and for the restoration to the Department of War of the premises transferred therefrom to the Department of Justice, when such penitentiary should be completed, in accordance with the provisions of said act Mar. 2, 1895, sec. 1, were made by act June 10, 1896, sec. 1 (29 Stat. 380).

The existing laws pertaining to or affecting the United States Disciplinary Barracks, guards, and disciplinary organizations are to continue and remain in force, except as specifically provided otherwise by sec. 22 of the national defense act of June 3, 1916, post, 2095.

527. Location of the Disciplinary Barracks.—That the Attorney-General is hereby authorized and directed to select on the military reservation at Leavenworth, Kansas, within limits hereinafter described, a site for the erection of a penitentiary and other buildings, wall, and workshops for the employment of United States prisoners, with such improvements as he may direct in connection with the completion of the several buildings; said penitentiary to be of a capacity to accommodate at least one thousand two hundred convicts, and to be situated on said grounds and within the following boundary lines: Beginning at a point at the northwestern intersection of Grant and Logan avenues, thence north seventy-two degrees west more or less, forty-five hundred feet more or less to a stone in the field north of the Government farm barn, thence due west fifteen hundred feet more or less to the north side of Logan Avenue; thence along said avenue and its prolongation to the western boundary of the Military Reservation; thence south along said line to the southwest corner of said reservation, thence east along the south line of said reservation to the pike leading north from the city of Leavenworth to the post of Fort Leavenworth; thence north along said pike to the point of beginning; and that these grounds thus described shall be, and hereby are, set apart from the contiguous military reservation for United States penitentiary purposes, and assigned to and placed under the care and control of the Attorney-General as a United States penitentiary reservation: *Provided*, That when the United States Penitentiary shall be occupied and applied to the purposes contemplated by this Act, the buildings and grounds within the said Military Reservation of Fort Leavenworth that were transferred from the Department of War to the Department of Justice, in accordance with the provisions of the Act of Congress approved March second, eighteen hundred and ninety-five, shall be restored to the control of the said Department of War: *And provided further*, That this prison reservation shall be open for military tactical purposes, when such purposes do not interfere with the discipline of said prison. *Sec. 1, act of June 10, 1896 (29 Stat. 380).*

528. Branches of the Disciplinary Barracks.—The Secretary of War may, from time to time, designate any building or structure or any part thereof under the control of the Secretary of War and pertaining to the military establishment as a branch disciplinary barracks for the confinement and detention of offenders whom it is impracticable to send to the United States Disciplinary Barracks at Fort Leavenworth, Kansas; and all branch disciplinary barracks and all offenders sent thereto for confinement and detention therein shall be subject to the laws respecting the United States Disciplinary Barracks at Fort Leavenworth, Kansas, and the offenders sent thereto for confinement and detention therein. *Par. 8, sec. 2, act of Mar. 4, 1915 (38 Stat. 1086), amending chap. 6, Title XIV, Revised Statutes.*

529. Government and control of the Disciplinary Barracks.—The government and control of the United States Disciplinary Barracks and of all offenders

sent thereto for confinement and detention therein shall be vested in the Adjutant General of the Army under the direction of the Secretary of War, who shall from time to time make such regulations respecting the same as may be deemed necessary, and who shall submit annually to Congress a full statement of the financial and other affairs of said institution for the preceding fiscal year. *Par 3, sec. 2, act of Mar. 4, 1915 (38 Stat. 1085), amending chap. 6, Title XIV, Revised Statutes.*

530. **Officers and guards for the Disciplinary Barracks.**—The officers of the United States Disciplinary Barracks shall consist of a commandant and such subordinate officers as may be necessary, who shall be detailed by the Secretary of War from the commissioned officers of the Army at large. In addition to detailing for duty at said disciplinary barracks such number of enlisted men of the Staff Corps and departments as he may deem necessary, the Secretary of War shall assign a sufficient number of enlisted men of the line of the Army for duty as guards at said disciplinary barracks and as noncommissioned officers of the disciplinary organizations hereinafter authorized. Said guards, and also the enlisted men assigned for duty as noncommissioned officers of disciplinary organizations, shall be detached from the line of the Army, or enlisted for the purpose; and said guards shall be organized as infantry, with noncommissioned officers, musicians, artificers, and cooks of the number and grades allowed by law for infantry organizations of like strength: *Provided*, That at least one of said guards shall have the rank, pay, and allowances of a battalion sergeant major. *Par. 4, sec. 2, act of Mar. 4, 1915 (38 Stat. 1085), amending chap. 6, Title XIV, Revised Statutes.*

531. **Duties of the commandant of the Disciplinary Barracks.**—The commandant of the United States Disciplinary Barracks shall have command thereof and charge and custody of all offenders sent thereto for confinement and detention therein; shall govern such offenders and cause them to be employed at such labor and in such trades and to perform such duties as may be deemed best for their health and reformation and with a view to their honorable restoration to duty or their reenlistment as hereinafter authorized; shall cause note to be taken and a record to be made of the conduct of such offenders; and may shorten the daily time of hard labor of those who by their obedience, honesty, industry, and general good conduct earn such favors—all under such regulations as the Secretary of War may from time to time prescribe. *Par. 5, sec. 2, act of Mar. 4, 1915 (38 Stat. 1085), amending chap. 6, Title XIV, Revised Statutes.*

532. **Military offenses punishable by confinement.**—Persons sentenced to confinement upon conviction by courts-martial or other military tribunals of crimes or offenses which, under some statute of the United States or under some law of the State, Territory, District, or other jurisdiction in which the crime or offense may be committed, are punishable by confinement in a penitentiary, including persons sentenced to confinement upon conviction by courts-martial or other military tribunals of two or more acts or omissions, any one of which, under the statute or other law hereinbefore mentioned, constitutes or includes a crime or offense punishable by confinement in a penitentiary, may be confined at hard labor, during the entire period of confinement so adjudged, in any United States, State, Territorial, or District penitentiary, or in any other penitentiary directly or indirectly under the jurisdiction of the United States; and all persons sentenced to confinement upon conviction by courts-martial or other military tribunals who are not confined in a penitentiary may be confined and detained in the United States Disciplinary Barracks. *Par. 2,*

sec. 2, act of Mar. 4, 1915 (38 Stat. 1084), amending chap. 6, Title XIV, Revised Statutes.

533. Disciplinary organizations, etc.—The Secretary of War shall provide for placing under military training those offenders sent to the United States Disciplinary Barracks for confinement and detention therein whose record and conduct are such as to warrant the belief that upon the completion of a course of military training they may be worthy of an honorable restoration to duty or of being permitted to reenlist; may provide for the organization of offenders so placed under military training into disciplinary companies and higher units, organized as infantry, with noncommissioned officers, except color sergeants, selected or appointed from the enlisted men assigned to duty for that purpose pursuant to the provisions of paragraph four hereof; and may provide for uniforming, arming, and equipping such organizations. *Par. 6, sec. 2, act of Mar. 4, 1915 (38 Stat. 1085), amending chap. 6, Title XIV, Revised Statutes.*

But see 2995, post.

534. Pardon of military prisoners.—Whenever he shall deem such action merited the Secretary of War may remit the unexecuted portions of the sentences of offenders sent to the United States Disciplinary Barracks for confinement and detention therein and in addition to such remission may grant those who have not been discharged from the Army an honorable restoration to duty, and may authorize the reenlistment of those who have been discharged or upon their written application to that end order their restoration to the Army to complete their respective terms of enlistment, and such application and order of restoration shall be effective to revive the enlistment contract for a period equal to the one not served under said contract. *Par. 7, sec. 2, act of Mar. 4, 1915 (38 Stat. 1085), amending chap. 6, Title XIV, Revised Statutes.*

535. Parole of general prisoners.—* * * *Provided further*, That the authority now vested in the Secretary of War to give an honorable restoration to duty, in case the same is merited, to general prisoners confined in the United States disciplinary barracks and its branches shall be extended so that such restoration may be given to general prisoners confined elsewhere, and the Secretary of War shall be, and he is hereby, authorized to establish a system of parole for prisoners confined in said barracks and its branches, the terms and conditions of such parole to be such as the Secretary of War may prescribe. *Act of Mar. 4, 1915 (38 Stat. 1074), making appropriations for the support of the Army.*

Notes of Decisions.

Habeas corpus.—Quaere, whether a writ of habeas corpus lies when petitioner had been paroled upon conditions expressly assented to by him. In re Feinler (Sup. Ct., D. C., 1921), 49 Wash. L. R. 147.

536. Donation to a dishonorably discharged prisoner.—* * * for a donation of $10 to each dishonorably discharged prisoner upon his release from confinement under court-martial sentence, involving dishonorable discharge; * * *. *Act of June 5, 1920 (41 Stat. 959), making appropriations for the support of the Army; Quartermaster Corps, Incidental expenses.*

Similar provisions appear in previous appropriation acts.

537. Clothing supplied to prisoners at discharge.—* * * for a suit of citizen's outer clothing, to cost not exceeding $25, to be issued to each soldier discharged otherwise than honorably; to each enlisted man convicted by civil court for an offense resulting in confinement in a penitentiary or other civil

prison; and to each enlisted man ordered interned by reason of the fact that he is an alien enemy, or, for the same reason, discharged without internment; * * * *Act of June 5, 1920 (41 Stat. 961), making appropriations for the support of the Army: Clothing, camp and garrison equipage.*

Similar provisions appear in previous appropriation acts.

R. S. 1355 provided that every prisoner, upon being discharged from prison, shall be furnished with decent clothing. This section was superseded by sec. 2, act of Mar. 4, 1915 (38 Stat. 1084).

538. Transportation of discharged prisoners.—That every prisoner when discharged from the jail and prison shall be furnished with transportation to the place of his residence within the United States at the time of his commitment under sentence of the court, and if the term of his imprisonment shall have been for one year or more, he shall also be furnished with suitable clothing, the cost not to exceed twelve dollars, and five dollars in money. *Sec. 6, act of Mar. 3, 1891 (26 Stat. 840).*

* * * for travel allowance to discharged prisoners and persons discharged from the Government Hospital for the Insane after transfer thereto from such barracks or place to their homes (or elsewhere as they may elect), provided the cost in each case shall not be greater than to the place of last enlistment; * * * *Act of June 5, 1920 (41 Stat. 959), making appropriations for the support of the Army: Transportation.*

539. Manufacture of military supplies by prisoners.—Support and improvement of the Leavenworth military prison * * * *Provided*, That the Secretary of War shall cause to be fabricated at the said prison such supplies for the Army as can be economically and properly manufactured at the said prison. *Act of Mar. 3, 1879 (20 Stat. 389), making appropriations for sundry civil expenses.*

The military prison was to be known as the United States Disciplinary Barracks by act Mar. 4, 1915, sec. 2, ante, 525.

The employment of prisoners at hard labor was authorized by act Mar. 4, 1915, sec. 2, ante, 531.

The manufacture of cotton fabrics to supply the requirements of the War Department and other needs of the Government was authorized to be carried on in the penitentiary at Atlanta, Ga., by act of July 10, 1918 (40 Stat. 896).

CHAPTER 11.

INSPECTOR GENERAL'S DEPARTMENT.

Composition:
- Permanent appointments, 540.
- Acting inspectors general, 541.
- Expert accountant, 542.
- Traveling expenses, 543.

Duties:
- Inspection of disbursements, 544.
- Inspection of the Soldiers' Home, 545.
- Inspection of the National Home for Disabled Volunteer Soldiers, 546.

HISTORICAL NOTE.

The Inspector General's Department had existed during the War of the Revolution, the office of inspector general having been held by Baron Steuben, whose appointment was approved by Congress in a resolution dated May 25, 1778. During the incumbency of Baron Steuben a system of drill regulations was introduced, which continued in use until replaced, in part, by the system prepared by Col. Alexander Smyth in 1810, and was finally superseded by the drill regulations prepared by Maj. Gen. Scott in 1821. On June 25, 1788, in conformity to a resolution of Congress of that date, the Department ceased to exist, and the inspection of the troops was conducted for a time by officers of the line detailed for the purpose. By sec. 4 of the act of Apr. 30, 1790 (1 Stat. 119), the appointment of one inspector was authorized for the establishment created by that enactment. The act of Mar. 5, 1792 (id. 241), merged the duties of the Adjutant and Inspector General's Departments and made provision for an adjutant who was to do the duty of an inspector; sec. 3 of the act of May 30, 1796 (id. 483), made similar provision for an inspector who was to do the duty of an adjutant. The acts of Mar. 3, 1797 (id. 507), and May 22, 1798 (id. 557), authorized the detail of an officer of the line to perform the duties of inspector general. Sec. 6 of the act of May 28, 1798 (id. 559), passed in contemplation of war with France, authorized the appointment of an inspector general with the rank of major general, and on July 18, 1798, Gen. Alexander Hamilton was appointed to the vacancy. The temporary military establishment thus authorized, which was never fully completed, was disbanded by the acts of Feb. 20, 1800 (2 id. 7), and May 14, 1800 (id. 85), and the duties of the department were again performed by detail until the office of inspector was created by sec. 4 of the act of Mar. 16, 1802 (id. 132); by sec. 3 of the act of Apr. 12, 1808 (id. 481), two brigade inspectors were authorized to be detailed from the line with increased rank; by the act of Dec. 24, 1811 (id. 669), the office of inspector general (brigadier general) was created and two assistants (lieutenant colonels) were authorized; the duties of the department were defined in regulations approved by the Secretary of War on November 4, 1812. By the act of Mar. 3, 1813 (id. 819), the Adjutant and Inspector General's Departments were again merged. The act of Mar. 3, 1815 (3 id. 224), fixing the peace establishment, made no express provision for these departments, their duties being performed by officers temporarily detailed for the purpose. By sec. 10 of the act of Apr. 24, 1816 (id. 297), however, the temporary establishment which had existed since 1815 was made permanent. Provision was also made for an Adjutant and Inspector General of the Army, together with an inspector general to each division and an assistant to each brigade, which were to be filled by detail of officers from the line. At the general reduction of 1821 the Inspector General's Department was recognized and continued by sec. 6 of the act of Mar. 2, 1821 (id. 615), its composition being fixed at two inspectors general with the rank and pay of colonels of Cavalry. By sec. 4 of the act of Aug. 23, 1842 (5 id. 512), the department was reduced to one officer; the disbanded officer was restored, however, by the act of June 12, 1846 (9 id. 21), and the composition of the department, as thus established, underwent no change until the outbreak of the War of the Rebellion.

By sec. 2 of the act of Aug. 3, 1861 (12 id. 287), 5 majors were added to the department; by sec. 4 of the act of Aug. 6, 1861 (id. 318), 2 colonels were authorized; and provision for the inspection service of the armies in the field was made by sec. 10 of the act of July 17, 1862 (id. 299), which authorized the rank and pay of lieutenant colonel of Cavalry to be conferred upon the Inspector General of Army corps. By sec. 11 of the act of July 28, 1866 (14 id. 334), the composition of the department was fixed as follows: Four colonels, 3 lieutenant colonels, and 2 majors. Sec. 6 of the act of Mar. 3, 1869 (15 id. 318), contained the requirement that there should be no promotions or appointments in the staff until otherwise directed by law; by the acts of June 8, 1872 (17 id. 338), and June 16, 1874 (18 id. 77), promotions were authorized to correct inequalities in the rank of officers of the department. By the act of June 23, 1874 (id. 244), the restriction contained in the act of Mar. 3, 1869, was removed and the strength of the department fixed at 1 inspector general with the rank of colonel, 2 inspectors general with the rank of lieutenant colonel, and 2 inspectors general with the rank of major; authority was also conferred for the detail of 4 officers from the line of the Army for service as assistant inspectors general, who were to receive the mounted pay of their grades, and no appointments were to be made to the grade of major until the number of officers in the department had been reduced to 5. By the act of Dec. 12, 1878 (20 id. 257), the rank of brigadier general was conferred upon the senior inspector general. (See (1881) 17 Op. Atty. Gen. 2.) By the act of Feb. 5, 1885 (22 id. 297), the composition of the department was fixed as follows: One inspector general (brigadier general), 2 colonels, 2 lieutenant colonels, and 2 majors. It was also provided that the inspector general should be selected from the officers of the corps, that promotions should be by seniority in the department, and that appointments to the grade of major should be made from the captains in the line of the Army. A temporary increase in the department was authorized by act July 7, 1898 (30 Stat. 720); and it was continued as then constituted by act Mar. 2, 1899, sec. 6 (30 Stat. 979). All these provisions were superseded by a provision in act Feb. 2, 1901, sec. 14 (31 Stat. 751), which was superseded by sec. 7, act of June 3, 1916 (39 Stat. 169), providing that the department should consist of 1 inspector general (brigadier general), 4 inspectors general with the rank of colonel, 8 inspectors general with the rank of lieutenant colonel, and 16 inspectors general with the rank of major. This act was in turn superseded by sec. 7, act of June 4, 1920, post, 540.

Changes in the number of officers of certain grades in the department, to take effect on the occurrence of a vacancy in the grade of colonel, are provided for by a clause of act Mar. 2, 1901 (31 Stat. 899), which was also superseded by said sec. 7, act of June 3, 1916.

Appointments and promotions in the department, other than to fill vacancies provided for by this section, were regulated by sec. 26 of this act. Appointments from officers of volunteers to fill original vacancies in the department were authorized by a provision of act Mar. 2, 1901 (31 Stat. 900), omitted as temporary merely.

An expert accountant for the department was authorized by act Feb. 24, 1891 (26 Stat. 773).

540. Composition.—The Inspector General's Department shall consist of one Inspector General with the rank of major general and sixty-one officers in grades from colonel to captain, inclusive. *Sec. 7, act of June 3, 1916 (39 Stat. 169), amended by sec. 7, act of June 4, 1920 (41 Stat. 765).*

541. Acting inspectors general.—* * * and the Secretary of War may, in addition, detail officers of the line, not to exceed four, to act as assistant inspector-general: *Provided*, That officers of the line detailed as acting inspectors-general shall have all the allowances of Cavalry officers of their respective grades; * * * *Sec. 1, act of June 23, 1874 (18 Stat. 244).*

Other provisions of this section were superseded by those of subsequent acts relating to the department. See historical note, ante. But see 2335, post.

542. Expert accountant.—For pay of expert accountant for the Inspector General's Department, $2,500. *Act of June 5, 1920 (41 Stat. 956), making appropriations for the support of the Army: Pay and so forth of the Army.*

Similar provisions appear in previous appropriation acts.

543. Traveling expenses of the expert accountant.—* * * *Provided*, That hereafter * * * the expert accountant, Inspector General's Department, shall receive mileage at the same rates and under the same conditions as is provided by law for officers of the Army: * * * *Sec. 1, act of Aug. 24, 1912 (37 Stat. 575).*

544. Inspection of disbursements.—That it shall be the duty of the Secretary of War to cause frequent inquiries to be made as to the necessity, economy, and propriety of all disbursements made by disbursing officers of the Army, and as to their strict conformity to the law appropriating the money; also to ascertain whether the disbursing officers of the Army comply with the law in keeping their accounts and making their deposits; such inquiries to be made by officers of the inspection department of the Army, or others detailed for that purpose: *Provided*, That no officer so detailed shall be in any way connected with the department or corps making the disbursement. *Sec. 1, act of April 20, 1874 (18 Stat. 33).*

That the reports of such inspections shall be made out and forwarded to Congress with the annual report of the Secretary of War. *Sec. 2, act of April 20, 1874 (18 Stat. 33).*

Provisions applicable to all the departments as to reports of expenditures by disbursing officers are contained in R. S., sec. 193, and act Mar. 3, 1877, sec. 1, ante, 270.

545. Inspection of the Soldiers' Home.—That the Inspector General of the Army shall, in person, once in each year thoroughly inspect the Home, its records, accounts, management, discipline, and sanitary condition, and shall report thereon in writing, together with such suggestions as he desires to make. *Sec. 2, act of Mar. 3, 1883 (22 Stat. 564).*

546. Inspection of the National Home for Disabled Volunteer Soldiers.—That hereafter, once in each fiscal year, the Secretary of War shall cause a thorough inspection to be made of the National Home for Disabled Volunteer Soldiers, its records, disbursements, management, discipline, and condition, such inspection to be made by an officer of the Inspector-General's Department, who shall report thereon in writing, and said report shall be transmitted to Congress at the first session thereafter. *Act of Aug. 18, 1894 (28 Stat. 412).*

CHAPTER 12.

JUDGE ADVOCATE GENERAL'S DEPARTMENT.

Composition, 547.
Appointments:
  Colonels and lieutenant colonels, 549.
  Captains, 550.
Duties:
  Specified, 551.
  Directed by the Judge Advocate General, 552.
Civilian force, 552½.

HISTORICAL NOTE.

The office of Judge Advocate of the Army was created during the War of the Revolution, having been established by resolution of Congress of July 25, 1775 (Journals of Cong.), soon after the enactment of the Articles of War on June 29 of the same year. In the reenactment of the articles, in 1776, this officer was styled the Judge Advocate General of the Army and was empowered to prosecute in the name of the United States or to conduct such prosecutions by deputy. The office of Judge Advocate ceased to exist at the disbandment of the Revolutionary Armies, but was revived by sec. 2 of the act of Mar. 3, 1797 (1 Stat. 507), which made provision for a judge advocate, to be taken from the commissioned officers of the line, who was to receive the same pay and allowances as the brigade major (adjutant) and inspector therein authorized. This office, with other offices in the General Staff, was discontinued by the act of Mar. 16, 1802 (2 id. 132). Sec. 19 of the act of 1812 (id. 674), passed in contemplation of war with England, made provision for one judge advocate, with the rank of major, to each division, and this number was increased to three by sec. 2 of the act of Apr. 24, 1816 (3 id. 297). At the reduction of 1818 these officers were disbanded (act of Apr. 14, 1818, 3 id. 426), and the office of Judge Advocate of the Army was discontinued by the act of Mar. 2, 1821 (id. 615).

By sec. 4 of the act of Mar. 3, 1849 (9 id. 351), the office of Judge Advocate of the Army was reestablished, with the rank and pay of major of Cavalry. By sec. 5 of the act of July 17, 1862 (12 id. 598), the office of Judge Advocate General was created, with the rank and pay of brigadier general; by this enactment the duties of the office were defined. By sec. 5 of the same statute provision was made for a corps of judge advocates, one of whom was to be assigned to duty at the headquarters of each army in the field. By sec. 5 of the act of June 20, 1864 (13 id. 145), the Bureau of Military Justice was established, to which the Judge Advocate General was transferred, and an Assistant Judge Advocate General, with the rank of colonel of Cavalry, was authorized. By sec. 12 of the act of July 28, 1866 (14 id. 334), the composition of the department was fixed at one Judge Advocate General (brigadier general), one Assistant Judge Advocate General (colonel), and 10 judge advocates were added to the military establishment, who were to be selected by the Secretary of War from the corps of judge advocates authorized by the act of July 17, 1862. By this statute the office of Solicitor of the War Department was discontinued, the duties of the office being merged in the Bureau of Military Justice. By sec. 3 of the act of Mar. 3, 1869 (15 Stat. 318), all appointments and promotions in the several departments of the staff were prohibited until otherwise directed by law; but this restriction was removed, as to the Bureau of Military Justice, by the act of Apr. 10, 1869 (16 id. 44), which fixed the number of judge advocates at eight.

The Bureau of Military Justice and a corps of judge advocates were authorized by R. S. secs. 1094, 1198, 1200.

By sec. 2 of the act of June 23, 1874 (18 id. 244), the office of Assistant Judge Advocate General was discontinued, and it was provided that there should be no appointments to the grade of major until the number of officers of that grade had been reduced to four. By the act of July 5, 1884 (23 id. 113), the Bureau of Military Justice and the corps of judge advocates were consolidated and merged in the Judge Advocate Gen-

eral's Department, the composition of which was fixed as follows: One Judge Advocate General (brigadier general), one Assistant Judge Advocate General (colonel), three deputy judge advocates general (lieutenant colonels), and three judge advocates (majors). Promotion to the grade of colonel was to be by seniority, and provision was made for the detail of officers of the line as judge advocates of military departments, who were to have, while so serving, the rank and pay of captains mounted.

By sec. 15 of the act of Feb. 2, 1901 (31 id. 751), the permanent strength of the department was fixed at one Judge Advocate General with the rank of brigadier general, two judge advocates with the rank of colonel, three judge advocates with the rank of lieutenant colonel, and six judge advocates with the rank of major. The system of details of officers of the grade of captain or first lieutenant to serve as acting judge advocates and, while so serving, to have the rank, pay, and allowances of captains mounted, as established by the act of July 5, 1884 (23 Stat. 113), was recognized and continued.

Majors in this department were to be appointed from officers of the line, from persons who had satisfactorily served as judge advocate of volunteers since Apr. 21, 1898, and from persons from civil life not over 35 years of age and required to pass an examination. That act may be regarded as superseded by sec. 24, act of June 4, 1920 (41 Stat. 771), post, 2279.

The provisions of sec. 7, act of Mar. 2, 1899 (30 Stat. 979), for appointments from civil life, on examination, etc., so far as applied to judge advocates, may be regarded as superseded by the said sec. 15. Appointments from officers of volunteers to fill original vacancies in this department were authorized by a provision of the act of Mar. 2, 1901 (31 Stat. 900), omitted as temporary.

By the act of Mar. 2, 1913 (37 Stat. 708), the number of majors was increased to seven.

By sec. 8 of the national defense act of June 3, 1916 (39 Stat. 169), the permanent strength of the department was fixed at 1 Judge Advocate General with the rank of brigadier general, 4 judge advocates with the rank of colonel, 7 judge advocates with the rank of lieutenant colonel, and 20 judge advocates with the rank of major, with a provision for acting judge advocates for separate brigades and separate general court-martial jurisdictions. The so-called "manchu" law (act of Aug. 24, 1912, 37 Stat. 571) was to apply in this department only to the acting judge advocates authorized by law. Said sec. 8 was stricken out by sec. 8 of the act of June 4, 1920 (41 Stat. 765–766), and replaced by 547, post.

By act of July 9, 1918 (40 Stat. 853), the President was authorized to appoint in the Officers' Reserve Corps and the National Army, for service in the Judge Advocate General's Department, officers of the grades of first lieutenant and captain for service during the World War.

547. Composition.—The Judge Advocate General's Department shall consist of one Judge Advocate General with the rank of major general and one hundred and fourteen officers in grades from colonel to captain, inclusive: *Provided*, That immediately upon the passage of this Act the number of colonels of the Judge Advocate General's Department shall be increased by five, and the vacancies thus created shall be filled by promotion in the manner heretofore provided by law. *Sec. 8, act of June 3, 1916 (39 Stat. 169), as amended by sec. 8, act of June 4, 1920 (41 Stat. 765–766).*

For general provision under which the Judge Advocate General first received the rank, pay, and allowances of a major general, see sec. 3, act of Oct. 6, 1917, post, 2342.

548. Vacant.

549. Appointment of colonels and lieutenant-colonels.—* * * Not less than three such persons shall be appointed to the grade of colonel in the Judge Advocate General's Department, and not less than eight to the grade of lieutenant colonel in the Judge Advocate General's Department, provided a sufficient number of applicants for such appointments are legally eligible and are found by the board provided for in this section to be properly qualified. * * * *Sec. 24, act of June 3, 1916 (39 Stat. 183), as amended by sec, 24, act of June 4, 1920 (41 Stat. 771).*

Sec. 24, above, provides for granting commissions in the Regular Army to officers holding emergency commissions.

550. Appointment of captains.—* * * Any vacancy in the grade of captain in the Judge Advocate General's Department, not filled by transfer or detail from another branch, may, in the discretion of the President, be filled by appointment from reserve judge advocates between the ages of thirty and thirty-six years, and such appointee shall be placed upon the promotion list immediately below the junior captain on said list. * * * *Sec. 24e, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

In regard to the promotion list, see 2282, post.

551. Duties.—The Judge-Advocate-General shall receive, revise and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge-Advocate-General of the Army. *R. S. 1199.*

Notes of Decisions.

"Revise."—Under this section, the Judge Advocate General does not reverse, or purport to reverse, the findings of a court-martial. He merely makes an advisory report to the Secretary of War, giving his opinion upon the merits of the trial and sentence. Nor is the power to reverse to be implied because the statute makes it the duty of the Judge Advocate General to "receive, revise, and cause to be recorded the proceedings of all courts-martial." It is not reasonable to suppose that the exercise of such an important power would be conferred in vague and doubtful terms, or that it lurks behind the word "revise." Applying the rule, "noscitur a sociis," the word "revise" is to be read in connection with the words that precede and follow it, and, thus read, the duty it imposes is analogous to the duty of receiving and recording the proceedings. Had it been intended by the statute to introduce such a marked innovation into the preexisting functions of that officer, and to convert a staff officer or the head of a bureau into a judicial officer having the ultimate decision in all cases of military offenses, the power to affirm, reverse, or modify the proceedings of courts-martial would have been lodged in plain and explicit language. The language employed is more appropriate to indicate the discharge of clerical duties.

It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form, and to point out errors of substance which, in his judgment, should be corrected by the proper authorities, nor is it doubted that, as to all such topics as are within the purview of his official scrutiny, his opinion is entitled to that respectful consideration which is due to the dignity and importance of the position which he holds. Ex parte Mason (C. C. 1882), 256 Fed. 384.

552. Duties directed by the Judge Advocate General.—Judge-advocates shall perform their duties under the direction of the Judge-Advocate-General. *R. S. 1201.*

The work done in the Judge Advocate General's Office and for which he is responsible consists mainly of the following particulars: Reviewing and making reports upon the proceedings of trials by court-martial of officers, enlisted men, and cadets, and the proceedings of courts of inquiry; making reports upon applications for pardon or mitigation of sentences; preparing and revising charges and specifications prior to trial, and instructing judge advocates in regard to the conduct of prosecutions; drafting of contracts, bonds, etc.; as also, for execution by the Secretary of War, of deeds, leases, licenses, grants of rights of way, approval of locations of rights of way, approval of plans of bridges, power dams, and other structures, notices to alter bridges as obstructions to navigation, removal of sunken wrecks, etc.; framing of bills affecting legislation for the Army, Militia, etc., forms of procedure, etc.; preparing of opinions upon questions relating to the appointment, promotion, rank, pay, allowances, etc., of officers, enlisted men, etc., and to their amenability to military jurisdiction and discipline; upon the civil rights, liabilities, and relations of military persons and the exercise of the civil jurisdiction over them; as to cases of death under act of May 11, 1908 (35 Stat. 108), as amended by the act of Mar. 3, 1909 (35 Stat. 735); upon the employment of the Army in the execution of the laws; upon the discharge of minors, deserters, etc., on habeas corpus; upon the administration of military commands, the care and government of military reservations,

militia target ranges, etc., and the extent of the United States and State jurisdiction over such reservations or other lands of the United States; upon the proper construction of appropriation acts and other statutes; upon the interpretations and effect of public contracts between the United States and individuals and corporations; upon the validity and disposition of the varied claims against the United States presented to the War Department, including injuries received by employees on public works under act of May 30, 1908 (35 Stat. 556); upon the execution of public works under appropriation by Congress; upon obstructions to navigation as caused by bridges, dams, locks, piers, harbor lines, etc., upon the riparian rights of the United States and of States and individuals on navigable waters, etc.; and the furnishing to other departments of the Government of statements and information apposite to claims therein pending; as to the application of the eight-hour law (act of Aug. 1, 1892, 27 Stat. 340), as amended by the act of Mar. 3, 1913 (37 Stat. 726), to the various classes of work, under the several bureaus of the War Department, including river and harbor improvements; rewards for the apprehension and delivery of deserters; and to furnish to individuals under the 111th Article of War copies of their records of trial by general courts-martial. The matter of the submitting to the Judge Advocate General of applications for opinions is regulated by paragraph 915, Army Regulations, 1913.

552½. Civilian force.—For additional employees in the Office of the Judge Advocate General, $25,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding $1,800 per annum. *Act of Mar. 3, 192[illegible] (41 Stat. 1277), making appropriations for legislative, executive, and judicial expenses: Office of Judge Advocate General.*

CHAPTER 13.

MEDICAL DEPARTMENT.

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HISTORICAL NOTE.

The medical and surgical needs of the troops composing the Revolutionary armies were, at first, supplied by the surgeons who were attached to the several regimental organizations, and no provision seems to have been made for medical or surgical supervision, for the procurement and distribution of supplies, or for the establishment of a general hospital service until 1775, when, by a resolution of Congress dated July 27, 1775, the office of Director General was established, who was charged with the duties subsequently performed by the Purveyor General of Medical Supplies. The same enactment provided for a medical staff composed of 4 surgeons and 20 surgeon's mates, for an apothecary and 2 storekeepers, and for hospital attendance at the rate of 1 nurse for every 10 patients. Under the authority thus conferred several general hospitals were established at points conveniently near to the several theaters of military operations. The medical establishment thus created was modified by subsequent resolutions of Congress; the changes caused by the resolution of Apr. 22, 1777, being so extensive as to constitute a complete reorganization of the department. As thus modified, however, the department continued in existence until the disbandment of the Revolutionary armies in 1783. For the 10 years succeeding the organization of the Government under the Constitution the medical and surgical necessities of the troops were met by the medical officers attached to the several organizations constituting the Military Establishment.

The act of Mar. 2, 1799 (1 Stat. 721), passed in contemplation of a war with France, but which was never fully executed, made provision for a complete medical establishment consisting of a physician general, an apothecary general, and a purveyor, together

with such numbers of hospital surgeons and mates as the service might require, who were made liable to duty in the field as well as in the hospitals provided for in the statute. The act of Mar. 2, 1799, was repealed and a Medical Department established by sec. 3 of the act of Mar. 16, 1802 (2 Stat. 133), which fixed the strength of the department at 2 surgeons and 25 surgeon's mates, who were "to be attached to garrisons and posts, and not to corps." During the war of 1812 the necessities of the case were met by a temporary increase of the department and by the allowance of surgeons to regiments called into the service for the period of the war. By sec. 7 of the act of Mar. 3, 1813 (2 Stat. 819), a physician and Surgeon General was authorized, whose powers and duties were to be prescribed by the President of the United States. The office of apothecary general was created by the act of Apr. 24, 1816 (3 Stat. 297), but was abolished by the act of Mar. 3, 1821. The office of Surgeon General was created by sec. 2 of the act of Apr. 14, 1818 (3 Stat. 426).

At the general reduction of 1821 the Medical Department was reorganized and made to consist of 1 Surgeon General, 8 surgeons, and 45 assistant surgeons, by sec. 2, act of Mar. 2, 1821 (3 Stat. 615). By the act of June 28, 1832 (4 Stat. 500), 4 surgeons and 10 surgeon's mates were added. The act of June 30, 1834 (4 Stat. 714), contained a requirement that all candidates for appointment, or for promotion to the grade of surgeon, should pass a professional examination as a condition precedent to such appointment or promotion. By this enactment the pay of surgeons was fixed at that allowed to majors, assistant surgeons were to receive for the first five years' service the pay of first lieutenants, and after five years' service the pay of captains. The examination for promotion to the grade of surgeon was to take place after five years' service in the grade of assistant surgeon. By sec. 33 of the act of July 5, 1838 (5 Stat. 256), 7 additional surgeons were authorized, but by sec. 4 of the act of Aug. 23, 1842 (5 Stat. 512), a reduction of 2 surgeons and 10 assistant surgeons was ordered, the displaced officers being allowed three months' pay when honorably discharged.

At the outbreak of the War with Mexico, under authority conferred by sec. 6 of the act of Feb. 11, 1847 (9 Stat. 123), 2 surgeons and 12 assistant surgeons were added to the regular establishment, and regimental medical officers were authorized for the volunteer troops at the rate of 1 surgeon and 1 assistant surgeon to each regiment, their service being restricted to the period of the existing war. By the act of Mar. 3, 1849 (9 Stat. 351), 10 assistant surgeons were authorized, and the requirement of the act of July 19, 1848, prohibiting the filling of vacancies in the department was repealed. By the act of Aug. 16, 1850 (11 Stat. 51), 4 surgeons and 8 assistant surgeons were added to the establishment; the force of hospital stewards was increased to such number as the service might require, not to exceed 1 to each military post; and cooks and nurses, detailed from the enlisted men, were, for the first time, allowed extra-duty pay for service in post hospitals.

At the outbreak of the War of the Rebellion regimental medical officers were again authorized, 1 surgeon and 1 assistant being allowed to each regiment; by the act of July 2, 1862 (12 Stat. 502), an additional assistant was authorized. By sec. 3 of the act of July 22, 1861 (12 Stat. 269), 1 surgeon to each brigade was authorized, but by the act of July 2, 1862 (12 Stat. 502), these officers were merged in the corps of 40 surgeons and 120 assistant surgeons created by that statute for the period of the war.

By the act of June 21, 1861 (12 Stat. 378), 4 surgeons and 4 assistant surgeons were added to the department. By the act of Apr. 16, 1862 (12 Stat. 378), the rank of brigadier general was conferred upon the Surgeon General; the office of Assistant Surgeon General, with the rank and pay of colonel of Cavalry, was created and the addition of 10 surgeons and 20 assistant surgeons was authorized; a corps of medical inspectors was created, consisting of 1 inspector general of hospitals (colonel) and 8 assistants (lieutenant colonels), whose duties were defined by law and who were to hold office during the continuance of the war. By the act of Dec. 27, 1862 (12 Stat. 633), 8 medical inspectors were added and authority was conferred upon these officers to discharge enlisted men for disability contracted in the military service. By this statute a corps of medical cadets was established which continued to exist until its gradual disbandment was brought about by the passage of the general act of reorganization in 1866. By the act of May 20, 1862 (12 Stat. 378), six medical storekeepers were authorized. By the act of Feb. 25, 1865 (13 Stat. 437), medical directors of armies in the field and of military departments were allowed the rank and pay of colonels, and those attached to Army corps the rank and pay of lieutenant colonels.

An ambulance service for the armies in the field was provided by the act of Mar. 11, 1864 (13 Stat. 20). It was composed of officers and enlisted men detailed from the several Army corps and was carried on under the direction of their respective medical directors. The duties of the corps were regulated by statute, and had to do, exclusively,

with the transportation of the sick and wounded and the removal of the wounded from the battle field. The corps ceased to exist at the disbandment of the volunteer armies in 1865.

At the general reorganization of 1866, by sec. 17, act of July 28, 1866 (14 Stat. 334), the strength of the department was fixed at 1 Surgeon General, 1 Assistant Surgeon General, 1 chief medical purveyor, and 4 assistant purveyors (lieutenant colonels), 60 surgeons (majors), 150 assistant surgeons, and 5 medical storekeepers; it was also provided that three years' service instead of five should be required of assistant surgeons before attaining the grade of captain. The act of Mar. 3, 1869 (15 Stat. 318), contained a requirement prohibiting appointments and promotions in the staff until otherwise ordered by Congress.

The Medical Department, authorized by R. S., sec. 1094, had its organization prescribed by R. S., sec. 1168. The latter section was superseded by secs. 4, 7, and 8 act of June 23, 1874 (18 Stat. 244, 245), which made changes in the organization and in the grades and number of the officers thereof; but these provisions were also superseded by later enactments. By act June 26, 1876 (19 Stat. 61), other changes were made, reducing the number of assistant surgeons from 150, allowed by R. S., sec. 1168, and sec. 4, act of June 23, 1874, mentioned above, to 125, abolishing the office of medical storekeeper and establishing additional grades of surgeons, with the rank, pay, etc., of colonel and of lieutenant colonel. By act July 27, 1892, sec. 1 (27 Stat. 276), medical officers holding the rank of colonel were to have the grade of Assistant Surgeon General, and those holding the rank of lieutenant colonel were to have the grade of Deputy Surgeon General; which provisions, applying to the chief medical purveyor and assistant medical purveyors, with the rank of colonel and lieutenant colonel, respectively, authorized by R. S., sec. 1168, and sec. 4, act June 23, 1874, as well as to the surgeons with those ranks authorized by act June 26, 1876, mentioned above, changed the designation of those officers to Assistant Surgeon General and Deputy Surgeon General, respectively.

A further reduction of the number of assistant surgeons to 110 was provided for by act Aug. 6, 1894 (28 Stat. 235), and act Aug. 18, 1894 (28 Stat. 403). An addition of 15 to this number and the appointment of as many contract surgeons as might be necessary were authorized by act May 12, 1898 (30 Stat. 406). The department was continued as then constituted with a temporary increase of force for volunteer regiments by secs. 7 and 12, act of Mar. 2, 1899 (30 Stat. 979). All these provisions were superseded by sec. 18, act of Feb. 2, 1901 (31 Stat. 752). Said provisions were superseded by those of act of Apr. 23, 1908 (35 Stat. 66), and parts of said act of Apr. 23, 1908, were in turn superseded by provisions of sec. 10, act of June 3, 1916 (39 Stat. 171), which section was stricken out by sec. 10, act of June 4, 1920 (41 Stat. 766–768).

Other provisions of said sec. 18 of act Feb. 2, 1901, and of previous acts relating to the rank, pay, and allowances of officers of the department were superseded by those of said act Apr. 23, 1908. Provisions which remain in force and applicable to the Medical Corps constituted by secs. 3, 4, and 5, act Apr. 23, 1908 (35 Stat. 67), are set forth, post, 561, 560, 559, note to 555.

Sec. 10, of the national defense act of June 3, 1916 (39 Stat. 171), provided that the Medical Department should consist of one Surgeon General with the rank of major general during the active service of the then incumbent, and thereafter with the rank of brigadier general, a Medical Corps, a Medical Reserve Corps, a Dental Corps, a Veterinary Corps, an enlisted force, the Nurse Corps and contract surgeons as then authorized by law. Sec. 37 of said act abolished the Medical Reserve Corps one year after the passage of said act. By sec. 3, act of Oct. 6, 1917, post, 2342, the Surgeon General was given the rank, pay, and allowances of a major general. This section was superseded by 553, post.

Sec. 10 of the act of June 4, 1920 (41 Stat. 766–768), amended sec. 10 of the national defense act of June 3, 1916 (39 Stat. 171), "by striking out the same and inserting the following in lieu thereof." Provision was not made in the amending act, however, for several matters covered by the earlier act which had been placed in sections in this chapter now marked "Vacant."

A Sanitary Corps was created by G. O. 80, W. D. June 30, 1917, pursuant to authority of sec. 2, act of May 18, 1917, being composed of commissioned officers up to and including the grade of colonel, and was part of the Medical Department. It was not mentioned in sec. 10, act of June 4, 1920 (41 Stat. 766–768) reorganizing the Medical Department.

553. Composition of the Medical Department.—The Medical Department shall consist of one Surgeon General with the rank of major general, two assistants,

with the rank of brigadier general, the Medical Corps, the Dental Corps, the Veterinary Corps, the Medical Administrative Corps, a number of enlisted men which until June 30, 1921, shall not exceed 5 per centum of the authorized enlisted strength and thereafter 5 per centum of the actual strength, commissioned and enlisted, of the Regular Army, the Army Nurse Corps as now constituted by law, and such contract surgeons as are now authorized by law. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 766–767).*

554. Rank and precedence.—* * * That officers of the Medical Department shall take rank and precedence in accordance with date of commission or appointment, and shall be so borne on the official Army Register. * * * *Act of July 5, 1884 (23 Stat. 111), making appropriations for the support of the Army.*

555. Promotions of officers.—* * * Hereafter an officer of the Medical or Dental Corps shall be promoted to the grade of captain after three years' service, to the grade of major after twelve years' service, to the grade of lieutenant colonel after twenty years' service, and to the grade of colonel after twenty-six years' service. * * * For purposes of promotion there shall be credited to officers of the Medical Department all active commissioned service in the Regular Army whenever rendered; and also all such service rendered since April 6, 1917, in the Army or in the National Guard when in active service under a call by the President, except service under a reserve commission while in attendance at a school or camp for the training of candidates for commission. * * * The length of service of any officer who shall have lost files by reason of sentence of court-martial or failure in examination for promotion shall be regarded as diminished to the equivalent of the service of the officer of his corps immediately preceding him in relative rank.

Of the vacancies in the Medical Department existing on July 1, 1920, such number as the President may direct shall be filled by the appointment on that date in any grade authorized by this section, of persons under the age of fifty-eight years, other than officers of the Regular Army, who served as officers of the Army at some time between April 6, 1917, and the date of the passage of this Act, the selection to be made by the board of general officers provided for in section 24, and subject to the restrictions as to age therein prescribed. * * * For purposes of future promotion, any person so appointed in the Medical or Dental Corps shall be considered as having had, on the date of appointment, service equal to that of the junior officer of his grade and corps now in the Regular Army; and in the Veterinary or Medical Administrative Corps, sufficient service to bring him to his grade under the rules established in this section. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767).*

Previous provisions relating to promotion of officers in the Medical Corps are found in the notes under 556, post, and in sec. 3, act of Apr. 23, 1908 (35 Stat. 67), which read, in part, as follows:

"That promotions in the Medical Corps to fill vacancies in the several grades created or caused by this Act, or hereafter occurring, shall be made according to seniority, but all such promotions and all appointments to the grade of first lieutenant in said corps shall be subject to examination as hereinafter provided: *Provided*, That the increase in grades of colonel, lieutenant-colonel, and major provided for in this Act shall be filled by promotion each calendar year of not exceeding two lieutenant-colonels to be colonels, three majors to be lieutenant-colonels, fourteen captains to be majors, and of the increase in the grade of first lieutenant not more than twenty-five per centum of the total of such increase shall be appointed in any one calendar year: * * *."

Provisions for examination for promotion mentioned in this section are found in secs. 4, 5 of this act, post 560, 559. As to the promotion of majors, Medical Corps, see 562, post.

Under sec. 10 of the act of June 3, 1916, persons commissioned in the Medical Corps were to be promoted to the grade of captain after five years' service and upon passing the required examination. That section was stricken out by sec. 10, act of June 4, 1920 (41 Stat. 767).

Assistant surgeons, under R. S., sec. 1168, had the rank of lieutenant of Cavalry for the first three years of service, and the rank of captain of Cavalry after three years of service; but under a provision of sec. 4, act of June 22, 1874 (18 Stat. 244), they had the rank, pay, etc., of lieutenant of Cavalry for the first five years' service, and the rank, pay, etc., of captain of Cavalry after five years' service. By the provisions of sec. 18, act of Feb. 2, 1901, mentioned in this section, the period during which any assistant surgeon had served as a surgeon or assistant surgeon in the Volunteer Army during the War with Spain or since was to be counted as a portion of the five years' service required to entitle him to rank of captain; but nothing in that section should affect the relative rank for promotion of any assistant surgeon then in the service, or who might be thereafter appointed therein, as determined by the date of his appointment or commission and as fixed in accordance with existing law and regulations. These provisions either were superseded by those of section 3, given above, or have become inoperative.

First lieutenants were to be promoted to the grade of captain after three years' service in the Medical Corps, instead of five years' service, previously required therefor, by a provision of section 2 of the act of Apr. 22, 1908 (35 Stat. 66), which said provision was superseded by a provision of sec. 10, act of June 3, 1916 (39 Stat. 171), providing for promotion to the grade of captain after five years' service, which in turn was superseded by sec. 10, act of June 4, 1920 (41 Stat. 767).

Notes of Decisions.

Assistant Surgeons General.—Under the laws as they existed prior to the enactment of the above act it has been held by the Attorney General's office that no officer possessed an inchoate right to the vacant office of Assistant Surgeon General; that the senior surgeon among those holding the rank of lieutenant colonel had a right to the vacancy in the grade to which that office belonged; that the office could not be filled by an appointee from an inferior grade other than himself; that a vacancy existing in the office of Assistant Surgeon General could be filled by appointing thereto any one of the surgeons with the rank of colonel or the chief medical purveyor (all holding offices of the same grade in the Medical Corps as that of the vacant office), or by promoting thereto the senior officer in the Medical Corps having the rank of lieutenant colonel, being the next grade below. (1882), 17 Op. Atty. Gen. 465.

Assistant Surgeons General were appointed for the purpose of exercising, at the places where they were stationed, the functions of the office of Surgeon General, and their acts, until disapproved by the Surgeon General, were valid. Parish v. U. S. (1879), 100 U. S. 500, 25 L. Ed. 763.

556. Composition of the Medical Corps.—* * * The number of officers of the Medical Corps shall be six and one-half for every thousand * * * of the total enlisted strength of the Regular Army, authorized from time to time, and within the peace strength permitted by this Act. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767).*

The Medical Corps was established as such by sec. 2, act of Apr. 23, 1908 (35 Stat. 66), reading as follows:

"The Medical Corps shall consist of one Surgeon-General, with rank of brigadier-general, who shall be chief of the Medical Department; fourteen colonels, twenty-four lieutenant colonels, one hundred and five majors, and three hundred captains or first lieutenants, who shall have rank, pay, and allowances of officers of corresponding grades in the cavalry arm of the service. Immediately following the approval of this Act all officers of the Medical Department then in active service, other than the Surgeon-General, shall be recommissioned in the corresponding grades in the Medical Corps established by this Act in the order of their seniority and without loss of relative rank in the Army, as follows: Assistant surgeons-general, with the rank of colonel, as

colonels; deputy surgeons-general with rank of lieutenant-colonel, as lieutenant-colonels; surgeons, with the rank of major, as majors; assistant surgeons, who at the time of the approval of this Act shall have served three years or more, as captains; and assistant surgeons, with the rank of first lieutenant, who at the time of the approval of this Act shall have served less than three years as such, as first lieutenants; and hereafter first lieutenants shall be promoted to the grade of captain after three years' service in the Medical Corps."

The officers of the former Medical Department, who other than the Surgeon General, were by this section to be recommissioned in the corresponding grades in the Medical Corps, were enumerated in sec. 18, act of Feb. 2, 1901 (31 Stat. 752), as follows:

"The Medical Department shall consist of one Surgeon-General with the rank of brigadier-general, eight assistant surgeons-general with the rank of colonel, twelve deputy surgeons-general with the rank of lieutenant-colonel, sixty surgeons with the rank of major, two hundred and forty assistant surgeons with the rank of captain or first lieutenant."

Said sec. 2 was superseded by sec. 10 of the national defense act of June 3, 1916 (39 Stat. 171), reading as follows:

"The Medical Corps shall consist of commissioned officers below the grade of brigadier general, proportionately distributed among the several grades as in the Medical Corps now established by law. The total number of such officers shall approximately be equal to, but not exceed, except as hereinafter provided, seven for every one thousand of the total enlisted strength of the Regular Army authorized from time to time by law: *Provided,* That if by reason of a reduction by law in the authorized enlisted strength of the Army aforesaid the total number of officers in the Medical Corps commissioned previously to such reduction shall for the time being exceed the equivalent of seven to one thousand of such reduced enlisted strength, no original appointment to commissioned rank in said corps shall be made until the total number of commissioned officers thereof shall have been reduced below the equivalent of seven to the thousand of the said reduced enlisted strength, nor thereafter so as to make the total number of commissioned officers thereof in excess of the equivalent of seven to the thousand of said reduced enlisted strength; and no promotion shall be made above the grade of captain in said corps until the number of officers in the grade above that of captain to which the promotion is due shall have been reduced below the proportional number authorized for such grade on the basis of the reduced enlisted strength, nor thereafter so as to make the number of officers in such grade in excess of the proportional number authorized on the basis of said reduced enlisted strength." This was superseded by sec. 10, act of June 4, 1920 (41 Stat. 767).

557. Appointment of first lieutenants in the Medical Corps.—* * * Appointments in the Medical * * * Corps shall be made in the grade of first lieutenant from reserve medical * * * officers, respectively, between the ages of twenty-three and thirty-two years; * * * *sec. 24e, added to the act of June 3, 1916, by act of June 4, 1920 (41 Stat. 774).*

Examination and approval by an Army medical board were required for appointment as assistant surgeon, and also for appointment as surgeon after five years' service as assistant surgeon, by R. S. 1172.

Sec. 10, act of June 3, 1916 (39 Stat. 171), required persons commissioned in the Medical Corps to be citizens between 22 and 30 years of age; the act of Aug. 29, 1916 (39 Stat. 640), repealed so much of this act as related to the appointment of first lieutenants in the Medical Department and provided that the maximum age for appointment of first lieutenants should be 32 years.

A proviso of sec. 7, act of Apr. 23, 1908 (35 Stat. 68), permitted the appointment of any contract surgeon not over 27 years of age in the Regular Army. Sec. 10 of the act of June 3, 1916, as amended by sec. 1, chap. XVII, act of July 9, 1918 (40 Stat. 889), provided for the appointment of a reserve officer or a contract surgeon who had been on active duty for 12 years subsequent to 1898 as first lieutenant in the Medical Corps. The last named act was expressly repealed by sec. 10, act of June 4, 1920 (41 Stat. 767), and the provision of the act of Apr. 23, 1908, appears to have been repealed by implication.

558. Rank and precedence of the Medical Corps.—That the commissioned officers of the Medical Corps of the Regular Army, none of whom shall have rank

above that of colonel, shall be proportionately distributed in the several grades as now provided by law * * * *Act of July 9, 1918 (40 Stat. 866).*

But see 556, ante.

559. **Promotions in the Medical Corps.**—That no officer of the Medical Corps below the rank of lieutenant-colonel shall be promoted therein until he shall have successfully passed an examination before an army medical board consisting of not less than three officers of the Medical Corps, to be designated by the Secretary of War, such examination to be prescribed by the Secretary of War and to be held at such time anterior to the accruing of the right to promotion as may be for the best interests of the service: *Provided*, That should any officer of the Medical Corps fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should be found disqualified for promotion for any other reason, a second examination shall not be allowed, but the Secretary of War shall appoint a board of review to consist of three officers of the Medical Corps superior in rank to the officer examined, none of whom shall have served as a member of the board which examined him. If the unfavorable finding of the examining board is concurred in by the board of review, the officer reported disqualified for promotion shall, if a first lieutenant or captain, be honorably discharged from the service with one year's pay; and, if a major, shall be debarred from promotion and the officer next in rank found qualified shall be promoted to the vacancy. If the action of the examining board is disapproved by the board of review, the officer shall be considered qualified and shall be promoted. *Sec. 5, act of Apr. 23, 1908 (35 Stat. 67).*

Existing laws governing the examination of officers of the Medical Corps are expressly excepted from repeal by sec. 24c of the act of June 4, 1920, post 2279.

Examination for promotion of all officers of the Army under the rank of major was provided for by act of Oct. 1, 1890 (26 Stat. 562), and assistant surgeons, before receiving the rank of captain of Cavalry, were required to be examined under that act by sec. 2, act of July 27, 1892 (27 Stat. 276). These provisions for examination for appointment as assistant surgeon and for promotion were superseded by those of this act.

Provisions for suspension from promotion and reexamination of any major of the Medical Corps found disqualified for any reason other than physical disability incurred in the line of duty, and for promotion or retirement on such reexamination, were made by act of Mar. 3, 1909, post, 562.

560. **First lieutenants, Medical Corps.**—That no person shall receive an appointment as first lieutenant in the Medical Corps unless he shall have been examined and approved by an army medical board consisting of not less than three officers of the Medical Corps designated by the Secretary of War. *Sec. 4, act of Apr. 23, 1908 (35 Stat. 67).*

561. **Captains, Medical Corps.**—* * * *Provided further*, That those assistant surgeons who at the time of the approval of this Act shall have attained their capacity by reason of service in the volunteer forces under the provisions of the Act of February second, nineteen hundred and one, section eighteen, or who will receive their captaincy upon the approval of this Act by virtue of such service, shall take rank among the officers in or subsequently promoted to that grade, according to date of entrance into the Medical Department of the Army as commissioned officers. *Sec. 3, act of Apr. 23, 1908 (35 Stat. 67).*

That during the existing emergency first lieutenants in the Medical Corps of the Regular Army and of the National Guard shall be eligible to promotion

as captain upon such examination as may be prescribed by the Secretary of War. *Act of Oct. 6, 1917 (40 Stat. 397).*

Sec. 18, act of Feb. 2, 1901, above, provided that the period of volunteer service or of service as assistant surgeon in the War with Spain might be credited toward the five years required for promotion under the terms of that act.

562. Majors, Medical Corps.—* * * *Provided,* That any major of the Medical Corps on the active list of the Army who, at his first examination for promotion to the grade of lieutenant-colonel in said corps, has been or shall hereafter be found disqualified for such promotion for any reason other than physical disability incurred in the line of duty shall be suspended from promotion and his right thereto shall pass successively to such officers next below him in rank in said corps as are or may become eligible to promotion under existing law during the period of his suspension; and any officer suspended from promotion, as hereinbefore provided, shall be reexamined as soon as practicable after the expiration of one year from the date of completion of the examination that resulted in his suspension; and if on such reexamination he is found qualified for promotion, he shall again become eligible thereto; but if he is found disqualified by reason of physical disability incurred in line of duty, he shall be retired, with the rank to which his seniority entitles him to be promoted; and if he is not found disqualified by reason of such physical disability, but is found disqualified for promotion for any other reason, he shall be retired without promotion. *Act of Mar. 3, 1909 (35 Stat. 787).*

563. Selection of the Surgeon-General.—* * * the Surgeon-General, * * * shall be appointed by selection from the corps to which they belong. *R. S. 1193.*

564. Vacant.

565. Assistant Surgeons General.—That the Medical Department of the Regular Army be, and is hereby, increased by one Assistant Surgeon General, for service abroad during the present war, who shall have the rank of major general, and two Assistant Surgeons General, who shall have the rank of brigadier general, all of whom shall be appointed from the Medical Corps of the Regular Army. *Act of July 9, 1918 (40 Stat. 866).*

See 553, ante.

566. Duties of medical officers.—That medical officers of the Army may be assigned by the Secretary of War to such duties as the interests of the service may demand. *Sec. 3, act of July 27, 1892 (27 Stat. 277).*

For general provisions as to the duties of the Medical Department see pars. 1386, 1387, A. R. 1913.

567. Supervision of cooking by medical officers.—The officers of the Medical Department of the Army shall unite with the officers of the line in superintending the cooking done by the enlisted men; and the Surgeon-General shall promulgate to the officers of said corps such regulations and instructions as may tend to insure the proper preparation of the ration of the soldier. *R. S. 1174.*

Section eleven hundred and seventy-four is amended by inserting, after the word "line" in the second line, the words "under such rules and regulations as shall be prescribed by the Secretary of War." *Act of Feb. 27, 1877 (19 Stat. 243), amending R. S. 1174.*

Line officers were required to superintend the cooking done for the enlisted men by R. S., sec. 1234, post, 917.

568. Detail of medical officers with the American National Red Cross.—* * * *Provided,* That hereafter the Secretary of War is hereby authorized

to detail an officer of the Medical Corps to take charge of the first-aid department of the American Red Cross. *Act of Mar. 3, 1911 (36 Stat. 1041).*

* * * The President is authorized to detail not more than five officers of the Medical Department for duty with the military relief division of the American National Red Cross. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 785).*

569. Appointment of contract surgeons.—* * * *Provided further*, That in emergencies the Surgeon-General of the Army, with the approval of the Secretary of War, may appoint as many contract surgeons as may be necessary, at a compensation not to exceed one hundred and fifty dollars per month. * * * *Sec. 18, act of Feb. 2, 1901 (31 Stat. 752).*

This provision superseded a previous provision limiting the number of contract surgeons to be employed to 75 made by sec. 4, act of June 23, 1874 (18 Stat. 245).

Notes of Decisions.

Pay of contract surgeons.—As a general rule, a contract surgeon is entitled to pay only from the time he enters upon duty under his contract. (1882) 17 Op. Atty. Gen. 461.

Contract surgeon not an officer.—A contract surgeon is not an officer within the provisions of R. S. 1262, or the act of June 30, 1882 (22 Stat. 118), post, 1641, granting longevity pay. Yemans v. U. S. (1917), 52 Ct. Cl. 388.

570. Authority of a contract surgeon.—* * * *Provided*, That when a contract surgeon is in charge of a hospital he shall have the same authority as a commissioned medical officer. *Act of Apr. 23, 1904 (33 Stat. 266).*

See A. R. 1391 and 1394.

571. Composition of the Dental Corps.—* * * The number of officers of the Dental Corps shall be one for every thousand of the total strength of the Regular Army, authorized from time to time, and within the peace strength permitted by this Act. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767).*

Until recent years the grade of dental officer did not exist in the Regular Army. By sec. 18 of the act of Feb. 2, 1901 (31 Stat. 752), the Surgeon General was authorized to employ not over 30 contract dental surgeons, in the proportion of 1 for every 1,000 officers and enlisted men in the Regular and Volunteer Army. Provision for the United States Military Academy was made in the act of Mar. 2, 1907 (34 Stat. 1163), which increased the number to 31. When the Dental Corps was established by the act of Mar. 3, 1911 (36 Stat. 1054), authority was granted for commissioning the existing contract dental surgeons as first lieutenants in this corps. See 573, post.

The Dental Corps was created by act of Mar. 3, 1911 (36 Stat. 1054), which provided that there should be a Dental Corps composed of dental and acting dental surgeons, "attached to the Medical Department." The act of Oct. 6, 1917 (40 Stat. 397), provided for the organization of the Dental Corps, as follows:

"Hereafter the Dental Corps of the Army shall consist of commissioned officers of the same grade and proportionately distributed among such grades as are now or may be hereafter provided by law for the Medical Corps, who shall have the rank, pay, promotion and allowances of officers of corresponding grades in the Medical Corps, including the right to retirement as in the case of other officers, and there shall be one dental officer for every thousand of the total strength of the Regular Army authorized from time to time by law: * * *"

Sec. 10 of the national defense act of June 3, 1916 (39 Stat. 173), provided for a strength at the rate of 1 for each 1,000 enlisted men of the line, and also provided that after eight years' service as first lieutenants they might be promoted to captains, and after 24 years' service be promoted to majors, and limited the number of majors to 18.

For regulations fixing the status and regulating the employment and duties of contract and dental surgeons see par. 1300 *et seq.*, Army Regulations of 1913.

572. Appointment of first lieutenants, Dental Corps.—* * * Appointments in the * * * and Dental Corps shall be made in the grade of first lieutenant from reserve * * * and dental officers, respectively, between the ages of twenty-three and thirty-two years; * * *. To be eligible for appointment in the Dental Corps, a candidate must be a graduate of a recognized dental college, and have been engaged in the practice of his profession for at least two years subsequent to graduation. * * * *Sec. 24e, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

573. Contract dental surgeons granted commissions in 1911.—* * * *Provided*, That the contract dental surgeons attached to the Medical Department at the time of the passage of this Act may be eligible for appointment as first lieutenants, dental corps, without limitation as to age: *And provided further*, That the professional examination for such appointment may be waived in the case of contract dental surgeons in the service at the time of the passage of this Act whose efficiency reports and entrance examinations are satisfactory. The Secretary of War is authorized to appoint boards of three examiners to conduct the examinations herein prescribed, one of whom shall be a surgeon in the Army and two of whom shall be selected by the Secretary of War from the commissioned dental surgeons. *Act of Mar. 3, 1911 (36 Stat. 1055).*

574. Recommission of dental surgeons in active service in 1917.—* * * *Provided further*, That immediately following the approval of this Act all dental surgeons then in active service shall be recommissioned in the Dental Corps in the grades herein authorized in the order of their seniority and without loss of pay or allowances or of relative rank in the Army: *And provided further*, That no dental surgeon shall be recommissioned who has not been confirmed by the Senate. *Act of Oct. 6, 1917 (40 Stat. 397).*

575. Dental examining and review boards.—* * * *Provided further*, That dental examining and review boards shall consist of one officer of the Medical Corps and two officers of the Dental Corps: * * * *Act of Oct. 6, 1917 (40 Stat. 397).*

576. Promotions in the Dental Corps.—* * * To officers of the Dental Corps shall be credited their service as contract dental surgeons and acting dental surgeons, * * * rendered prior to June 3, 1916. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767).*

577. Rank and command of dental surgeons.—* * * Officers of the dental corps shall have rank in such corps according to date of their commissions therein and shall rank next below officers of the Medical Reserve Corps. Their right to command shall be limited to the dental corps. * * * *Act of Mar. 3. 1911 (36 Stat. 1054).*

See 554, ante, and 2309, post.

578. Dental surgeon detailed at the United States Military Academy.—* * * *Provided*, That hereafter the number of dental surgeons authorized by law shall be thirty-one, of which number one shall be detailed to the United States Military Academy. *Act of Mar. 2, 1907 (34 Stat. 1163), making appropriations for the support of the Army.*

So much of this provision as fixed the number of dental surgeons at "thirty-one," was superseded by the provision that the number of dental surgeons in the Dental Corps attached to the Medical Department should not exceed 60, made by act Mar. 3, 1911, and subsequent acts creating the Dental Corps.

579. **Acting dental surgeons.**—* * * *Provided*, That the time served by dental surgeons as acting dental or contract dental surgeons shall be reckoned in computing the increased service pay of such as are commissioned under this Act. The appointees as acting dental surgeons must be citizens of the United States between twenty-one and twenty-seven years of age, graduates of a standard dental college, of good moral character and good professional education, and they shall be required to pass the usual physical examination required for appointment in the Medical Corps, and a professional examination which shall include tests of skill in practical dentistry and of proficiency in the usual subjects of a standard dental college course: * * * *Act of Mar. 3, 1911 (36 Stat. 1054)*.

580. **Proportion of privates first class.**—* * * *Provided*, That hereafter the proportion of privates first class to privates in the Signal Corps and in the Medical Department shall be the same as the proportion of privates first class to privates now authorized by law in the Quartermaster Corps. *Act of Aug. 29, 1916 (39 Stat. 625), making appropriations for the support of the Army.*

For see 1671, post.

581. **Composition of the Army Nurse Corps.**—That the Nurse Corps (female) of the Medical Department of the Army shall hereafter be known as the Army Nurse Corps, and shall consist of one superintendent, who shall be a graduate of a hospital-training school having a course of instruction of not less than two years; of as many chief nurses, nurses, and reserve nurses as may from time to time be needed and prescribed or ordered by the Secretary of War, and, in the discretion of the Secretary of War, of not exceeding six assistant superintendents, and, for each Army or separate military force beyond the continental limits of the United States, one director and not exceeding two assistant directors of nursing service, all of whom shall be graduates of hospital-training schools and shall have passed such professional, moral, mental, and physical examination as shall be prescribed by the Secretary of War. *Sec. 1, chap. V, act of July 9, 1918 (40 Stat. 879)*.

Previous to 1901, nurses (female) were held to be civilian employees. (G. O. 120, W. D. 1900.) Authority to employ them was given in sec. 5, act of Mar. 16, 1802 (2 Stat. 133), and this was continued in subsequent legislation. The Nurse Corps (female) came into being by sec. 19, act of Feb. 2, 1901 (31 Stat. 753):

"The Nurse Corps (female) shall consist of one superintendent, to be appointed by the Secretary of War, who shall be a graduate of a hospital training school having a course of instruction of not less than two years, whose term of office may be terminated at his discretion, whose compensation shall be one thousand eight hundred dollars per annum, and of as many chief nurses, nurses, and reserve nurses, as may be needed. Reserve nurses may be assigned to active duty when the emergency of the service demands, but shall receive no compensation except when on such duty: *Provided*, That all nurses in the Nurse Corps shall be appointed or removed by the Surgeon-General, with the approval of the Secretary of War; that they shall be graduates of hospital training schools, and shall have passed a satisfactory professional, moral, mental, and physical examination." Repealed by sec. 7, act of July 9, 1918 (40 Stat. 880).

582. **Appointment of Army nurses.**—That the superintendent shall be appointed by, and, at his discretion, be removed by, the Secretary of War; that all other members of said corps shall be appointed by, and, at his discretion, be removed by, the Surgeon General by and with the approval of the Secretary of War; but the assistant superintendents, the directors, the assistant directors, and the chief nurses shall be appointed by promotion from other members of the corps, and shall, upon being relieved from duty as such, unless removed for

incompetency or misconduct, revert to the grades in the corps from which they were promoted. *Sec. 3, chap. V, act of July 9, 1918 (40 Stat. 879).*

583. Relative rank of the Army Nurse Corps.—* * * Hereafter the members of the Army Nurse Corps shall have relative rank as follows: The superintendent shall have the relative rank of major; the assistant superintendents, director and assistant directors, the relative rank of captain; chief nurses, the relative rank of first lieutenant; head nurses and nurses, the relative rank of second lieutenant; and as regards medical and sanitary matters and all other work within the line of their professional duties shall have authority in and about military hospitals next after the officers of the Medical Department. The Secretary of War shall make the necessary regulations prescribing the rights and privileges conferred by such relative rank. *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767–768).*

584. Duties of Army nurses.—That rules and regulations prescribing the duties of the members of the Army Nurse Corps shall be prescribed by the Surgeon General of the United States Army, subject to the approval of the Secretary of War. *Sec. 2, chap. V, act of July 9, 1919 (40 Stat. 879).*

585. Matrons of post hospitals and nurses.—Hospital matrons and nurses may be employed in post or regimental hospitals in such numbers as may be necessary. *R. S. 1239.*

586. Composition of the Veterinary Corps.—* * * The number of officers of the Veterinary Corps shall be 175. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767).*

The "hire of veterinary surgeons" is provided for in recent Army appropriation acts, the last such provision being found in the act of June 5, 1920 (41 Stat. 967).

By sec. 2 of act of July 29, 1861 (12 Stat. 280), one veterinary sergeant was provided with each battalion of Cavalry, and by sec. 4 of that act received the pay and allowances of a sergeant of Cavalry. By sec. 37, act of Mar. 3, 1863 (12 Stat. 737), each Cavalry regiment was provided with one veterinary surgeon with the rank of regimental sergeant major, held to be a citizen employed (Army Register, 1871), with the salary of $75 per month. Later another veterinarian was added with salary of $100, but holding the same grade, and veterinarians were attached to Artillery regiments. By sec. 2, act of Mar. 3, 1899 (30 Stat. 977), proper qualifications were required for appointment, and the pay and allowances of a second lieutenant mounted were granted to the veterinarians, first class, and pay of $75 per month and the allowances of a sergeant major to the veterinarians, second class. The grade of veterinarian, second class, was abolished by sec. 20, act of Feb. 2, 1901 (31 Stat. 753), and all veterinarians received the pay and allowances of second lieutenants, mounted. Said section 20 provided that "such number of veterinarians as the Secretary of War may authorize shall be employed to attend the animals pertaining to the Quartermaster's or other Departments not directly connected with the cavalry and artillery regiments, at a compensation not exceeding one hundred dollars per month." Retirement under the laws governing second lieutenants was provided by the act of Mar. 3, 1911 (36 Stat. 1042). Sec. 16 of the national defense act of June 3, 1916 (39 Stat. 176), which was stricken out by the above section, read as follows:

"The President is hereby authorized, by and with the advice and consent of the Senate, to appoint veterinarians and assistant veterinarians in the Army, not to exceed, including veterinarians now in service, two such officers for each regiment of Cavalry, one for every three batteries of Field Artillery, one for each mounted battalion of Engineers, seventeen as inspectors of horses and mules and as veterinarians in the Quartermaster Corps, and seven as inspectors of meats for the Quartermaster Corps; and said veterinarians and assistant veterinarians shall be citizens of the United States and shall constitute the Veterinary Corps and shall be a part of the Medical Department of the Army. * * *"

587. Appointment of second lieutenants, Veterinary Corps.—* * * Appointments * * * shall be made * * * in the Veterinary Corps in the grade

of second lieutenant from reserve veterinary officers between the ages of twenty-one and thirty years; * * * *Sec. 24e, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

588. Promotions in the Veterinary Corps.—* * * An officer of the Veterinary Corps shall be promoted to the grade of first lieutenant after three years' service, to the grade of captain after seven years' service, to the grade of major after fourteen years' service, to the grade of lieutenant colonel after twenty years' service, and to the grade of colonel after twenty-six years' service. * * * To officers * * * shall be credited their service * * * and to officers of the Veterinary Corps, their governmental veterinary service rendered prior to June 3, 1916. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767).*

Provision for appointment and promotion in the Veterinary Corps of veterinarians of Cavalry, Field Artillery, and the Quartermaster Corps, after 15 years' service as veterinarians (captains), after five years' service as assistant veterinarians (first lieutenant), and under five years' service as assistant veterinarians (second lieutenant), as well as for appointment of probationary assistant veterinarians, reserve veterinarians, veterinary examining boards, etc., was made in sec. 16 of the national defense act of June 3, 1916 (39 Stat. 177), repealed by sec. 16, act of June 4, 1920 (41 Stat. 769).

589. Composition of the Medical Administrative Corps.—* * * The number of officers * * *, and of the Medical Administrative Corps, one for every two thousand, of the total enlisted strength of the Regular Army, authorized from time to time, and within the peace strength permitted by this Act. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767).*

590. Appointment to the Medical Administrative Corps.—* * * Appointees in the Medical Administrative Corps must also have had at least five years' enlisted service in the Medical Department, and the number appointed in the grades of captain and first lieutenant under the provisions of this paragraph shall not exceed one-half of the whole number authorized for said corps. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767).*

591. Appointment of second lieutenants, Medical Administration Corps.—* * * Appointments * * * shall be made * * * in the Medical Administrative Corps in the grade of second lieutenant from enlisted men of the Medical Department between the ages of twenty-one and thirty-two years, who have had at least two years' service. * * * *Sec. 24e, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

592. Promotion in the Medical Administrative Corps.—* * * An officer of the Medical Administrative Corps shall be promoted to the grade of first lieutenant after five years' service, and to the grade of captain after ten years' service. * * * *Sec. 10, act of June 3, 1916 (39 Stat. 171), as amended by sec. 10, act of June 4, 1920 (41 Stat. 767).*

593. Board on serums, etc.—That the Surgeon-General of the Army, the Surgeon-General of the Navy, and the supervising Surgeon-General of the Marine-Hospital Service be, and they are hereby, constituted a board with authority, subject to the approval of the Secretary of the Treasury, to promulgate from time to time such rules as may be necessary in the judgment of said board to govern the issue, suspension, and revocation of licenses for the maintenance of establishments for the propagation and preparation of viruses, serums, toxins, antitoxins,

and analogous products, applicable to the prevention and cure of diseases of man, intended for sale in the District of Columbia, or to be sent, carried, or brought for sale from any State, Territory, or the District of Columbia, into any other State, Territory, or the District of Columbia, or from the United States into any foreign country, or from any foreign country into the United States: *Provided*, That all licenses issued for the maintenance of establishments for the propagation and preparation in any foreign country of any virus, serum, toxin, antitoxin, or product aforesaid, for sale, barter, or exchange in the United States, shall be issued upon condition that the licentiates will permit the inspection of the establishments where said articles are propagated and prepared, in accordance with section three of this act. *Sec. 4, act of July 1, 1902 (32 Stat. 729).*

594. Advisory board for the Hygienic Laboratory.—That there shall be an advisory board for the hygienic laboratory provided by the Act of Congress approved March third, nineteen hundred and one, for consultation with the Surgeon-General of the Public Health and Marine-Hospital Service relative to the investigations to be inaugurated, and the methods of conducting the same, in said laboratory. Said board shall consist of three competent experts, to be detailed from the Army, the Navy, and the Bureau of Animal Industry by the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Secretary of Agriculture, respectively, which experts, with the director of the said laboratory, shall be ex officio members of the board, and serve without additional compensation. Five other members of said board shall be appointed by the Surgeon-General of the Public Health and Marine-Hospital Service, with the approval of the Secretary of the Treasury, who shall be skilled in laboratory work in its relation to the public health, and not in the regular employment of the Government. The said five members shall each receive compensation of ten dollars per diem while serving in conference, as aforesaid, together with allowance for actual and necessary traveling expenses and hotel expenses while in conference. Said conference is not to exceed ten days in any one fiscal year. The term of service of the five members of said board, not in the regular employment of the Government, first appointed shall be so arranged that one of said members shall retire each year, the subsequent appointments to be for a period of five years. Appointments to fill vacancies occurring in a manner other than as above provided shall be made for the unexpired term of the member whose place has become vacant. *Sec. 5, act of July 1, 1902 (32 Stat. 713).*

The Hygienic Laboratory was provided for by act Mar. 3, 1901, sec. 1 (31 Stat. 1137).

594½. Civilian force.—For additional employees in the office of the Surgeon General, $60,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding $1,200 per annum. *Act of Mar. 3, 1921 (41 Stat. 1278), making appropriations for legislative, executive, and judicial expenses: Office of Surgeon General.*

CHAPTER 14.

CORPS OF ENGINEERS.

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HISTORICAL NOTE.

Legislative provision for the services of Engineer officers with the Revolutionary armies was made at a relatively early stage in the progress of the war by a resolution of Congress of June 16, 1775, which authorized the employment of Engineer officers at the headquarters of the Army and in the several departments. Col. R. Gridley was appointed Chief Engineer by General Washington, and his services were recognized and continued in that capacity by a resolution of Congress dated Jan. 16, 1776. The difficulty of obtaining trained engineers in the Continental establishment made it necessary to secure such services abroad, and the action of the American commissioners in Paris, in employing several members of the French Corps of Engineers, was approved by Congress in a resolution dated July 8, 1777. A Corps of Engineers was subsequently established by the resolution of Mar. 11, 1779, and M. Duportail, an officer of the Royal Engineers of France, was placed at its head, with the rank of brigadier general. This corps continued in service until the close of the war, not having been disbanded until Nov., 1783.

A Corps of Artillerists and Engineers was established by the act of May 9, 1784 (1 Stat. 366). This organization was required to be "completed" by the act of Mar. 3, 1795 (id. 430), and an additional regiment of artillerists and engineers was added to the establishment by the act of Apr. 27, 1798 (id. 552). The seventeenth and eighteenth sections of the act of Mar. 3, 1799 (id. 755), passed in contemplation of war with France, authorized the appointment of two engineers "distinct from the Corps of Artillerists and Engineers," with the rank and pay of lieutenant colonels, and conferred power upon the President, in his discretion, to appoint an inspector of fortifications, who was to have the rank of major and was to be selected from the artillerists and engineers or from civil life. If he was appointed from the existing corps, he was to retain his office and was to rise "therein in the same manner as if he had never been appointed to the said office of inspector."

The functions of the Artillerists and Engineers were dissociated by the act of Mar. 6, 1802 (2 id. 132), which created a regiment of Artillery and authorized the President to organize and establish a Corps of Engineers to consist of 1 major, 2 captains, 2 first lieutenants, 2 second lieutenants, and 10 cadets; provision was made in the same enactment for the gradual expansion of the corps by a clause conferring authority upon the President to make promotions "without regard to rank" until the corps should consist of 1 colonel, 1 lieutenant colonel, 2 majors, 4 captains, 4 first lieutenants, and 4 second lieutenants. By the act of Apr. 29, 1812 (2 id. 720), 2 captains, 2 first lieutenants, 2 second lieutenants, "to be taken from the subaltern officer of Engineers," and 1 paymaster and a company of bombardiers, sappers, and miners were added to the existing establishment. The composition of this corps was not changed by the acts of Mar. 3, 1815 (3 id. 224), and Apr. 4, 1818 (id. 426), for the reduction and reorganization of the staff, nor was its organization modified at the general reduction of Mar. 2, 1821 (id. 615).

By sec. 4 of the act of July 5, 1838 (5 Stat. 257), a Corps of Topographical Engineers was established, and by sec. 2 of said act the President was authorized to increase the

Corps of Engineers by the addition of 1 lieutenant colonel, 2 majors, 6 captains, 6 first lieutenants, and 6 second lieutenants, and the pay of Engineer officers was fixed at the rates established by law for officers of dragoons. By sec. 3 of the act of July 5, 1838, the paymaster authorized by the act of Apr. 12, 1808, was transferred to the Pay Department. A second company of Engineer soldiers was added to the corps by sec. 4 of the act of May 15, 1846 (9 id. 12). By the act of Mar. 3, 1851 (id. 62), the President was authorized to employ officers of Engineers on lighthouse duty, and by sec. 8 of the act of Aug. 31, 1852 (10 id. 119), officers of the corps were required to be attached to the Lighthouse Board as member and engineer secretary, respectively. By sec. 9 of the act of Mar. 3, 1853 (id. 112), lieutenants of engineers, after 14 years' continuous service, were to be entitled to the pay and allowance of captains. By sec. 3 of the act of Aug. 5, 1861 (12 id. 287), 3 first lieutenants and 3 second lieutenants were added, and the organization of 3 additional companies of Engineer soldiers was authorized by the act of Aug. 6, 1861 (id. 317); 2 lieutenant colonels and 4 majors were added to the strength of the corps "by regular promotion." The Corps of Topographical Engineers was discontinued by the act of Mar. 3, 1863 (id. 743), and its officers were merged in the Corps of Engineers. Examinations were also required, in all grades below that of field officer, as a condition precedent to promotion. The composition of the corps was fixed, by the same enactment, at 1 brigadier general, 4 colonels, 10 lieutenant colonels, 20 majors, 30 captains, 30 first lieutenants, and 10 second lieutenants. By sec. 19 of the act of July 28, 1866 (14 id. 333), the strength of the corps was fixed at 1 brigadier general, 6 colonels, 12 lieutenant colonels, 24 majors, 30 captains, 26 first lieutenants, and 10 second lieutenants. By sec. 6 of the act of Mar. 3, 1869 (15 id. 318), appointments and promotions in the several departments of the staff were suspended until otherwise directed by Congress. This requirement was removed, however, as to all officers below the grade of brigadier general by the act of June 10, 1872 (17 id. 392), and repealed as to the Chief of Engineers by the act of June 30, 1879 (21 id. 45).

The Corps of Engineers was authorized by R. S. sec. 1094, and its composition was prescribed by R. S. sec. 1151, and the composition of the battalion of Engineers and of each company was prescribed by R. S. secs. 1154 and 1155, and by the act of July 5, 1898 (30 id. 652), the strength of the Corps of Engineers was fixed at 1 brigadier general, 7 colonels, 14 lieutenant colonels, 28 majors, 35 captains, 30 first lieutenants, and 12 second lieutenants.

By sec. 22 of the act of Feb. 2, 1901 (31 Stat. 754), the strength of the department was fixed at 1 Chief of Engineers with the rank of brigadier general, 7 colonels, 14 lieutenant colonels, 28 majors, 40 captains, 40 first lieutenants, and 30 second lieutenants. The enlisted force was also increased by the addition of 2 battalions of Engineer troops. It was also provided that the troops of the 3 Engineer battalions and the officers of Engineers assigned to duty therewith should constitute a part of the line of the Army.

By the act of Apr. 23, 1904 (33 Stat. 263), the strength of the corps was fixed at 1 Chief of Engineers with the rank of brigadier general, 10 colonels, 16 lieutenant colonels, 32 majors, 48 captains, 43 first lieutenants, and 43 second lieutenants. By sec. 5 of the act of Feb. 27, 1911 (36 Stat. 957), the corps was increased by 5 colonels, 6 lieutenant colonels, 19 majors, 17 captains, and 13 first lieutenants—the increase to be extended over a period of 5 years as nearly as practicable.

By sec. 11, act of June 3, 1916 (39 Stat. 173), it was provided that the commissioned personnel should consist of 1 Chief of Engineers (brigadier general), 23 colonels, 30 lieutenant colonels, 72 majors, 152 captains, 148 first lieutenants, and 79 second lieutenants. That act was superseded by sec. 11, act of June 4, 1920, post, 595.

It was provided by sec. 11, act of Feb. 2, 1901, and sec. 11, act of June 3, 1916, that the enlisted force of Engineers provided by these acts and the officers serving with them should be troops of the line.

The Corps of Engineers is designated as a combatant arm of the Army, by sec. 2, act of June 4, 1920, post, 2118.

The Corps of Topographical Engineers.—The act of Mar. 3, 1813 (2 Stat. 819), authorized the appointment of 8 topographical engineers with the rank of major of Cavalry and 8 assistants with the rank of captain of Infantry; but this force was reduced to 2 majors by the act of Mar. 3, 1815 (id. 224). By the act of Apr. 24, 1816 (id. 297), 3 majors and 2 assistants with the rank of captain were authorized for each division of the Army. On July 2, 1818, these officers were merged, by general orders, in the Corps of Engineers. In Aug., 1818, a Topographical Bureau was established in the War Department, the duties of the bureau being performed by officers detailed from the line. By the act of Apr. 30, 1824 (4 id. 22), civil assistants were authorized

to be employed, and on June 21, 1831, the Topographical Bureau was formally constituted, in general orders, as a separate office of the War Department.

The Corps of Topographical Engineers *eo nomine* was established by sec. 4 of the act of July 5, 1838 (5 Stat. 257), to consist of 1 colonel, 1 lieutenant colonel, 4 majors, 10 captains, 10 first lieutenants, and 10 second lieutenants, who were to be appointed by selection from the Corps of Engineers, from the line of the Army, and from the civil engineers authorized by the act of Apr. 30, 1824. The corps as thus constituted was increased by sec. 2 of the act of Aug. 5, 1861 (12 id. 287), by the addition of 3 first lieutenants and 3 second lieutenants, and, by the act of Aug. 6, 1861 (id. 317), by the addition of 2 lieutenant colonels, 4 majors, and 1 company of Engineer soldiers. The corps was discontinued by the act of Mar. 3, 1863 (12 Stat. 743), its officers being merged in the Corps of Engineers.

595. Composition.—The Corps of Engineers shall consist of one Chief of Engineers with the rank of major general, one assistant with the rank of brigadier general, six hundred officers in grades from colonel to second lieutenant, inclusive, and twelve thousand enlisted men, such part of whom as the President may direct being formed into tactical units organized as he may prescribe. *Sec. 11, act of June 3, 1916 (39 Stat. 173), as amended by sec. 11, act of June 4, 1920 (41 Stat. 768).*

For general provision under which the Chief of Engineers received the rank, pay, and allowances of a major general, see sec. 8, act of Oct. 6, 1917, post, 2342.

596. Selection of the Chief of Engineers.—The * * * Chief of Engineers * * * shall be appointed by selection from the corps to which they belong. *R. S. 1193.*

* * * *Provided*, That the Chief of Engineers shall be appointed as now provided by law, * * * *Sec. 23, act of Feb. 2, 1901 (31 Stat. 754), as amended by act of Apr. 23, 1904 (33 Stat. 263).*

See 2320, post.

597. Appointment of second lieutenants.—* * * Vacancies in the grade of second lieutenant in the Corps of Engineers shall hereafter be filled, as far as may be consistent with the interests of the military service, by promotions from the Corps of Cadets at the United States Military Academy: *Provided*, That vacancies remaining in any fiscal year after the assignment of cadets of the class graduating in that fiscal year may be filled from civil life as hereinafter provided: *And provided further*, That the proportion of any graduating class assigned to the Corps of Engineers shall not be less than the proportion which the total number of officers authorized at date of graduation for that corps bears to the total number of officers authorized at same date for all branches of the Army to which cadets are eligible for promotion upon graduation, except when such a proportionate number is more than the number of vacancies existing at date of graduation plus the number of retirements due to occur in the Corps of Engineers prior to the first day of the following January. To become eligible for examination and appointment, a civilian candidate for the appointment as second lieutenant must be an unmarried citizen of the United States between the ages of twenty-one and twenty-nine, who holds a diploma showing graduation in an engineering course from an approved technical school, and is eligible for appointment as a junior engineer under the Engineer Bureau of the War Department. Selection of eligible civilians for appointment, including term of probation, shall be made as the result of such competitive examination into the mental, moral, and physical qualifications, and under such rules and regulations as shall be recommended by the Chief of Engineers and approved by

the Secretary of War. *Sec. 5, act of Feb. 27, 1911 (36 Stat. 957), making appropriations for river and harbor expenses.*

But see 2269, post.

Other provisions relating to the composition of the Corps of Engineers are contained in act Feb. 2, 1901, sec. 22, as amended by act Apr. 23, 1904, and act June 3, 1916, sec. 11 (39 Stat. 174), and relating to promotions in the Corps by said act Feb. 2, 1901, sec. 22, as amended by act Apr. 23, 1904, and a provision of act June 3, 1916, sec. 24.

The appointment to the Corps of Engineers of any officer graduated from the Military Academy at the head of his class, not then in the Corps, was provided for by a provision of sec. 13, act of Mar. 2, 1899 (30 Stat. 980).

598. Promotions.— * * * and hereafter vacancies in the Corps of Engineers in all other grades above that of second lieutenant shall be filled by promotion, according to seniority, from the Corps of Engineers. * * * *Sec. 23, act of Feb. 2, 1901 (31 Stat. 754), as amended by act of Apr. 23, 1904 (33 Stat. 263).*

* * * The increase in each grade hereby provided for shall be extended over a period of five years as nearly as practicable, and the original vacancies hereby created in each grade shall be filled by promotion from the next lower grade in accordance with existing law: * * * *Sec. 5, act of Feb. 27, 1911 (36 Stat. 957).*

Formerly promotion in this corps was subject to examination, according to R. S. 1206.

But see 2279, post.

599. Promotion of lieutenant with 14 years of service.—When any lieutenant of the Corps of Engineers has served fourteen years' continuous service as lieutenant, he shall be promoted to the rank of captain, on passing the examination provided by the preceding section, but such promotion shall not authorize an appointment to fill any vacancy, when such appointment would increase the whole number of officers in the corps beyond the number fixed by law; nor shall any officer be promoted before officers of the same grade who rank him in his corps. *R. S. 1207.*

Section twelve hundred and seven is amended by inserting after the word "engineers" in the first line, the words "or Ordnance Corps." *Act of Feb. 27, 1877 (19 Stat. 243), amending R. S. 1207.*

But see 2279, post.

Notes of Decisions.

Promotion for continuous service.—An officer of the Engineer Corps who has unsuccessfully undergone examination for promotion under 598, ante, and in consequence has been suspended from promotion for one year as provided by that section, is not, during the period of such suspension, qualified for promotion on account of continuous service under this section. (1883) 17 Op. Atty. Gen. 571.

600. Limits of duty.—Engineers shall not assume nor be ordered on any duty beyond the line of their immediate profession, except by the special order of the President. They may, at the discretion of the President, be transferred from one corps to another, regard being paid to rank. *R. S. 1158.*

But see 2353, post.

Employment of retired officers of the Army and Navy on river and harbor improvement was provided for by sec. 7, act of June 3, 1896 (29 Stat. 235), post, 2443.

The detail of officers of the Engineer Corps, for consultation or to superintend the construction or repair of any aid to navigation was authorized by act June 17, 1910, sec. 11 (36 Stat. 538).

Officers of the Army and Navy were to be employed, as far as compatible with the successful prosecution of the work, in the coast survey, by R. S. secs. 4684, 4687.

The organization of a board of five Engineer officers required to perform the duties imposed by the Chief of Engineers, and to consider and report on all reports and surveys for river and harbor improvements, was provided for by act June 13, 1902, sec. 3, post, 1514.

Notes of Decisions.

Repeal.—Act Mar. 4, 1909, sec. 9, ante, 223, does not operate either to repeal any portion of this section or to revoke the implied power there given to the President to order Army engineers to any duty, nor does it curtail his power hereunder, or otherwise, to assign such engineers to any duty. (1910) 28 Op. Atty. Gen. 270.

Order for duty.—Officers of the Engineer Corps of the Army may be ordered to any duty in the line of their profession. The President may detail officers of the Engineer Corps to act as experts at a hearing involving the granting of a permit to the city and county of San Francisco to use the Hetch Hetchy Valley, in the Yosemite National Park, for maintaining a water supply for municipal purposes. (1910) 28 Op. Atty. Gen. 270.

Limits of duty.—The oversight and inspection of a public work, requiring science and skill to construct it, is the appropriate duty of an engineer, as also the disbursement of public moneys applicable to any such work about the execution of which an engineer may be engaged. (1860) 9 Op. Atty. Gen. 463.

601. Duties of enlisted men.—The enlisted men of the engineer battalion shall be instructed in and perform the duties of sappers, miners, and pontoniers, and shall aid in giving practical instruction in those branches at the Military Academy. They may be detailed by the Chief of Engineers to oversee and aid laborers upon fortifications and other works in charge of the Engineer Corps, and, as fort-keepers, to protect and repair finished fortifications. *R. S. 1157.*

One company of bombardiers, sappers, and miners was authorized by the act of Apr. 29, 1812 (2 Stat. 720), to be officered from the Corps of Engineers; this company was disbanded at the general reduction of 1821, act of Mar. 2, 1821 (2 id. 615). A similar company, to be officered in the same manner, was authorized by the act of May 15, 1846 (9 id. 12); three additional companies were provided for in sec. 4 of the act of Aug. 6, 1861 (12 id. 317). A sergeant-major, quartermaster-sergeant, and commissary sergeant were authorized by sec. 4 of the act of June 20, 1864 (13 id. 144). By sec. 20 of the act of July 28, 1866 (14 id. 335), the enlisted establishment of the Corps of Engineers was fixed at five companies, with the battalion sergeant-major and quartermaster-sergeant already authorized by law. The grade of battalion commissary-sergeant was discontinued by section 10 of the act of July 15, 1870 (15 id. 318). Section 7 of the act of Mar. 2, 1899 (30 Stat. 979), contained the requirement that the battalion of Engineers and the officers serving therewith should constitute a part of the line of the Army; this provision was reenacted in sec. 22 of the act of Feb. 1, 1901 (31 Stat. 754); by sec. 11 of the same enactment the enlisted force of the Engineer Corps was increased to three battalions of engineer troops and a band.

602. Vacant.

603. Use of the Library of Congress.—That the Joint Committee of Congress on the Library is authorized to extend the use of the books in the Library of Congress to * * * the Chief of Engineers of the Corps of Engineers United States Army, resident in Washington, on the same conditions and restrictions as members of Congress are allowed to use the Library. *Joint Res. 41, Aug. 28, 1890 (26 Stat. 678).*

604. Military surveys and maps.—For the execution of topographic or other surveys, the securing of such extra topographic data as may be required, and the preparation and printing of maps required for military purposes, to be immediately available and remain available until December 31, 1921, $100,000: *Provided*, That the Secretary of War is authorized to secure the assistance, wherever practicable, of the United States Geological Survey, the Coast and

Geodetic Survey, or other mapping agencies of the Government in this work and to allot funds therefor to them from this appropriation. *Act of June 5, 1920 (41 Stat. 970), making appropriations for the support of the Army: Engineer Department.*

605. Civilian force.—For additional employees in the office of the Chief of Engineers, $10,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding $1,800 per annum.

The services of skilled draftsmen, civil engineers, and such other services as the Secretary of War may deem necessary, may be employed only in the office of the Chief of Engineers, to carry into effect the various appropriations for rivers and harbors, surveys, preparation for and the consideration of river and harbor estimates and bills, fortifications, engineer equipment of troops, engineer operations in the field, and other military purposes, to be paid from such appropriations: *Provided*, That the expenditures on this account for the fiscal year 1922 shall not exceed $150,000; the Secretary of War shall each year, in the annual estimates, report to Congress the number of persons so employed, their duties, and the amount paid to each. *Act of Mar. 3, 1921 (41 Stat. 1279), making appropriations for legislative, executive, and judicial expenses: Office of Chief of Engineers.*

* * * *Provided*, That the services of skilled draftsmen, civil engineers, and such other services as the Secretary of War may deem necessary may be employed only in the office of the Chief of Engineers to carry into effect the various appropriations for "Engineer equipment of troops," "Engineer operations in the field," and other military appropriations to be paid from such appropriations: *Provided further*, That the expenditures on this account for the fiscal year 1921 shall not exceed $150,000. The Secretary of War shall each year, in the annual estimates, report to Congress the number of persons who are employed, their duties, and amount paid to each. *Act of June 5, 1920 (41 Stat. 969), making appropriations for the support of the Army: Engineer equipment of troops.*

For services of surveyors, survey parties, draftsmen, photographers, master laborers, and clerks to Engineer officers on the staffs of division, corps, and department commanders, $40,000. *Act of June 5, 1920 (41 Stat. 969), making appropriations for the support of the Army: Civilian assistants to Engineer officers.*

Similar provisions appear in previous appropriation acts.

606. Per diem rate in lieu of subsistence.—That hereafter when the expenses of persons engaged in field work or traveling on official business outside of the District of Columbia and away from their designated posts of duty are chargeable to appropriations of the Engineer Department, a per diem of not exceeding $4 may be allowed in lieu of subsistence when not otherwise fixed by law. *Sec. 9, act of July 18, 1918 (40 Stat. 912), making appropriations for river and harbor works.*

607. Vacant.

CHAPTER 15.

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HISTORICAL NOTE.

The duties in connection with the procurement, manufacture, and supply of cannon, small arms, and military stores, now performed by the Ordnance Department, seem to have been vested during the Revolutionary period in a purveyor of public supplies, an office created by Congress, which ceased to exist at the close of the war. With a view to secure proper accountability and a more efficient administration in this branch of the military service President Washington, on Jan. 7, 1794, recommended to Congress that the office of purveyor of public supplies be created and charged "with the duties of receiving, safe-keeping, and distributing the public supplies." The office thus recommended was established by the act of Feb 23, 1795 (1 Stat. 419), and continued to exist until May 31, 1812, when, its duties having been transferred to the several departments of the staff, it was abolished by sec 9, act of Mar. 28, 1812 (2 id. 696).

The Ordnance Department, *eo nomine*, was established by the act of May 14, 1812 (id. 732), and was to consist of 1 commissary general of ordnance, an assistant commissary general, 4 deputy commissaries, and as many assistant deputy commissaries, not exceeding 8, as the President might deem necessary. The commissary general of ordnance was to have the rank and pay of colonel, the assistant commissary general that of lieutenant colonel, the deputy commissaries that of major, and the assistant deputy commissaries that of captain. By the act of Feb. 8, 1815 (3 id. 203), the department was reorganized, its duties were defined, and its strength fixed at 1 colonel, 1 lieutenant colonel, 2 majors, 10 captains, 10 first lieutenants, and as many enlisted men, to serve as armorers, blacksmiths, wheelwrights, artificers, etc., as the Secretary of War might deem necessary; by the same enactment the supervision of the several armories, magazines, and arsenals was vested in the Ordnance Department.

By sec. 4 of the act of Mar. 2, 1821 (3 id. 283), the Ordnance Department was merged in the Artillery, 1 captain being added to each regiment of artillery for ordnance duty. Although the department ceased to exist, for the time, as a separate establishment, the duties pertaining to the ordnance service seem to have continued to be performed by officers of Artillery detailed for the purpose. By the act of Apr. 5, 1830 (4 id. 504), the Ordnance Department was reconstituted, with the following commissioned strength: One colonel, 1 lieutenant colonel, 2 majors, 10 captains, with the pay and allowances of Artillery officers of corresponding grades, and as many enlisted men as might be required, not to exceed 250. By sec. 2 of the act of Apr. 5, 1830, the grade of ordnance sergeant was established, the number authorized to be appointed being restricted to one for each military post. By sec. 13 of the act of July 5, 1838 (5 id. 256), the President was authorized to add 2 majors to the department "when he may deem it expedient to increase the same"; he was also authorized to transfer 10 first lieutenants and 10 second lieutenants to the department from the Artillery; by the act of July 7, 1838 (id. 308), the number of lieutenants thus authorized to be transferred was reduced to 12. The act of July 5, 1838, placed officers of ordnance on the same footing in respect to pay and allowances as officers of dragoons. By sec. 16 of the act of Mar. 3, 1847 (9 id. 184), the President was authorized to add to the department, under the conditions set forth in the statute last cited, 2 captains and 6 first lieutenants. By sec. 3 of the act of Aug. 3, 1861 (12 id. 287), a Chief of Ordnance, with the rank and pay of quartermaster general (brigadier general), 1 colonel, 1 lieutenant colonel, and 6 second lieutenants were added to the establishment. By sec. 4 of the act of Mar. 3, 1863 (id. 743), 1 lieutenant colonel, 2 majors, 8 captains, and 8 first lieutenants were added; the appointments to be made by promotion "as far as the present Ordnance Corps will permit, and the residue to be appointed by transfer from other regiments and corps of the Army"; by this statute examinations were required in all grades below that of field officer as a condition precedent to promotion.

By sec. 21 of the act of July 28, 1866 (14 id. 335), the peace strength of the department was fixed at 1 brigadier general, 3 colonels, 4 lieutenant colonels, 10 majors, 20 captains, 16 first lieutenants, and 10 second lieutenants; 16 ordnance storekeepers were also added to the establishment. Section 6 of the act of Mar. 3, 1869 (15 id. 318), contained the requirement that there should be no promotions or appointments in the several staff corps until otherwise directed by law. Changes in the organization and in the grades and number of the officers thereof were made by act June 23, 1874, sec. 5 (18 Stat. 245), and act July 7, 1898 (30 Stat. 720); and the department, consisting of the officers and enlisted men as then constituted, was continued by act Mar. 2, 1899, sec. 7 (30 Stat. 979). These provisions, other than those relating to the enlisted force, were superseded by act Feb. 2, 1901, sec. 23 (31 Stat. 754), and that section was superseded by act June 25, 1906, sec. 1 (34 Stat. 455), which said section was superseded by sec. 12, national defense act of June 3, 1916 (39 Stat. 174), providing that the commissioned personnel should consist of 1 Chief of Ordnance (brigadier general), 10 colonels, 15 lieutenant colonels, 32 majors, 42 captains, and 42 first lieutenants. This provision was in turn superseded by 607, post.

Provisions relating to the enlisted men of the Ordnance Department, including ordnance sergeants, were made by R. S. secs. 1109, 1162, and 1163, post, 615, 614, 616, and R. S. sec. 1110, superseded by sec. 12, national defense act of June 3, 1916 (39 Stat. 174), providing that the enlisted personnel should consist of the ordnance sergeants then authorized by law and such other enlisted men of grades then authorized by law as the President might direct, which was superseded by 607, post.

608. Composition.—The Ordnance Department shall consist of one Chief of Ordnance with the rank of major general, two assistants with the rank of brigadier general, three hundred and fifty officers in grades from colonel to second lieutenant, inclusive, and four thousand five hundred enlisted men. *Sec. 12, act of June 3, 1916 (39 Stat. 174), as amended by sec. 12, act of June 4, 1920 (41 Stat. 768).*

609. Detail of officers from the Army at large.—That details to the Ordnance Department under the provisions of the Act of February second, nineteen hundred and one, may be made from the Army at large from the grade in which the vacancy exists, or from the grade below: *Provided*, That no officer shall be so detailed except upon the recommendation of a board of ordnance officers, and after at least one examination, which shall be open to competition: *And*

provided further, That officers so detailed in grades below that of major shall not be again eligible for such detail until after they shall have served for at least one year out of that department. *Sec. 2, act of June 25, 1906 (34 Stat. 455).*

By the act of Feb. 2, 1901, permanent appointments in this corps were discontinued, and officers detailed from the line for a period of four years. But see 2260, 2353, 2337.

610. Detail of majors.—That majors may be detailed in the Ordnance Department, under section twenty-six of the Act approved February second, nineteen hundred and one, and Acts amendatory thereof, without a compulsory period of service out of that department. *Act of Feb. 24, 1915 (38 Stat. 812).*

But see 2260, post.

611. Rank.—Hereafter officers serving by detail in the Ordnance Department, under the Acts of February second, nineteen hundred and one, and June twenty-fifth, nineteen hundred and six, shall take rank in their respective grades from the dates of their rank under their original detail in said grades. *Act of Mar. 3, 1909 (35 Stat. 751), making appropriations for the support of the Army.*

The provisions of acts mentioned above are set forth, 609, ante, and 2336, post. But see 2260 and 2353, post.

612. Disbursing officer to pay civilian employees.—The Chief of Ordnance is authorized to appoint one of the Army officers serving in his office as disbursing officer to pay the civilian employees in the Ordnance Office authorized in this or any other appropriation Act for the fiscal year nineteen hundred and nineteen. *Act of July 3, 1918 (40 Stat. 785), making appropriations for legislative, executive and judicial expenses.*

Civilian employees in the department are provided for by the annual Army appropriation acts. But see 497, ante.

613. Chief ordnance officer on a corps or division staff.—A chief ordnance officer may be assigned to the staff of an army or a corps commander, and while so assigned shall have the rank, pay, and allowance of a lieutenant-colonel. A chief ordnance officer may be assigned to the staff of a division commander, and while so assigned shall have the rank, pay, and allowances of a major. *Act of July 7, 1898 (30 Stat. 720).*

This act amended sec. 5 of act June 23, 1874 (18 Stat. 245). But see 2311, post.

614. Enlisted force.—The Chief of Ordnance may enlist as many master armorers, master carriage-makers, master blacksmiths, artificers, armorers, carriage-makers, blacksmiths, and laborers as the Secretary of War may direct. Master armorers, master carriage-makers, and master blacksmiths shall be designated and mustered as sergeants; armorers, carriage-makers, and blacksmiths shall be designated and mustered as corporals; artificers shall be designated and mustered as privates of the first class, and laborers as privates of the second class. *R. S. 1162.*

Section eleven hundred and sixty-two is amended by striking out all after the word "many" in the first line and inserting the following: "sergeants of ordnance, corporals of ordnance, and first and second class privates of ordnance, as the Secretary of War may direct." *Act of Feb. 27, 1877 (19 Stat. 242), amending R. S. 1162.*

But see 1671, post.

615. Ordnance sergeants.—There shall be an ordnance sergeant for each military post, whose duty it shall be to take care of the ordnance, arms, ammunition, and other military stores at such post, under the direction of the commanding officer, and according to regulations prescribed by the Secretary of War. *R. S. 1109.*

616. Details of enlisted men. The Chief of Ordnance, subject to the approval of the Secretary of War, shall organize and detail to regiments, corps, or garrisons, such numbers of privates of the first class, furnished with proper tools, carriages, and apparatus, as may be necessary, and shall make regulations for their government. *R. S. 1163.*

Section eleven hundred and sixty-three is amended by striking out, in the third line, the words "privates of first class", and inserting the words "ordnance enlisted men", in lieu thereof. *Act of Feb. 27, 1877 (19 Stat. 242), amending R. S. 1163.*

617. Armories.—At each arsenal there shall be established a national armory, in which there shall be employed one superintendent, who shall be an officer of the Ordnance Department, to be designated by the President; one master-armorer, who shall be appointed by the President, and as many workmen as the Secretary of War may, from time to time, deem necessary. *R. S. 1662.*

But see 2353, post.

618. Annual accounts of the expenses of armories.—An annual account of the expenses of the national armories shall be laid before Congress, together with an account of the arms made and repaired therein. *R. S. 1665.*

619. Pay of employees in armories.—The ordnance officer in charge of any national armory shall receive no compensation other than his regular pay as an officer of the corps; the master-armorers shall receive fifteen hundred dollars per annum each; the inspectors and clerks, each, eight hundred dollars per annum, * * * *R. S. 1663.*

Portions omitted have been superseded by later statutes.

620. Salaries of clerks at Springfield Armory.—That on and after the passage of this act, in lieu of the compensation now allowed to the clerks at the United States armory in Springfield, Massachusetts, including fuel and quarters, there shall be paid to each of said clerks an annual salary of one thousand six hundred and fifty dollars. *Act of June 23, 1874 (18 Stat. 282).*

621. Pay of master armorer at Springfield Armory.—That in addition to the compensation now allowed and paid to the master armorer at the national armory in Springfield, Massachusetts, there shall be paid to him, from and after the passage of this act, further compensation at the rate of one thousand dollars per annum during such time as he shall perform the duties of master machinist at said armory in addition to those of master armorer. *Act of Aug. 5, 1882 (22 Stat. 299).*

622. Leaves of absence for civilian employees.—That each and every employee of the * * * arsenals of the United States Government is hereby granted thirty days' leave of absence each year, without forfeiture of pay during such leave: *Provided further*, That it shall be lawful to allow pro rata leave only to those serving twelve consecutive months or more: *And provided further*, That in all cases the heads of divisions shall have discretion as to the time when the leave can best be allowed: *And provided further*, That not more than thirty days' leave with pay shall be allowed to any such employee in one year: *Provided further*, That this provision shall not be construed to deprive employees of any sick leave or legal holidays to which they may now be entitled under existing law. *Act of Aug. 29, 1916 (39 Stat. 617) making appropriations for the naval service.*

This section superseded act Feb. 1, 1901 (31 Stat. 746), which gave 15 days' leave of absence, less any absence on account of sickness.

Notes of Decisions.

Employees entitled to leave—Day laborers and piece workers.—The words "leave of absence," as used in act of Feb. 1, 1901, and similar acts, imply a surrender by the Government of time or service which is part of a larger total of time or service contracted for; and the word "forfeited," as applied to forfeiture of pay during leave of absence, also suggests that the employee referred to work under an arrangement which entitles the Government to their time and services, so that that act did not embrace employees working at a fixed rate of pay per day or hour, or to piece workers. (1909) 27 Op. Atty. Gen. 613.

Employees of the navy yards, gun factories, naval stations, and arsenals of the United States Government, working under continuous employment, are not day laborers or piece workers in the ordinary sense of that term, and are therefore entitled to leaves of absence. (1910) 28 Op. Atty. Gen. 339.

Place of employment.—It is the nature of the duties performed by the employee, and not the place where performed, that constitutes the test as to their inclusion under act of Feb. 1, 1901, which therefore grants leave to all employees of the powder and ordnance depots, the national armory, the gun factory, and civilian employees in the service of the Ordnance Department at works of private establishments having Government contracts; the word "arsenal" being broad enough to include a depot where clothing for troops is made and stored, and where military clothing, tents, and other articles of camp and garrison equipment not manufactured by the Government, and also other military supplies, are stored and distributed, although arms and ammunition are not made or stored there. (1909) 27 Op. Atty. Gen. 613.

Employees in the general depot of the Quartermaster's Department at Philadelphia, Pa., are entitled to leave of absence. Id.

623. Pay of employees in arsenals while on leave of absence.—That the Secretary of War is hereby authorized and empowered, during the period of the war, to make payment, under such regulations as may be prescribed by him, in addition to and at the rate of pay now provided by law to each and all civilians employed by the War Department in gun factories and arsenals for work performed on all days of leave of absence granted by law to such employees. *Act of July 9, 1918 (40 Stat. 870).*

624. Accrued leaves of absence to employees serving abroad.—*Provided*, That hereafter any civilian employee of the Ordnance Department who is a citizen of the United States and employed at any station outside the continental limits of the United States may, in the discretion of the Secretary of War, after at least two years' continuous, faithful, and satisfactory service abroad, and subject to the interests of the public service, be granted accrued leave of absence, with pay, for each year of service, and if an employee should elect to postpone the taking of any or all of the leave to which he may be entitled in pursuance hereof such leave may be allowed to accumulate for a period of not exceeding four years, the rate of pay for accrued leave to be the rate obtaining at the time the leave is granted. *Act of May 12, 1917 (40 Stat. 65), making appropriations for the support of the Army: Ordnance Department.*

625. Subsistence allowance when traveling.— * * * *Provided*, That the appropriations hereinbefore made under the heading "Ordnance Department" shall be available for the payment of an allowance not to exceed $4 per day in lieu of subsistence to civilian employees of the Ordnance Department traveling on official business outside of the District of Columbia and away from their designated posts of duty. *Act of July 11, 1919 (41 Stat. 125), making appropriations for the support of the Army: Ordnance Service.*

Similar provision appears in previous appropriation acts.

626. Exemption from jury service.—All artificers and workmen employed in the armories and arsenals of the United States shall be exempted, during their time of service, from service as jurors in any court. *R. S. 1671.*

627. Reward for suggestion of improved process or economy.—That the Secretary of War is hereby authorized to offer periodically at such of the establishments of the Ordnance Department as he may select a cash reward for the suggestion, or series of suggestions, for an improvement or economy in manufacturing processes or plant, submitted within the period by one or more employees of the establishment which shall be deemed the most valuable of those submitted and adopted for use: *Provided*, That to obtain this reward the winning suggestion must be one that will clearly effect a material economy in production or increase efficiency or enhance the quality of the product in comparison with its cost and in the opinion of the Secretary shall be so worthy as to entitle the employee making the same to receive the reward: *Provided further*, That the sums awarded to employees in accordance with this Act shall be paid them in addition to their usual compensation and shall constitute part of the general or shop expense of the establishment: *Provided further*, That the total amount paid under the provisions of this Act shall not exceed one thousand dollars for any one month: *And provided further*, That no employee shall be paid a reward under this Act until he has properly executed an agreement to the effect that the use by the United States of the suggestion, or series of suggestions, made by him shall not form the basis of a further claim of any nature upon the United States by him, his heirs, or assigns, and that application for patent has not been made for the invention. *Act of July 17, 1912 (37 Stat. 193).*

628. Carelessness and disobedience of workmen.—If any artificer or workman, hired, retained, or employed in any public arsenal or armory, wantonly and carelessly breaks, impairs, or destroys any implements, tools, or utensils, or any stock, or materials for making guns, the property of the United States, or willfully and obstinately refuses to perform the services lawfully assigned to him, pursuant to his contract, he shall forfeit a sum not exceeding twenty dollars for every such act of disobedience or breach of contract, to be recovered in any court having competent jurisdiction thereof. *R. S. 1669.*

629. Vacant.

630. Enticing away workmen.—Whoever shall procure or entice any artificer or workman retained or employed in any arsenal or armory, to depart from the same during the continuance of his engagement, or to avoid or break his contract with the United States; or whoever, after due notice of the engagement of such workman or artificer, during the continuance of such engagement, shall retain, hire, or in anywise employ, harbor, or conceal such artificer or workman, shall be fined not more than fifty dollars, or imprisoned not more than three months, or both. *Sec. 43, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1097).*

631. Employees in the District of Columbia.—For the current expenses of the Ordnance Department * * * and payment for mechanical labor in the office of the Chief of Ordnance * * * *Act of June 5, 1920 (41 Stat. 970), making appropriations for the support of the Army: Ordnance Department.*

Similar provision appears in previous appropriation acts.

632. Civilian employees in the Ordnance Office.—For additional employees in the office of the Chief of Ordnance, $60,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding $1,800 per annum.

The services of skilled draftsmen and such other services as the Secretary of War may deem necessary may be employed only in the office of the Chief of Ordnance to carry into effect the various appropriations for the armament of

fortifications and for the arming and equipping of the National Guard, to be paid from such appropriations: *Provided*, That the entire expenditures for this purpose for the fiscal year 1922 shall not exceed $300,000, and the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. *Act of Mar. 3, 1921 (41 Stat. 1279), making appropriations for legislative, executive, and judicial expenses: Office of Chief of Ordnance.*

Salvage activities: The Ordnance Department is authorized to expend from the appropriation "Ordnance service," contained in the Army Appropriation Act for the fiscal year 1921, a sum not exceeding $43,000 for payment for services of the civilian personnel employed in the District of Columbia required and used solely for the work of the Salvage Board of the Ordnance Department during the fiscal year 1921, and to reimburse funds heretofore used for this purpose; and the restrictive proviso in the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1921, and for other purposes," approved May 20, 1920, shall not apply to the payment and reimbursement herein authorized. *Act of Mar. 1, 1921 (41 Stat. 1164), making appropriations to supply deficiencies: Ordnance Department.*

Similar provisions appear in previous appropriation acts.

633. Regulations for the Ordnance Department.—Section eleven hundred and sixty-seven is amended by inserting at the end thereof the following words: "* * * The Chief of ordnance, subject to the approval of the Secretary of War, is hereby authorized and directed to draw up and enforce in his department a system of rules and regulations for the government of the Ordnance Department, and of all persons in said department, and for the safe-keeping and preservation of all ordnance property of every kind, and to direct and prescribe the time, number, and forms of all returns and reports, and to enforce compliance therewith." *Act of Feb. 27, 1877 (19 Stat. 252), amending R. S. 1167.*

634. Duties of the Chief of Ordnance.—It shall be the duty of the Chief of Ordnance to furnish estimates, and, under the direction of the Secretary of War, to make contracts and purchases, for procuring the necessary supplies of ordnance and ordnance stores, for the use of the armies of the United States; to direct the inspection and proving of the same, and to direct the construction of all cannon and carriages, ammunition-wagons, traveling forges, artificers' wagons, and of every implement and apparatus for ordnance, and the preparation of all kinds of ammunition and ordnance stores constructed or prepared for said service. *R. S. 1161.*

Notes of Decisions.

Purchase and disposal of public property.—The section contains no authority for selling or loaning public property. U. S. v. Hall (C. C. 1826), Fed. Cas. No. 15,670.

The Chief of the Ordnance Department may purchase a patented device. Berdan Firearms Mfg. Co. v. U. S. (1890), 26 Ct. Cl. 48.

635. Reports to the Secretary of War upon personnel and public property.—The Chief of Ordnance shall, half yearly, or oftener if so directed, make a report to the Secretary of War of all the officers and enlisted men in his department of the service, and of all ordnance and ordnance stores under his control. *R. S. 1167.*

636. Agents of disbursing officers.—During the present emergency, under such regulations as may be prescribed by the Secretary of War, officers of the Ordnance Department accountable for public moneys may intrust moneys to other officers for the purpose of having them make disbursements as their agents, and the officers to whom the money is intrusted, as well as the officers who intrust it to them, shall be held pecuniarily responsible therefor to the United States. *Act of Oct. 6, 1917 (40 Stat. 367).*

But see 250, ante.

637. Board of Ordnance and Fortification.—That the appropriations hereinafter provided for * * * shall be expended under the direct supervision of a board to consist of the commanding general of the Army, an officer of Engineers, an officer of Ordnance, and an officer of Artillery, to be selected by the Secretary of War, to be called and known as the Board of Ordnance and Fortification; * * * *Sec. 1, act of Sept. 22, 1888 (25 Stat. 489), making appropriations for fortifications, etc.*

* * * One additional member shall be added to the said Board of Ordnance and Fortification, who shall be an artillery officer of technical ability and experience, to be selected by the Secretary of War; * * * *Act of Mar. 1, 1901 (31 Stat. 875).*

* * * the Secretary of War is hereby authorized to appoint two additional members for the Board of Ordnance and Fortification, both of whom shall be selected from the Artillery Corps. * * * *Act of Mar. 2, 1901 (31 Stat. 919).*

The words of this section, "the commanding general of the Army," were superseded by a provision that the duties prescribed by statute for the commanding general of the Army as a member of the Board of Ordnance and Fortification should be performed by the Chief of Staff or other officer designated by the President, made by act Feb. 14, 1903, sec. 4; see note to 515, ante.

The act of May 21, 1920 (41 Stat. 614), directed that unexpended funds be covered into the Treasury, and the members of the board were relieved by Par. II, G. O. 49, War Dept. 1920, and the duties transferred to Inventions Section, Operations Division of the General Staff.

638. Civilian member of the Board of Ordnance and Fortification.—* * * one additional member shall be added to said Board of Ordnance and Fortification who shall be a civilian and not an exofficer of the Regular Army or Navy, and he shall be nominated by the President, and, by and with the advice and consent of the Senate, appointed, and shall be paid a salary of five thousand dollars per annum and actual traveling expenses when traveling on duty; * * * *Act of Feb. 24, 1891 (26 Stat. 769).*

A general limitation on subsistence allowances, or money in lieu thereof, as to officers and employees of the United States, was made by 79, ante.

The acts of appropriation for fortifications since that of Aug. 4, 1894, contain provisions for the salary and necessary traveling expenses of the civilian member of the board when traveling on duty.

639. Interest in a device disqualifies for serving on the Board of Ordnance and Fortification.—*Provided*, That hereafter no person shall be a member of or serve on said Board who has been or is in any manner interested in any invention, device, or patent which, or anything similar to which, has been considered or may be considered by or come before said Board for test or adoption; or who is connected with or in the employ of any manufacturer who has or shall have contracts with the United States for any ordnance materials. *Act of Feb. 18, 1893 (27 Stat. 461), making appropriations for fortifications, etc.*

But see note to 637, ante.

640. Payment of members of the Board of Ordnance and Fortification.—* * * salary of the civilian member of the board and for his necessary traveling expenses when traveling on duty as provided by the Act of February twenty-fourth, eighteen hundred and ninety-one; necessary expenses of the board, including rent of offices in the District of Columbia, at not exceeding $900 per annum, and a per diem allowance of $2.50 to each officer detailed to serve thereon, when employed on duty away from his permanent station; * * *. *Act of July 8, 1918 (40 Stat. 820), making appropriations for fortifications.*

The several acts of appropriation since that of July 23, 1892, contain provisions for similar allowances to each officer detailed to serve on the Board of Ordnance and Fortification when on duty away from his permanent station.

This provision has appeared in all subsequent acts of appropriation. An officer who is authorized to receive compensation "while necessarily employed" only, must produce satisfactory evidence of his employment, and of the necessity therefor, during the period for which he claims compensation. (4 Comp. Dec. 424.) The auditor is authorized and it is his duty to require the production of satisfactory evidence of the time of actual employment of an officer who is paid a per diem compensation or allowance. (Id. 479.)

The mileage of officers of the Army traveling on duty connected with the Board of Ordnance and Fortification is payable from the appropriation made for the board as a part of the necessary expenses incident to the performance of the work. (3 Id. 332.) Officers of the Army connected with the Board of Ordnance and Fortification, when traveling on duty, should be furnished with transportation in kind by the Quartermaster's Department, in accordance with War Department Circular No. 8, of 1897, but whether the requests for transportation addressed to the railroad companies should be issued by the officers of the Quartermaster's Department exclusively is to be determined by the Secretary of War. (Id. 590.)

This provision does not appear in the appropriation act of Mar. 3, 1919 (40 Stat. 1305).

641. Duties of the Board of Ordnance and Fortification.—* * * and said Board shall be under the direction of the Secretary of War and subject to his supervision and control in all respects, and shall have power to provide suitable regulations for the inspection of guns and materials at all stages of manufacture to the extent necessary to protect fully the interests of the United States, and generally to provide such regulations concerning matters within said Board's operations as shall be necessary to carry out to the best advantage all duties committed to its charge: *Provided*, That subject to the foregoing provisions the expenditure shall be made by the several Bureaus of the War Department having jurisdiction of the same under existing law. *Sec. 1, act of Sept. 22, 1888 (25 Stat. 489), making appropriations for fortifications, etc.*

For all needful and proper purchases, experiments, and tests to ascertain, with a view to their utilization by the Government, the most effective guns, small arms, cartridges, projectiles, fuses, explosives, torpedoes, armor plates, and other implements and engines of war, and to purchase or cause to be manufactured, under authority of the Secretary of War, such guns, carriages, armor plates, and other war material as may, in the judgment of the board, be necessary in the proper discharge of the duty devolved upon it by the Act approved September twenty-second, eighteen hundred and eighty-eight; * * * test of experimental guns, carriages, and other devices procured in accordance with the recommendation of the board, $50,000, the expenditure of which shall be made by the several bureaus of the War Department heretofore having jurisdiction of the same, or by the board itself, as the Secretary of War may direct; * * * *Act of July 8, 1918 (40 Stat. 820), making appropriations for fortifications.*

The act of Sept. 22, 1888 (25 Stat. [illegible] the expenditures of [illegible] in respect to the investigations, tests [illegible] may [illegible]

its direction under that statute, by the requirement that "the amount expended and liabilities incurred in such purchases, investigations, experiments, and tests shall not exceed five hundred thousand dollars, which sum is hereby appropriated"; and that "said board shall test, and if found satisfactory, shall purchase two breech-loading field guns of three and two-tenths inch bore of aluminum bronze."

By several acts of appropriation the powers of the Board of Ordnance and Fortification have been reduced and defined. By the act of Feb. 24, 1891 (26 Stat. 767), the appropriations of the Engineer Department for gun and mortar batteries and for sites of fortifications have been withdrawn from the supervision of the board; by the act of July 23, 1892 (27 Stat. 260), all regular appropriations of the Ordnance Department for the armament of fortifications were similarly withdrawn from its supervision. See also the acts of Feb. 18, 1893 (27 Stat. 461), Aug. 1, 1894 (28 id. 215), Mar. 2, 1895 (id. 706), and June 6, 1896 (29 id. 259), for similar provisions of statutes in which the board is specially charged with the supervision of stated funds and with the general expenditure of funds appropriated for experimental purposes.

The act of Mar. 2, 1889 (25 Stat. 833), conferred authority upon the Board of Ordnance and Fortification to examine and report upon a site or sites for ordnance testing and proving ground to be used in the testing and proving of heavy ordnance. As a result, Sandy Hook Proving Ground was established and used until Oct. 1, 1919, when it was abandoned as a proving ground. For legislation respecting Aberdeen, Md., proving ground, see 1112, 1113, post.

642. Expenditures by the Board of Ordnance and Fortification.—* * * The Board is authorized to make all needful and proper purchases, investigations, experiments, and tests, to ascertain with a view to their utilization by the Government, the most effective guns, including multicharge guns and the conversion of Parrott and other guns on hand, small arms, cartridges, projectiles, fuzes, explosives, torpedoes, armor-plates, and other implements and engines or war; and the Secretary of War is hereby authorized to purchase or cause to be manufactured, such guns, carriages, armor-plates, and other war materials and articles as may, in the judgment of said Board, be necessary in the proper discharge of the duty herein devolved upon them: * * *

That under the provisions of this section there shall not be expended or contract or contracts entered into involving the Government in an aggregate expenditure exceeding six million five hundred thousand dollars, nor an expenditure on the part of the Government in any one fiscal year in excess of two million dollars, and all guns and materials purchased under authority of this section shall be of American production and furnished by citizens of the United States. * * * *Sec. 6, act of Sept. 22, 1888 (25 Stat. 491), making appropriations for fortification, etc.*

Secs. 2–5 of the act made appropriations and other provisions of a temporary nature merely, and are omitted.

The provisions of this section were also to a great extent, temporary in their nature, and the first two paragraphs of the section, preceding those set forth here, having been limited by their terms as to time and particular transactions, are omitted as temporary and executed.

The provisions set forth here may be regarded as indicating the nature and extent of the duties and powers of the board, although in part superseded for subsequent years by provisions of similar appropriation acts repeated from year to year.

A further proviso, annexed to the first paragraph set forth here, relating to the test and purchase of two guns described, is omitted.

Instead of the provision of this section, authorizing the Secretary of War to purchase or cause to be manufactured such guns, etc., as may, in the judgment of the Board, be necessary, etc., subsequent similar appropriations are to enable the Board to purchase or cause to be manufactured, under authority of the Secretary of War, such guns, etc. See act of July 6, 1916, sec. 1 (39 Stat. 350).

Instead of the further provision that all guns and materials purchased under authority of this section should be of American production, etc., subsequent fortifications appropriation acts provide, as to purchases for each year, as follows:

"That all material purchased under the provisions of this act shall be of American manufacture, except in cases when, in the judgment of the Secretary of War, it is to the manifest interest of the United States to make purchases in limited quantities abroad, which material shall be admitted free of duty."

See act July 6, 1916, sec. 2 (39 Stat. 350).

An appropriation at the end of this section for payment of the necessary expenses of the Board, including a per diem allowance to each member thereof when employed on duty away from his permanent station, of $2.50 a day, $5,000, or so much thereof as may be necessary, which is omitted here as applicable to the particular year only, is repeated in substance in the similar appropriations for subsequent years, as follows:

"The necessary expenses of the board, and a per diem allowance to each officer detailed to serve thereon, when employed on permanent duty away from his permanent station, of $2.50."

See act July 6, 1916, sec. 1 (39 Stat. 350). See 1223 Report ACofC 1912 p.4

643. Right of the United States to use inventions tested.—* * * *Provided*, That before any money shall be expended in the construction or test of any gun, gun carriage, ammunition, or implements under the supervision of the said board, the board shall be satisfied, after due inquiry, that the Government of the United States has a lawful right to use the inventions involved in the construction of such gun, gun carriage, ammunition, or implements, or that the construction or test is made at the request of a person either having such lawful right or authorized to convey the same to the Government. *Act of July 8, 1918 (40 Stat. 820), making appropriations for fortifications, etc.*

Similar provisions appear in previous appropriation acts.

644. Machine for testing iron and steel.—For improved machinery and instruments for testing American iron and steel, twenty-five thousand dollars. *Act of Mar. 3, 1873 (17 Stat. 547), making appropriations for the support of the Army.*

That for experiments in testing iron and steel, including the cost of any machine built for such purpose, the sum of fifty thousand dollars is hereby appropriated; and the further sum of twenty-five thousand dollars provided "for improved machinery and instruments for testing American iron and steel" in the act entitled "An act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and seventy-four," approved March third, eighteen hundred and seventy-three, is hereby continued and made available for such purpose; * * * *Sec. 4, act of Mar. 3, 1875 (18 Stat. 399).*

Watertown Arsenal, testing machines: For necessary professional and skilled labor, purchase of materials, tools, and appliances for operating the testing machines, for investigative test and tests of material in connection with the manufacturing work of the Ordnance Department, and for instruments and materials for operating the chemical laboratory in connection therewith, and for maintenance for the establishment, $50,000. *Act of Mar. 4, 1921 (41 Stat. 1385), making appropriations for sundry civil expenses: Armories and arsenals.*

A provision in act May 27, 1908, sec. 1 (35 Stat. 354), transferring the testing machines at the Watertown Arsenal to the Department of Commerce and Labor, was repealed by a provision of act Mar. 4, 1909, sec. 1 (35 Stat. 905).

This act also provided "that the President be, and hereby is authorized to appoint a board, to consist of one officer of the engineers of the United States Army, one officer of ordnance of the United States Army, one line officer of the United States Navy, one engineer of the United States Navy, and three civilians who shall be experts; and it shall be the duty of said board to convene at the earliest practicable moment, at such place as may be designated by the President, for the purpose of determining, by actual tests, the strength and value of all kinds of iron, steel and other metals which may be submitted to them or by them procured, and to prepare tables which will exhibit the

strength and value of said materials for constructive and mechanical purposes, and to provide for the building of a suitable machine for establishing such tests: *Provided*, That no officers in the pay of the Government shall be entitled to, or receive, any additional compensation by reason of any services rendered in connection with this board; but one of the civil experts shall act as secretary of the board, and shall be entitled, under this act, to such compensation as the President may deem proper and fit: *Provided*, That not more than fifteen thousand dollars of the sum herein provided shall be used for the expenses of such board."

645. Tests of iron and steel for private parties.—The Secretary of War is hereby authorized to cause the machine built for testing iron and steel to be set up and applied to the testing of iron and steel for all persons who may desire to use it, upon the payment of a suitable fee for each test; the table of fees to be approved by the Secretary of War, and to be so adjusted from time to time as to defray the actual cost of the tests as near as may be; * * * *Act of June 20, 1878 (20 Stat. 223), making appropriations for civil expenses.*

* * * That hereafter the tests of iron and steel and other materials for industrial purposes shall be continued, and report thereof shall be made to Congress: *And provided further*, That in making tests for private citizens the officer in charge may require payment in advance, and may use the funds so received in making such private tests, making full report thereof to the Chief of Ordnance; and the Chief of Ordnance shall give attention to such programme of tests as may be submitted by the American Society of Civil Engineers, and the record of such tests shall be furnished said society, to be by them published at their own expense. *Act of March 3, 1885 (23 Stat. 502), making appropriations for civil expenses.*

CHAPTER 16.

SIGNAL CORPS.

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HISTORICAL NOTE.

The office of Signal Officer of the Army, with the rank of major of Cavalry, was established by the act of June 21, 1860 (12 Stat. 66). By sec. 17 of the act of Mar. 3, 1863 (id. 753), a Signal Corps was created to consist of a Chief Signal Officer with the rank of colonel, 1 lieutenant colonel, 2 majors who were to be inspectors, and, for each army corps or military department, 1 captain and as many lieutenants, not exceeding 8, as the President might deem necessary. The officers thus provided for were to receive the mounted pay of their grades, and were to continue in service during the pendency of the existing rebellion. For each officer authorized by the act of Mar. 3, 1863, 1 sergeant and 6 privates were to be detailed from the Volunteer armies, who were to receive the pay and allowances of enlisted men of Engineers. Eligibility for appointment and detail were to be determined, in part, by prior faithful service in the acting Signal Corps, and were conditioned in all cases, upon the successful passage of a preliminary examination.

A permanent Signal Corps was added to the military establishment by sec. 22 of the act of July 28, 1866 (12 Stat. 335) (which was embodied in the Revised Statutes as secs. 1165, 1166, and 1167). It was to consist of a Chief Signal Officer, with the rank of colonel of Cavalry, and of 6 officers of the line, detailed for signal duty, and 100 enlisted men, detailed from the battalion of engineers; these details were to be conditioned upon the successful passage of a preliminary examination, and the officers, while so detailed, were to receive mounted pay. By the act of Mar. 3, 1871 (16 id. 520), certain duties in connection with the observation and report of storms were assigned to the department. By the act of June 18, 1878 (20 id. 146), the number of enlisted men, hitherto fixed by Executive regulation, was established at 450, and by the act of June 20, 1878 (id. 219), the enlisted force of the department was fixed at 150 sergeants, 30 corporals, and 270 privates, who were to receive the pay and allowances of enlisted men of corresponding grades in the battalion of engineers. By this enactment extra-duty pay was prohibited, and the commissioned force of the department was increased by the annual appointment of 2 second lieutenants who were to be selected from the grade of sergeant. By the act of June 16, 1880 (21 id. 267), the rank of brigadier general was conferred upon the Chief Signal Officer, and the number of privates was increased to 320; by the act of Aug. 4, 1886 (24 id. 247), the number of second lieutenants was limited to 16, the school of instruction at Fort Myer, Va., was abolished, and the Secretary of War was authorized to detail 5 commissioned officers of the Army for signal duty, this number to be in addition to the second lieutenants already authorized by law; this requirement was repeated in the acts of Oct. 2, 1888 (26 id. 537), and Mar. 2, 1889 (id. 969), by which enactments the number of second lieutenants was reduced to 14.

By the act of Oct. 1, 1890 (26 Stat. 653), the Weather Service was transferred to the Department of Agriculture, and the strength of the Signal Corps was established at 1 Chief Signal Officer (brigadier general), 1 major, 4 captains, and 4 first lieutenants

mounted, and 50 sergeants who were to have the pay and allowances of hospital stewards. The second lieutenants not selected for appointment as first lieutenants were to be transferred to the line of the Army. By the act of Aug. 6, 1894, the department was reorganized, the reorganization to take effect upon the occurrence of a vacancy in the office of Chief Signal Officer, when the corps was to consist of 1 colonel, one lieutenant colonel, 1 major, 3 captains, and 3 first lieutenants; by the act of Mar. 2, 1897 (29 id. 611), the promotions provided for in the act of Aug. 6, 1894, were authorized to be made. By sec. 2 of the act of May 18, 1898 (30 id. 417), and joint resolution No. 53, of July 8, 1898 (id. 749), a volunteer Signal Corps was authorized, to consist of 1 colonel, 1 lieutenant colonel, 1 major, as disbursing officer, and such other officers and men as might be required, not exceeding 1 lieutenant colonel for each army corps, and 2 captains, 2 first lieutenants, 5 first-class sergeants, 10 sergeants, 10 corporals, and 30 first-class privates to each organized division of troops, a certain proportion of whom were to be skilled electricians or telegraph operators.

By sec. 24 of the act of Feb. 2, 1901 (31 Stat. 754), all these provisions were superseded and the permanent strength of the Signal Corps was fixed at 1 Chief Signal Officer with the rank of brigadier general, 1 colonel, 1 lieutenant colonel, 4 majors, 14 captains, 14 first lieutenants, 80 first-class sergeants, 120 sergeants, 150 corporals, 250 first-class privates, 150 second-class privates, and 10 cooks, and a system of detail was established by the operation of which the permanent commissioned personnel of the department will be gradually replaced as vacancies occur by officers detailed from the line of the Army for duty in the Signal Department.

To the Signal Corps, constituted as prescribed by said act Feb. 2, 1901, sec. 24, there was added 1 lieutenant colonel, 2 majors, 4 captains, and 4 first lieutenants by a provision of act Mar. 2, 1903 (32 Stat. 932), with a proviso that the vacancies thus created or caused should be filled first by the promotion of officers of the Signal Corps, according to seniority, and thereafter by details from the line of the Army. A provision for the addition to the Signal Corps in time of war of 10 corporals, 100 first-class privates, and 40 second-class privates, made by act Apr. 26, 1898, sec. 3 (30 Stat. 365), may be regarded as superseded by subsequent provisions for the organization and increase of the corps, particularly those increasing the enlisted men, made by act Feb. 2, 1901, sec. 24 (31 Stat. 754), and provisions of act Apr. 23, 1904 (33 Stat. 261). The provisions of said act Feb. 2, 1901, sec. 24, act Mar. 2, 1903, and act Apr. 23, 1904, mentioned above, were superseded by sec. 13, national defense act of June 3, 1916 (39 Stat. 174), providing that the Signal Corps should consist of 1 Chief Signal Officer (brigadier general), 3 colonels, 8 lieutenant colonels, 10 majors, 30 captains, and 75 first lieutenants. This section was in turn superseded by 646, post.

During the World War the commissioned and enlisted personnel of this corps was increased in accordance with the act of July 24, 1917 (40 Stat. 243), by the detail of officers from the Regular Army and the appointment of temporary officers with proper qualifications, including temporary general officers. This act also authorized the President to increase the enlisted personnel, to increase or decrease the number of organizations prescribed for divisions, brigades, regiments, wings, squadrons, battalions, companies, and flights, and to prescribe such new and different organizations and personnel as the efficiency of the service might require, including headquarters detachments, and provided for the draft of men between the ages of 21 and 31 years.

646. Composition.—The Signal Corps shall consist of one Chief Signal Officer with the rank of major general, three hundred officers in grades from colonel to second lieutenant, inclusive, and five thousand enlisted men, such part of whom as the President may direct being formed into tactical units organized as he may prescribe. *Sec. 13, act of June 3, 1916 (39 Stat. 174), as amended by sec. 13, act of June 4, 1920 (41 Stat. 768).*

The Signal Corps is designated as a combatant arm or of the line of the Army by sec. 2 of said act of June 4, 1920, post, 2118.

For general provision under which the Chief Signal Officer received the rank, pay, and allowances of a major general, see sec. 3, act of Oct. 6, 1917, post, 2342.

647. Appointments and promotions of commissioned officers.—That all appointments and promotions in the Signal Corps after this reorganization shall be made after examination and approved under sections twelve hundred and six and twelve hundred and seven of the Revised Statutes, which are hereby

* * * ded so as to be applicable to and to provide for the promotion of the officers of the Signal Corps in the same manner as they now apply to the Corps of Engineers and the Ordnance Corps; and all vacancies which may hereafter exist in the grade of first lieutenant in the Signal Corps shall be filled by transfer from the line of the Army, after competitive examination and recommendation by a board of officers of the Signal Corps to be appointed by the Secretary of War. *Sec. 7, act of Oct. 1, 1890 (26 Stat. 654), amending U. S. secs. 1206 and 1207.*

This section was part of the act to increase the efficiency, etc., of the Signal Corps. U. S. secs. 1206, 1207, mentioned in this section, are set forth ante, 598, 599. But see 2269 and 2270, post.

648. Chief of the telegraph and cipher bureau of the Executive office.—* * * *Provided further*, That the President be, and is hereby, authorized to appoint, by and with the advice and consent of the Senate, an officer of the Signal Corps, as chief of the telegraph and cipher bureau of the Executive office, who shall have, while so serving, the rank, pay, and allowances of a major. *Act of Mar. 12, 1903 (32 Stat. 932).*

But see 2311, post.

649. Privates.—*Provided*, That hereafter second-class privates of the Signal Corps shall be designated as privates, with the same pay and allowances as now allowed by law to second-class privates: * * * *Act of June 30, 1902 (32 Stat. 509), making appropriations for the support of the Army: Signal Corps.*

But see 1671, post.

650. Sergeants for service in the Philippines or Alaska.—* * * *And provided further*, That fifty first-class sergeants may be temporarily added to the Signal Corps for service in the Philippine Islands and Alaska; such additional force, or part thereof, to be continued only as long as in the opinion of the Secretary of War (or the President) it may be necessary for the efficiency of the Army. *Act of June 30, 1902 (32 Stat. 509), making appropriations for the support of the Army: Signal Corps.*

But see 1671, post.

651. Chauffeurs.—* * * *Provided further*, That the grades of chauffeur, first class, and chauffeur are hereby created in the Signal Corps. * * * All chauffeurs while serving as such shall rank with corporals of the Signal Corps and shall be subject to promotion and reduction to any other grade now authorized in the Signal Corps. *Sec. 3, act of July 24, 1917 (40 Stat. 244).*

But see 1682, post.

652. Vacant.

653 Duties of the Chief Signal Officer.—That the Chief Signal Officer shall have charge, under the direction of the Secretary of War, of all military signal codes and of books, papers, and devices connected therewith, including telegraph and telephone apparatus and the necessary meteorological instruments for use on target ranges, and other military uses; the construction, repair, and operation of military telegraph lines, and the duty of collecting and transmitting information for the Army by telegraph or otherwise, and all other duties generally pertaining to military signaling; and the operations of said corps shall be confined to strictly military matters. *Sec. 2, act of Oct. 1, 1890 (26 Stat. 653).*

Annual appropriation acts for fortifications, etc., place the appropriation for fire control and [illegible] at seacoast defenses under the Chief Signal Officer.

654. Regulations.—* * * The Chief Signal Officer, subject to the approval of the Secretary of War, is hereby authorized and directed to draw up and enforce in his Bureau a system of rules and regulations for the government of the Signal Bureau, and of all persons in said Bureau, and for the safe-keeping and preservation of all Signal Service property of every kind, and to direct and prescribe the kind, number, and form, of all returns and reports, and to enforce compliance therewith. *Act of Oct. 12, 1888 (25 Stat. 552).*

655. Government radio stations.—* * * and a license shall not be required for the transmission or exchange of radiograms or signals by or on behalf of the Government of the United States, but every Government station on land or sea shall have special call letters designated and published in the list of radio stations of the United States by the Department of Commerce and Labor. * * * *Sec. 1, act of Aug. 13, 1912 (37 Stat., 303).*

By the act of Mar. 4, 1913 (37 Stat., 736), the Department of Commerce and Labor was separated into the Department of Commerce and the Department of Labor, the control of radio communication remaining in the Department of Commerce.

656. Control of private radio stations in time of war. * * *. Every such license shall provide that the President of the United States in time of war or public peril or disaster may cause the closing of any station for radio communication and the removal therefrom of all radio apparatus, or may authorize the use or control of any such station or apparatus by any department of the Government, upon just compensation to the owners. *Sec. 2, act of Aug. 13, 1912 (37 Stat., 303).*

Notes of Decisions.

Censorship of radio stations.—The President has authority to maintain a Government censorship in radio stations, and may, through the Secretary of the Navy or any other appropriate Department, close down, or take charge of and operate, such plants, should he deem it necessary in securing obedience to his proclamation of neutrality of Aug. 5, 1914. 30 Op. Atty. Gen., 291.

657. Regulations for radio stations.—For the purpose of preventing or minimizing interference with communication between stations in which such apparatus is operated, to facilitate radio communication, and to further the prompt receipt of distress signals, all private and commercial stations shall be subject to the regulations of this section. These regulations shall be enforced by the Secretary of Commerce and Labor through the collectors of customs and other officers of the Government as other regulations herein provided for. * * *

The Secretary of Commerce and Labor may grant special temporary licenses to stations actually engaged in conducting experiments for the development of the science of radio communication, or the apparatus pertaining thereto, to carry on special tests, using any amount of power or any wave lengths, at such hours and under such conditions as will insure the least interference with the sending or receipt of commercial or Government radiograms, of distress signals and radiograms, or with the work of other stations.

In these regulations the naval and military stations shall be understood to be stations on land. * * *

"Right of Way" for Distress Signals.

Ninth. All stations are required to give absolute priority to signals and radiograms relating to ships in distress; to cease all sending on hearing a distress signal; and, except when engaged in answering or aiding the ship in distress, to refrain from sending until all signals and radiograms relating thereto are completed.

Reduced Power for Ships Near a Government Station.

Tenth. No station on shipboard, when within fifteen nautical miles of a naval or military station, shall use a transformer input exceeding one kilowatt, nor, when within five nautical miles of such a station, a transformer input exceeding one-half kilowatt, except for sending signals of distress, or signals or radiograms relating thereto.

Intercommunication.

Eleventh. Each shore station open to general public service between the coast and vessels at sea shall be bound to exchange radiograms with any similar shore station and with any ship station without distinction of the radio systems adopted by such stations, respectively, and each station on shipboard shall be bound to exchange radiograms with any other station on shipboard without distinction of the radio systems adopted by each station, respectively.

It shall be the duty of each such shore station, during the hours it is in operation, to listen in at intervals of not less than fifteen minutes and for a period not less than two minutes, with the receiver tuned to receive messages of three hundred meter wave lengths.

Division of Time.

Twelfth. At important seaports and at all other places where naval or military and private or commercial shore stations operate in such close proximity that interference with the work of naval and military stations can not be avoided by the enforcement of the regulations contained in the foregoing regulations concerning wave lengths and character of signals emitted, such private or commercial shore stations as do interfere with the reception of signals by the naval and military stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time. The Secretary of Commerce and Labor may, on the recommendation of the department concerned, designate the station or stations which may be required to observe this division of time.

Government Stations to Observe Divisions of Time.

Thirteenth. The naval or military stations for which the above-mentioned division of time may be established shall transmit signals or radiograms only during the first fifteen minutes of each hour, local standard time, except in case of signals or radiograms relating to vessels in distress, as hereinbefore provided. * * *

Special Restrictions in the Vicinities of Government Stations.

Sixteenth. No station of the character mentioned in regulation fifteenth situated within five nautical miles of a naval or military station shall use a transmitting wave length exceeding two hundred meters or a transformer input exceeding one-half kilowatt. * * *

Limitations for Future Installations in Vicinities of Government Stations.

Eighteenth. No station on shore not in actual operation at the date of the passage of this Act shall be licensed for the transaction of commercial business by radio communication within fifteen nautical miles of the following naval or military stations, to wit: Arlington, Virginia; Key West, Florida; San Juan, Porto Rico; North Head and Tatoosh Island, Washington; San Diego, California; and those established or which may be established in Alaska and in the Canal Zone; and the head of the department having control of such Govern-

ment stations shall, so far as is consistent with the transaction of governmental business, arrange for the transmission and receipt of commercial radiograms under the provisions of the Berlin convention of nineteen hundred and six and future international conventions or treaties to which the United States may be a party, at each of the stations above referred to, and shall fix the rates therefor, subject to control of such rates by Congress. * * *

Secrecy of Messages.

Nineteenth. No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court. * * * *Sec. 4, act of Aug. 13, 1912 (37 Stat. 304-307).*

The expression "radio communication" as used in this Act means any system of electrical communication by telegraphy or telephony without the aid of any wire connecting the points from and at which the radiograms, signals, or other communications are sent or received. *Sec. 6, act of Aug. 13, 1912 (38 Stat. 308).*

This Act shall not apply to the Philippine Islands. *Sec. 10, act of Aug. 13, 1912 (37 Stat. 308).*

See note to 635, ante.

658. Radio signals sent from foreign ships.—A person, company, or corporation shall not use or operate any apparatus for radio communication on a foreign ship in territorial waters of the United States otherwise than in accordance with the provisions of sections four and seven of this Act and so much of section five as imposes a penalty for interference. Save as aforesaid, nothing in this Act shall apply to apparatus for radio communication on any foreign ship. *Sec. 8, act of Aug. 13, 1912 (37 Stat. 308).*

659. False radio signals.—A person, company, or corporation within the jurisdiction of the United States shall not knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent distress signal or call or false or fraudulent signal, call, or other radiogram of any kind. The penalty for so uttering or transmitting a false or fraudulent distress signal or call shall be a fine of not more than two thousand five hundred dollars or imprisonment for not more than five years, or both, in the discretion of the court, for each and every such offense, and the penalty for so uttering or transmitting, or causing to be uttered or transmitted, any other false or fraudulent signal, call, or other radiogram shall be a fine of not more than one thousand dollars or imprisonment for not more than two years, or both, in the discretion of the court, for each and every such offense. *Sec. 7, act of Aug. 13, 1912 (37 Stat. 308).*

660. Private telegrams over Government lines—* * * *Provided*, That on and after the first day of July, eighteen hundred and eighty-three, all moneys received for the transmission of private dispatches over any and all telegraph lines owned or operated by the United States, shall be paid into the Treasury of the United States, as required by section thirty-six hundred and seventeen of the Revised Statutes; and all acts or parts of acts inconsistent herewith are

hereby repealed. *Act of Mar. 3, 1883 (22 Stat. 616), making appropriations for sundry civil expenses.*

R. S. sec. 3617, mentioned in this provision, is set forth ante, 253.

A provision permitting transmission of private messages over telephone lines controlled by the Treasury Department and requiring the proceeds thereof to be paid into the Treasury was made by act Apr. 28, 1904 (33 Stat. 460).

661. Civilian employees.—For additional employees in the Signal Office, $20,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding $1,800 per annum.

The services of skilled draftsmen and such other services as the Secretary of War may deem necessary may be employed only in the Signal Office to carry into effect the various appropriations for fortifications and other works of defense, and for the Signal Service of the Army, to be paid from such appropriations, in addition to the foregoing employees appropriated for in the Signal Office: *Provided*, That the entire expenditures for this purpose for the fiscal year 1922 shall not exceed $40,000, and the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. *Act of Mar. 3, 1921 (41 Stat. 1277), making appropriations for legislative, executive, and judicial expenses: Signal Office.*

Similar provision appears in previous appropriation acts.

662. Radio engineer and assistants.—The services of one radio engineer and such radio assistants, as the Secretary of War may deem necessary, may be employed only in the Signal Office to carry into effect the appropriation for the Signal Service of the Army, to be paid from such appropriation, in addition to the foregoing employees appropriated for in the Signal Office: *Provided*, That the entire expenditures for this purpose for the fiscal year nineteen hundred and nineteen shall not exceed $5,000, and the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. *Act of July 3, 1918 (40 Stat. 784), making appropriations for legislative, executive and judicial expenses: The Signal Office.*

663. Vacant.

CHAPTER 17.

AIR SERVICE.

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HISTORICAL NOTE.

The act of July 18, 1914 (38 Stat. 514), entitled, "An Act to increase the efficiency of the Aviation Service of the Army, and for other purposes," created an Aviation Section in the Signal Corps and provided that in addition to the officers and enlisted men assigned from the Signal Corps at large to executive, administrative, scientific, or other duty in said section, there should be not to exceed 60 Aviation officers and 260 Aviation enlisted men, the Aviation officers chiefly to be selected from line officers below the rank of captain and detailed to serve for periods of four years, unless sooner relieved. A provision against the selection of married officers was abrogated by sec. 13 of the national defense act of June 3, 1916 (39 Stat. 175). The officers so selected were to be graded as Aviation students, junior military aviators, and military aviators, and were to receive additional pay. Enlisted men were to be trained as Aviation mechanics and pilots. In case of death, compensation was to be paid to dependents.

The limitation of the time of detached duty of officers of the line fixed by sec. 1, act of Aug. 24, 1912, as amended by resolution of Aug. 24, 1912, No. 53, post 2349, was not to apply to officers detailed for Aviation duty, by a proviso therein.

Provisions for detail to Aviation duty are also found in the acts of Mar. 2, 1913 (37 Stat. 705) and June 3, 1916, sec. 13 (39 Stat. 175).

The strength of the Aviation Section of the Signal Corps was fixed by sec. 13 of the national defense act of June 3, 1916 (39 Stat. 174), at 1 colonel, 1 lieutenant colonel, 8 majors, 24 captains, and 114 first lieutenants. This section was superseded by 646, ante.

The Air Service was established by the following indorsement:

"1st Ind.

"War Department, A. G. O., May 29, 1918.—To the Chief, Division of Military Aeronautics.

"The following is furnished for your information:

"a. Under authority conferred by secs. 1, 2, 8 and 9 of the act of Congress "Authorizing the President to increase temporarily the Military Establishment of the

United States,' approved May 18, 1917, secs. 1 to 5 of the act 'To authorize the President to increase temporarily the Signal Corps of the Army, etc.,' approved July 24, 1917, and the act 'Authorizing the President to coordinate or consolidate executive bureaus, agencies, and offices, and for other purposes in the interest of economy and the more efficient concentration of the Government,' approved May 20, 1918, the President directs that, for the period of the existing emergency:

"1. There be organized an Air Service to include the present Aviation Section provided by law for the Signal Corps of the Regular Army (act of June 3, 1916), and such additional personnel as may be authorized in the National Army, the Air Service to consist of a Bureau of Aircraft Production and a Division of Military Aeronautics.

"2. The commissioned and enlisted strength of the Division of Military Aeronautics be fixed at:

* * * * * * *

"c. You will submit a list of the requisite number of officers now on duty with the Aviation Section, who have the necessary rank in the line of the Regular Army, to be detailed in the Air Service under the provisions of sec. 13 of the national defense act approved June 3, 1916.

"By order of the Secretary of War:

"(Sgd) F. W. LEWIS,
"Adjutant General."

By sec. IV, General Order No. 19, W. D., Jan. 29, 1919, the Director of Air Service was directed to carry out the duties of the Chief of the Air Service, as prescribed in Army Regulations, 1913, and by an Executive order, dated Mar. 19, 1919 (republished in General Order No. 52, W. D., Apr. 18, 1919), the Aircraft Board was dissolved and the Director of Air Service given direction of the Bureau of Aircraft Production. The present organization is an Air Service, at the head of which is a director, who, in addition to other duties and functions, has supervision, control, and direction of the Bureau of Aircraft Production and the Division of Military Aeronautics.

For the duties taken over by the Aviation Section, to which the Air Service succeeded, see post, 683.

The Air Service is designated as a combatant arm of the Army, by sec. 2, act of June 4, 1920, post, 2118.

The act of Sept. 17, 1919 (41 Stat. 287), provided for the retention of 1,200 emergency officers assigned to the Air Service, of whom not less than 85 per cent were to be fliers. For general provision for the retention of emergency officers until Dec. 31, 1920, see 2207, post.

664. Composition.—There is hereby created an Air Service. The Air Service shall consist of one Chief of the Air Service with the rank of major general, one assistant with the rank of brigadier general, one thousand five hundred and fourteen officers in grades from colonel to second lieutenant, inclusive, and sixteen thousand enlisted men, including not to exceed two thousand five hundred flying cadets, such part of whom as the President may direct being formed into tactical units, organized as he may prescribe: * * * *Sec. 13a, added to the act of June 3, 1916, by sec. 13, act of June 4, 1920 (41 Stat. 768).*

665. Detail to aviation duty not compulsory.—* * * *Provided*, That no person, except in time of war, shall be assigned or detailed against his will to duty as an aviation student or an aviation officer: * * * *Sec. 2, act of July 18, 1914 (38 Stat. 515).*

But see 2353, post.

666. Inefficient aviation officers.—* * * *Provided further*, That whenever, under such regulations as the Secretary of War shall prescribe and publish to the Army, an officer assigned or detailed to duty of any kind in or with the aviation section shall have been found to be inattentive to his duties, inefficient, or incapacitated from any cause whatever for the full and efficient discharge of all duties that might properly be imposed upon him if he should be continued on duty in or with said section, said officer shall be returned forthwith to the branch of the service in which he shall hold a commission. *Sec. 2, act of July 18, 1914 (38 Stat. 515).*

* * * *Provided*, That not to exceed 10 per centum of the officers in each grade below that of brigadier general who fail to qualify as aircraft pilots or as observers within one year after the date of detail or assignment shall be permitted to remain detailed or assigned to the Air Service. * * * *Sec. 13a, added to the act of June 3, 1916, by sec. 13, act of June 4, 1920 (41 Stat. 768).*

667. **College education not requisite for a commission.**—* * * *Provided further*, That no person otherwise qualified for service as a cadet, pilot, military aviator, or other officer in the aviation service, shall be barred from such service by reason of not being equipped with a college education. *Act of July 9, 1918 (40 Stat. 845).*

But see 2269, post.

668. **Examinations of aviators and mechanicians.**—That officers detailed in or attached to the aviation section of the Signal Corps may, when qualified therefor, be rated as junior military aviators, military aviators, junior military aeronauts, and military aeronauts, but no person shall be so rated until there shall have been issued to him a certificate to the effect that he is qualified for the rating, and no certificate shall be issued to any person until an examining board, which shall be composed of two officers of experience of the aviation section of the Signal Corps and one medical officer, shall have examined him under general regulations to be prescribed by the Secretary of War and published to the Army by the War Department, and shall have reported to him to be qualified for the rating. * * * *Sec. 6, act of July 24, 1917 (40 Stat. 244).*

* * * *Provided further*, That, except as hereinafter provided in the cases of officers now on aviation duty, no person shall be detailed as an aviation officer, or rated as a junior military aviator, or as a military aviator, or as an aviation mechanician until there shall have been issued to him a certificate to the effect that he is qualified for the detail or rating, or for both the detail and the rating, sought or proposed in his case, and no such certificate shall be issued to any person until an aviation examining board, which shall be composed of three officers of experience in the aviation service and two medical officers, shall have examined him, under general regulations to be prescribed by the Secretary of War and published to the Army by the War Department, and shall have reported him to be qualified for the detail or rating, or for both the detail and the rating, sought or proposed in his case: * * * and no person shall receive the rating of military aviator until he shall have served creditably for at least three years as an aviation officer with the rating of junior military aviator: * * * *Sec. 3, act of July 18, 1914 (38 Stat. 516).*

Similar provisions appear in sec. 13, act of June 3, 1916 (39 Stat. 175), repealed by sec. 13, act of June 4, 1920 (41 Stat. 768). But see 1658, post.

Instead of the above ratings, a rating as airplane pilot is now conferred on qualified officers. Par. 1584½, A. R. 1913. But see 2353, post.

669. **Certificates for aviators and mechanicians.** * * * *Provided further*, That the Secretary of War shall cause appropriate certificates of qualification to be issued by the Adjutant General of the Army to all officers and enlisted men who shall have been found and reported by aviation examining boards in accordance with the terms of this Act, to be qualified for the details and ratings for which said officers and enlisted men shall have been examined: * * * *Sec. 3, act of July 18, 1914 (38 Stat. 516).*

670. Service as an aviation student prior to detail of an officer.—* * * *Provided further*, That except as hereinbefore provided in the cases of officers who are now on aviation duty and who shall be rated as junior military aviators as hereinbefore authorized, no person shall be detailed for service as an aviation officer in the aviation section until he shall have served creditably as an aviation student for a period to be fixed by the Secretary of War; * * * *Sec. 3, act of July 18, 1914 (38 Stat. 516).*

But see 2353, post.

671. Earliest appointments of junior military aviators.—That the aviation officers hereinbefore provided for shall be rated in two classes, to wit, as junior military aviators and as military aviators. Within sixty days after this Act shall take effect the Secretary of War may, upon the recommendation of the Chief Signal Officer, rate as junior military aviators any officers with rank below that of captain, who are now on aviation duty and who have, or shall have before the date of rating so authorized, shown by practical tests, including aerial flights, that they are especially well qualified for military aviation service; and after said rating shall have been made the rating of junior military aviator shall not be conferred upon any person except as hereinafter provided. * * * *Sec. 3, act of July 18, 1914 (38 Stat. 515).*

But see 1658, post.

672. Rating of military aviators and military aeronauts in time of war.—* * * No person shall receive the rating of military aviator or military aeronaut until he shall have served creditably for three years as an aviation officer with the rating of a junior military aviator or the rating of a junior military aeronaut, except that in time of war any officer or enlisted man who specially distinguishes himself in active service may, upon recommendation of the Chief Signal Officer of the Army, be rated as a junior military aviator, military aviator, junior military aeronaut, or military aeronaut without regard to examination or to length of service: * * * *Sec. 6, act of July 24, 1917 (40 Stat. 244).*

But see 1658, post.

673. Flying cadets.—* * * There shall also be constantly attached to the aviation section a sufficient number of aviation students to make, with the aviation officers actually detailed in said section under the provisions of this Act, a total number of sixty aviation officers and aviation students constantly under assignment to, or detail in, said section. Said aviation students, all of whom shall be selected on the recommendation of the chief signal officer from among unmarried lieutenants of the line of the Army not over thirty years of age, shall remain attached to the aviation section for a sufficient time, but in no case to exceed one year, to determine their fitness or unfitness for detail as aviation officers in said section, and their detachment from their respective arms of service which under assignment to said section shall not be held to create in said arms vacancies that may be filled by promotions or original appointments: * * * *Sec. 2, act of July 18, 1914 (38 Stat. 515).*

The word "which" in the third line from the end evidently should be "while."

Aviation students shall be enlisted in or appointed to the grade of flying cadet, Air Service, which grade is hereby established: *Provided*, That the total number of flying cadets shall not at any time exceed one thousand three hundred. * * * *Act of July 11, 1919 (41 Stat. 109), making appropriations for the support of the Army: Air Service.*

* * * *Provided*, That nothing in this Act shall be construed as amending existing provisions of law relating to flying cadets. *Sec. 13a, added to the act of June 3, 1916, by sec. 13, act of June 4, 1920 (41 Stat. 769).*

But see 664, ante.

674. Discharge of flying cadets.—Upon completion of a course prescribed for flying cadets, each flying cadet, if he so desire, may be discharged and commissioned as a second lieutenant in the Officers' Reserve Corps: *Provided*, That the Secretary of War is authorized to discharge at any time any flying cadet whose discharge shall have been recommended by a board of not less than three officers. *Act of July 11, 1919 (41 Stat. 109), making appropriations for the support of the Army: Air Service.*

675. Enlisted men instructed in flying.—* * * *Provided*, That twelve enlisted men at a time shall, in the discretion of the officer in command of the aviation section, be instructed in the art of flying, and no enlisted man shall be assigned to duty as an aerial flyer against his will except in time of war. * * * *Sec. 3, act of July 18, 1914 (38 Stat. 516).*

676. Instruction of the Coast Guard at aviation schools.—At the request of the Secretary of the Treasury the Secretaries of War and Navy are authorized to receive officers and enlisted men of the Coast Guard for instruction in aviation at any aviation school maintained by the Army and Navy, and such officers and enlisted men shall be subject to the regulations governing such schools. *Act of Aug. 29, 1916 (39 Stat. 601), making appropriations for the naval service.*

677. Special training of flying cadets.—For creating, maintaining, and operating at established flying schools and balloon schools courses of instruction for officers, students, and enlisted men, including cost of equipment and supplies necessary for instruction, purchase of tools, equipment, materials, machines, textbooks, books of reference, scientific and professional papers, instruments, and materials for theoretical and practical instruction; * * * *Act of June 5, 1920 (41 Stat. 953), making appropriations for the support of the Army: Air Service.*

Similar provisions appear in previous appropriation acts.

678. Courses in aeronautic engineering and associate studies.—That the Secretary of War be, and he hereby is, authorized to detail such officers of the Army as he may select, not exceeding twenty-five at any one time, to attend and pursue courses of aeronautic engineering or associate study at such schools, colleges, and universities as he may select. *Sec. 1, act of May 10, 1920 (41 Stat. 594).*

679. Tuition, textbooks, and supplies furnished to officers studying.—That the Secretary of War is authorized to pay tuition for the officers so detailed and to provide them with necessary textbooks and technical supplies from any moneys available for the Air Service of the Army not otherwise specifically appropriated. *Sec. 2, act of May 10, 1920 (41 Stat. 594).*

680. Vacant.

681. Aviation mechanicians and balloon mechanicians.—* * * Not to exceed forty of said enlisted men shall at any one time have the rating of aviation mechanician, which rating is hereby established, and said rating shall not be conferred upon any person except as hereinafter provided: * * * *Sec. 2, act of July 18, 1914 (38 Stat. 516).*

That the Secretary of War is authorized from time to time to cause such number of the enlisted men of the aviation section of the Signal Corps above

the grade of corporal as he may deem necessary to be rated as aviation mechanicians or as balloon mechanicians in the manner now prescribed by law: * * * *Sec. 7, act of July 24, 1917 (40 Stat. 245).*

But see 1671, post.

682. Civilian force.—* * * for the services of such consulting engineers at experimental stations of the Air Service as the Secretary of War may deem necessary, including necessary traveling expenses; * * * salaries and wages of civilian employees within the District of Columbia and elsewhere as may be necessary, and payment of their traveling and other necessary expenses as authorized by existing law; * * * *Act of June 5, 1920 (41 Stat. 953), making appropriations for the support of the Army: Air Service.*

The services of aeronautical engineers, skilled draftsmen, and such other technical services as the Secretary of War may deem necessary may be employed only in the office of the Chief of Air Service to carry into effect the various appropriations for aeronautical purposes, to be paid from such appropriations, in addition to the foregoing employees appropriated for in the office of the Chief of Air Service: *Provided*, That the entire expenditure for this purpose for the fiscal year 1922 shall not exceed $65,000, and the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. *Act of Mar. 3, 1921 (41 Stat. 1278), making appropriations for legislative, executive, and judicial expenses: Office of Chief of Air Service.*

Similar provision appears in previous appropriation acts.

683. Duties.—That there shall hereafter be, and there is hereby created, an aviation section, which shall be a part of the Signal Corps of the Army, and which shall be, and is hereby, charged with the duty of operating or supervising the operation of all military air craft, including balloons and aeroplanes, all appliances pertaining to said craft, and signaling apparatus of any kind when installed on said craft; also with the duty of training officers and enlisted men in matters pertaining to military aviation. *Sec. 1, act of July 18, 1914 (38 Stat. 514).*

The provisions of this act were mostly superseded by act June 3, 1916, sec. 13 (39 Stat. 174). See historical note and 664, ante.

684. Control of aerial operations.—* * * *And provided further*, That hereafter the Army Air Service shall control all aerial operations from land bases, and Naval Aviation shall have control of all aerial operations attached to a fleet, including shore stations whose maintenance is necessary for operation connected with the fleet, for construction and experimentation and for the training of personnel. *Act of June 5, 1920 (41 Stat. 954), making appropriations for the support of the Army: Air Service.*

685. Command of flying units.—* * * Flying units shall in all cases be commanded by flying officers. * * * *Sec. 13a, added to the act of June 3, 1916, by sec. 18, act of June 4, 1920 (41 Stat. 769).*

686. Composition of the National Advisory Committee for Aeronautics.—An Advisory Committee for Aeronautics is hereby established, and the President is authorized to appoint not to exceed twelve members, to consist of two members from the War Department, from the office in charge of military aeronautics; two members from the Navy Department, from the office in charge of naval aeronautics; a representative each of the Smithsonian Institution, of the United States Weather Bureau, and of the United States Bureau of Standards; together

such not more than five additional persons who shall be acquainted with the needs of aeronautical science, either civil or military, or skilled in aeronautical engineering or its allied sciences: * * * *Act of Mar. 3, 1915* (*38 Stat. 930*), *making appropriations for the naval service.*

687. Service without compensation.—* * * *Provided*, That the members of the Advisory Committee for Aeronautics, as such, shall serve without compensation: * * * *Act of March 3, 1915* (*38 Stat. 930*).

688. Duties of the National Advisory Committee on Aeronautics.—* * * *Provided further*, That it shall be the duty of the Advisory Committee for Aeronautics to supervise and direct the scientific study of the problems of flight, with a view to their practical solution, and to determine the problems which should be experimentally attacked, and to discuss their solution and their application to practical questions. In the event of a laboratory or laboratories, either in whole or in part, being placed under the direction of the committee, the committee may direct and conduct research and experiment in aeronautics in such laboratory or laboratories: *And provided further*, That rules and regulations for the conduct of the work of the committee shall be formulated by the committee and approved by the President. * * * *Provided*, That an annual report to the Congress shall be submitted through the President, including an itemized statement of expenditures. *Act of March 3, 1915* (*38 Stat. 930*).

689. Office of the National Advisory Committee for Aeronautics.—* * * *Provided*, That the Secretary of War is authorized and directed to furnish office space to the National Advisory Committee for Aeronautics in governmental buildings occupied by the Signal Corps. *Act of July 1, 1918* (*40 Stat. 636*, *making appropriations for sundry civil expenses.*

690. Appropriation for the National Advisory Committee for Aeronautics.—That the sum of $5,000 a year, or so much thereof as may be necessary, for five years is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available, for experimental work and investigations undertaken by the committee, clerical expenses and supplies, and necessary expenses of members of the committee in going to, returning from, and while attending, meetings of the committee: * * * *Act of March 3, 1915* (*38 Stat. 930*), *making appropriations for the naval service.*

For scientific research, technical investigations, and special reports in the field of aeronautics, including the necessary laboratory and technical assistants; traveling expenses of members and employees; office supplies, printing, and other miscellaneous expenses, including technical periodicals and books of reference; equipment, maintenance, and operation of Langley Memorial Aeronautical Laboratory, and construction of additional buildings necessary in connection therewith; maintenance and operation of one motor-propelled passenger-carrying vehicle; and purchase, maintenance, and operation of one passenger-carrying motor cycle; personal services in the field and in the District of Columbia: *Provided*, That the sum to be paid out of this appropriation for clerical, drafting, watchmen, and messenger service for the fiscal year ending June 30, 1922 shall not exceed $30,000; in all, $200,000. *Act of Mar. 3, 1921* (*41 Stat. 1351*), *making appropriations for sundry civil expenses; National Advisory Committee on Aeronautics.*

691. Bureau of Aircraft Production established. That the President is further authorized to establish an executive agency which may exercise such supervision and control over the production of aeroplanes, aeroplane engines, and aircraft equipment as in his judgment may be advantageous; and, further,

to transfer to such agency, for its use, all or any moneys heretofore appropriated for the production of aeroplanes, aeroplane engines, and aircraft equipment. *Sec. 3, act of May 20, 1918 (40 Stat. 557).*

692. Civilian employees in the Bureau of Aircraft Production.—That during the existing emergency the head of the bureau or department charged with aircraft production be, and he is hereby, authorized to employ in the District of Columbia out of appropriations made for designing, procuring, caring for, and supplying airships, engines, and property connected therewith such services as are necessary for carrying out these purposes. *Act of July 9, 1918 (40 Stat. 850), making appropriations for the support of the Army.*

693. Corporations to further the production of aircraft.—That the Director of Aircraft Production may, whenever in his judgment it will facilitate and expedite the production of aircraft, aircraft equipment, or materials therefor, for the United States and Governments allied with it in the prosecution of the present war, form under the laws of the District of Columbia or under the laws of any State one or more corporations for the purchase, production, manufacture, and sale of aircraft, aircraft equipment, or materials therefor, and to build, own, and operate railroads in connection therewith. The total capital stock of the corporation or corporations so formed, together with any bonds, notes, debentures, or other securities issued by them, shall not at any one time exceed $100,000,000. *Sec. 1, chap. XVI, act of July 9, 1918 (40 Stat. 888), making appropriations for the support of the Army.*

694. Stock held by the Director of Aircraft Production.—That the Director of Aircraft Production may, for and on behalf of the United States, subscribe, purchase, and vote not less than a majority of the voting capital stock of any such corporation, and may purchase for and on behalf of the United States all or any part of the preferred nonvoting stock, bonds, notes, debentures, or other securities issued by such corporations, and do all things necessary to protect the interest of the United States and to carry out the purpose of this chapter; and, with the approval of the Secretary of War, may sell any or all of the stock, bonds, notes, debentures, or other securities of the United States in such corporation: *Provided*, That at no time shall the United States be a minority holder of voting stock therein. Any sums heretofore or hereafter appropriated for the purchase or procurement of aircraft, aircraft equipment, or materials therefor, for the Army shall be available for the purchase of the capital stock of such corporation or corporations or their bonds, notes, debentures, or other securities. *Sec. 2, chap. XVI, act of July 9, 1918 (40 Stat. 888), making appropriations for the support of the Army.*

695. Dissolution of aircraft corporations.—That within one year from the signing of a treaty of peace with the Imperial German Government the Director of Aircraft Production shall, on behalf of the United States as a stockholder, institute such proceedings as are necessary to dissolve such corporation or corporations under the laws of the District of Columbia or the State or States under which such corporation or corporations are organized. Upon the dissolution of the corporation or corporations the same shall be liquidated and the assets distributed in accordance with the laws of the District of Columbia or the State or States under which such corporation or corporations are organized. *Sec. 3, chap. XVI, act of July 9, 1918 (40 Stat. 889), making appropriations for the support of the Army.*

696–698. Vacant.

CHAPTER 18.

CHEMICAL WARFARE SERVICE.

Chemical Warfare Service:
Composition, 699.
Duties, 700.

HISTORICAL NOTE.

The Chemical Warfare Service is an outgrowth of a Gas Service Section, which owed its origin to a memorandum from The Adjutant General to the Chief of Engineers, dated October 17, 1917, reading as follows:

"Under the instructions of the Secretary of War of October 16, a Gas Service Section of the National Army is to be organized and the following commissioned personnel appointed upon your recommendation:

a. An Officer of Engineers not above the rank of colonel, to be appointed Director of the Gas Service.

b. Following commissioned personnel for this service:

4 majors,
6 captains,
10 first lieutenants,
25 second lieutenants."

Sec. XI, General Order 139, War Department, Nov. 1, 1917, directed that a Chemical Service Section of the National Army be organized with a commissioned personnel of 47 and an enlisted force of 95.

By General Order 62, War Department, June 28, 1918, the Gas Service was organized into a Chemical Warfare Service, National Army, to include the Chemical Service Section, National Army. General Order 80, War Department, 1918, directs that the Chief of the Chemical Warfare Service will operate under the direct supervision of the Chief of Staff, in so far as pertains to purely military matters, and is responsible for the efficiency and preparedness for service of personnel and matériel.

The act of July 11, 1919 (41 Stat. 129), directed that the Chemical Warfare Service "with their powers and duties as defined in orders and regulations in force and effect on Nov. 11, 1918, shall be continued to and until June 30, 1920."

Specific appropriation for the above service appears for the first time in act of June 5, 1920 (41 Stat. 972), making appropriations for the support of the Army.

699. The Chemical Warfare Service.—There is hereby created a Chemical Warfare Service. The Chemical Warfare Service shall consist of one Chief of the Chemical Warfare Service with the rank of brigadier general, one hundred officers in grades from colonel to second lieutenant, inclusive, and one thousand two hundred enlisted men. * * * *Sec. 12a, added to the act of June 3, 1916, by sec. 12, act of June 4, 1920 (41 Stat. 768).*

700. Duties of the Chemical Warfare Service.—* * * The Chief of the Chemical Warfare Service under the authority of the Secretary of War shall be charged with the investigation, development, manufacture, or procurement and supply to the Army of all smoke and incendiary materials, all toxic gases, and all gas-defense appliances; the research, design, and experimentation con-

nected with chemical warfare and its material; and chemical projectile filling plants and proving grounds; the supervision of the training of the Army in chemical warfare, both offensive and defensive, including the necessary schools of instruction; the organization, equipment, training, and operation of special gas troops, and such other duties as the President may from time to time prescribe. *Sec. 12a, added to the act of June 2, 1916, by sec. 12, act of June 4, 1920 (41 Stat. 768).*

701. Vacant.

CHAPTER 19.

QUARTERMASTER CORPS.

Composition, 702.
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HISTORICAL NOTE.

Quartermaster's Department.—The Quartermaster's Department was authorized by R. S., sec. 1094, and its organization was prescribed by R. S., sec. 1132. The latter section was amended, by the addition of other provisions, by act Feb. 27, 1877 (19 Stat. 242); but its original provisions had been superseded, previous to that amendment, by act Mar. 3, 1875 (18 Stat. 338), and the department was continued, as then constituted, by act Mar. 2, 1899, sec. 7 (30 Stat. 979). All these provisions were superseded by provisions of act Feb. 2, 1901, sec. 16 (31 Stat. 751), which provided that the Quartermaster's Department should consist of 1 Quartermaster General with the rank of brigadier general, 6 assistant quartermasters general with the rank of colonel, 9 deputy quartermasters general with the rank of lieutenant colonel, 20 quartermasters with the rank of major, 60 quartermasters with the rank of captain mounted, and 150 post quartermaster sergeants, which said provisions were superseded by sec. 9 of the national defense act of June 3, 1916 (39 Stat. 170). Said act of Feb. 2, 1901, sec. 16, also contained a provision, omitted here, which included in the department "the military storekeeper now provided for by law." Military storekeepers, not exceeding 16, with the rank of captain of Cavalry, were authorized by R. S., sec. 1132; but act Mar. 3, 1875, sec. 2 (18 Stat. 338), provided that no more appointments should be made in the grade, and that it should cease as soon as it should become vacant. The appointment of a military storekeeper in the department was authorized by act July 1, 1898 (30 Stat. 571), but the office was to cease, on the occurrence of a vacancy therein, by act Feb. 2, 1901, sec. 1 (34 Stat. 748). A proviso annexed to said act Feb. 2, 1901, sec. 16, providing for filling vacancies created or caused by this act is omitted as temporary merely. A further proviso, annexed to said sec. 16, authorizing the continuance in service, during emergency, for duty in the Philippine Islands and on transports, of certain officers of volunteers, is also omitted as temporary merely.

The number of officers in the department was increased by 2 colonels, 3 lieutenant colonels, 7 majors, and 18 captains, the vacancies thus created to be filled by promotion and detail in accordance with act Feb. 2, 1901, sec. 26 (31 Stat. 755), by a provision of act Mar. 3, 1911 (36 Stat. 1045), which provision was superseded by sec. 9 of the national defense act of June 3, 1916 (39 Stat. 170), providing that the commissioned personnel of the Quartermaster Corps should consist of 1 Quartermaster General (major general), 2 assistants to the Quartermaster General (brigadier generals), 21 colonels, 24 lieutenant colonels, 68 majors, and 180 captains. The section further provided that the pay clerks then in active service should have the rank, pay, and allowances of second lieutenant and that they might be commissioned second lieutenants in the Quartermaster Corps. The strength of the enlisted personnel and the number in each grade was to be fixed by the President, under certain limitations set forth in said section. This section was superseded by 702, post.

Sec. 4, act of Aug. 24, 1912 (37 Stat. 593), provided for the replacement of certain grades of civilian employees by enlisted men, 713, post.

Pay Department.—The Pay Department, *eo nomine*, was first organized by the act of Apr. 24, 1816 (3 Stat. 297), but a Paymaster for the Army, "to reside near the head-

quarters of the troops of the United States," had been authorized by sec. 8, act of May 8, 1792 (1 Stat. 280).

The earliest legislation creating a Pay Department is the resolution of the Continental Congress of June 16, 1775, which provided for a Paymaster General and a deputy under him, in a separate department. The two offices of Paymaster General and commissioner for settling the accounts of the Army were continued in the same person down to May, 1792, when a Paymaster of the Army was appointed under the act above named.

The personnel of the department was increased, after 1816, by various acts, in 1821, 1836, and 1838. In 1842, the number of majors was reduced. The acts of Mar. 3, 1847 (9 Stat. 184), and July 28, 1866 (14 Stat. 335), provided for reorganization after the Mexican and Civil Wars, respectively. No more appointments or promotions were to be made in the department by the act of Mar. 3, 1869 (15 Stat. 318), but the act of June 4, 1872 (17 Stat. 219), provided for a Paymaster General, with the rank of colonel, and Joint Resolution No. 7 of Mar. 2, 1875 (18 Stat. 524), fixed the number of paymasters at not more than 50. The act of July 22, 1876 (19 Stat. 95), restored the rank of brigadier general to the office of Paymaster General and the restriction established by the act of Mar. 3, 1869, was finally removed by the act of Mar. 3, 1877 (19 Stat. 270). A gradual reduction in personnel was provided for by the acts of Mar. 3, 1883 (22 Stat. 451), July 5, 1884 (23 Stat. 108), July 16, 1892 (27 Stat. 175), and Feb. 12, 1895 (28 Stat. 655).

By sec. 21, act of Feb. 2, 1901 (31 Stat. 754), the permanent strength of the department was fixed at 1 Paymaster General with the rank of brigadier general, 3 assistant paymasters general with the rank of colonel, 4 deputy paymasters general with the rank of lieutenant colonel, 20 paymasters with the rank of major, and 25 paymasters with the rank of captain, mounted. A system of details was also established by the operation of which the permanent commissioned personnel was to be replaced, as vacancies occurred, by officers detailed from the line of the Army for duty in the Pay Department.

The Pay Department was merged into the Quartermaster Corps by sec. 3, act of Aug. 24, 1912, post, 703.

Subsistence Department.—The earliest legislation relative to the subsistence of the Army is found in the resolution of the Continental Congress of July 19, 1775, creating the office of Commissary General of Stores and Provisions. On June 10, 1777, Congress instituted a new system, creating two great branches, one under a Commissary General of Purchases and the other under a Commissary General of Issues. On Nov. 25, 1779, these two offices were placed under the supervision of the Board of War. On July 10, 1781, Congress directed the Superintendent of Finance to procure on contract all supplies necessary for the Army, and under this resolution the commissariat system of subsisting the Army was discontinued.

The next legislation was under the Constitution. The act of Mar. 8, 1792, placed the duty for purchasing all subsistence supplies for the Army on the Treasury Department. This act was repealed by the act of July 16, 1798, requiring all purchases and contracts for supplies to be made under the direction of the Secretary of War.

The act of Apr. 14, 1818 (3 Stat. 426), first created the office of Commissary General, with provision for as many assistant commissaries as the service might require. By the act of Mar. 2, 1821 (3 Stat. 615), the organization of the department was somewhat modified, the number of assistant commissaries being limited to 50.

The personnel of the department was increased by acts of 1838, 1846, 1850, 1861, and 1863. After the Civil War the peace strength of the department was fixed by sec. 16, act of July 28, 1866 (14 Stat. 334). Acts of 1869, 1874, and 1895 limited and reduced the strength of the personnel. The act of July 7, 1898 (30 Stat. 715), increased the strength for the Spanish War.

By sec. 17, act of Feb. 2, 1901 (31 Stat. 752), the permanent strength of the department was fixed at 1 Commissary General with the rank of brigadier general, 3 assistant commissary generals with the rank of colonel, 4 deputy commissary generals with the rank of lieutenant colonel, 9 commissaries with the rank of major, and 27 commissaries with the rank of captain, mounted; promotions were to be by seniority. A system of details was also established by the operation of which the permanent commissioned personnel was to be replaced, as vacancies occurred, by officers detailed from the line of the Army for duty in the Subsistence Department.

The Subsistence Department was merged into the Quartermaster Corps by sec. 3, act of Aug. 24, 1912, post, 703.

Motor Transport Corps.—During the World War, under authority of section 1, act of May 18, 1917 (40 Stat. 76), the President established a Motor Transport Corps, the functions of which were defined by General Order 75, War Department, 1918. In the spring of 1920, these functions were transferred to the Quartermaster Corps.

Construction Division.—The Adjutant General of the Army, by order of the Secretary of War, on Mar. 13, 1918, wrote to the officer in charge of cantonment construction as follows:

"Under authority granted in section 1, of the act of Congress 'to authorize the President to increase temporarily the Military Establishment of the United States,' approved May 18, 1917, the President directs that the Cantonment Division of the Quartermaster Corps (including as a part thereof the Construction and Repair Division of the Quartermaster Corps), now operating as a part of the office of the Chief of Staff, shall be hereafter called the Construction Division and shall be temporarily increased during the present emergency, so as to consist of" one brigadier general, 1,406 other officers, and 1,138 civilian employees.

"In view of existing orders of the Secretary of War that all building and construction rendered necessary in the United States by the present emergency shall be executed by the Construction Division unless especially excepted by the Secretary of War, all commissioned and civilian personnel of the Ordnance Department and Signal Corps heretofore employed exclusively on construction work and no longer needed in those corps and departments, will be considered available for assignment to the Construction Division as a part of the personnel herein authorized, upon the request of the officer in charge of the Construction Division, but no officer of the line of the Regular Army, who may be detailed in any of these corps and departments shall be assigned to the Construction Division under this authority."

Sec. 7 b, G. O. 80, W. D. 1918, directs that the chief of the Construction Division will operate under the direct supervision of the Chief of Staff, in so far as pertains to purely military matters, will be responsible for the efficiency and preparedness for service of personnel and matériel, and shall communicate directly with the Director of Operations in all matters with which the latter is charged which require the action of the Chief of Staff.

The Construction Division was continued to June 30, 1920, by act of July 11, 1919 (41 Stat. 129), but no provision for continuing it as a separate entity being made in subsequent legislation, the functions formerly exercised by the Construction Division are now exercised by the Construction Service, Quartermaster Corps. See 719, post.

702. Composition.—The Quartermaster Corps shall consist of one Quartermaster General with the rank of major general, three assistants with the rank of brigadier general, one thousand and fifty officers in grades from colonel to second lieutenant, inclusive, and twenty thousand enlisted men. * * * *Sec. 2, act of June 3, 1916 (39 Stat. 170), as amended by sec. 9, act of June 4, 1920 (41 Stat. 766).*

703. Consolidation of obsolete departments.—That the office establishments of the Quartermaster General, the Commissary General, and the Paymaster General of the Army are hereby consolidated and shall hereafter constitute a single bureau of the War Department, which shall be known as the Quartermaster Corps, and of which the Chief of the Quartermaster Corps created by this Act shall be the head. The Quartermaster's Subsistence, and Pay Departments of the Army are hereby consolidated into and shall hereafter be known as the Quartermaster Corps of the Army. The officers of said departments shall hereafter be known as officers of said corps and by the titles of the rank held by them therein, and, except as hereinafter specifically provided to the contrary, the provisions of sections twenty-six and twenty-seven of the Act of Congress approved February second, nineteen hundred and one, entitled "An Act to increase the efficiency of the permanent military establishment of the United States," are hereby extended so as to apply to the Quartermaster Corps in the manner and to the extent to which they now apply to the Quartermaster's, Subsistence, and Pay Departments, and the provision of said sections of said act relative to chiefs of staff corps and departments shall, so far as they are applicable, apply to all offices and officers of the Quartermaster Corps with rank above that of colonel. The officers now holding commissions as officers of the said departments shall hereafter have the same tenure of commission in the Quartermaster Corps, and as officers of said corps shall have rank of

the same grades and dates as that now held by them, and, for the purpose of filling vacancies among them, shall constitute one list, on which they shall be arranged according to rank. So long as any officers shall remain on said list any vacancy occurring therein shall be filled, if possible, from among such officers, by selection if the vacancy occurs in a grade above that of colonel, and, if the vacancy occurs in a grade not above that of colonel, by the promotion of an officer who would have been entitled to promotion to that particular vacancy if the consolidation of departments hereby prescribed had never occurred: * * * *And provided further*, That for the purpose of carrying into effect the provisions of this section the President is hereby authorized to appoint, by and with the advice and consent of the Senate, the Chief of the Quartermaster Corps herein provided for immediately upon the passage of this Act, and it shall be the duty of the said chief, under the direction of the President and the Secretary of War, to put into effect the provisions of this section not less than sixty days after the passage of this Act. *Sec. 3, act of Aug. 24, 1912 (37 Stat. 591, 593), making appropriations for the support of the Army.*

The requirements of the above have been fulfilled, but it is inserted here as being of possible value to officers of the corps.

704. Promotions.—* * * *Provided*, That on and after the first day of January, nineteen hundred and seventeen, any vacancies occurring among officers of the Quartermaster Corps with rank above that of colonel may, in the discretion of the President, be filled by selection from among officers who shall have served by detail in said corps for not less than four years: * * * *Sec. 3, act of Aug. 24, 1912 (37 Stat. 591), making appropriations for the support of the Army.*

705. Promotion of second lieutenants.—* * * The board convened upon the passage of this Act shall also report the names of those second lieutenants of the Quartermaster Corps who were commissioned under the provisions of section 9 of the Act of June 3, 1916, who are not qualified for further promotion. The officers so reported shall continue in the grade of second lieutenant for the remainder of their service and the others shall be placed upon the promotion list according to their commissioned service, as hereinbefore provided. *Sec. 24b, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

As to the board mentioned in this section, see post, 2280.

By a provision of sec. 9, act of June 3, 1916 (39 Stat. 170), pay clerks were to be commissioned second lieutenants.

706. Quartermaster General of the Army.—* * * *Provided*, That hereafter the title of the Chief of the Quartermaster Corps shall be Quartermaster General of the Army. *Act of Apr. 27, 1914 (38 Stat. 356), making appropriations for the support of the Army.*

But see 702, ante.

707. Rank of the Quartermaster General.—* * * *Provided further*, That there shall be a Chief of the Quartermaster Corps, who shall have the rank of major general while so serving, and who shall be appointed by the President, by and with the advice and consent of the Senate, from among the officers of said corps and in accordance with the requirements of section twenty-six of the Act of Congress approved February second, nineteen hundred and one, hereinbefore cited: * * * *Sec. 3, act of Aug. 24, 1912 (37 Stat. 593).*

For sec. 26, above, see 2424 and 2341, post. See also 702, ante.

708. Grade of storekeeper. * * *. *Provided,* That when a vacancy shall occur through death, retirement, or other separation from active service in the office of storekeeper, in the Quartermaster's Department and Ordnance Department, respectively, now provided for by law, said offices shall cease to exist. *Sec. 1, act of Feb. 2, 1901 (31 Stat. 748).*

The above statute replaces a similar restriction which was contained in sec. 2 of the act of Mar. 3, 1875 (18 Stat. 339).

See also notes to 1627, post.

709. Grade of military storekeeper revived.—The President of the United States, in his discretion be, and he is hereby, authorized to appoint Charles P. Daly, chief clerk, office of the Quartermaster Corps, United States Army, a military storekeeper in the Quartermaster Corps, United States Army, with the rank, pay, and allowances of a captain, mounted; and the grade of military storekeeper is hereby revived in the Army of the United States for this purpose only. *Act of Aug. 29, 1916 (39 Stat. 626).*

By 2261, post, "the present military storekeeper" is given the rank, pay, and allowances of a major, but by 2282, post, the military storekeeper is not to be placed on the promotion list.

710. Vacant.

711. Quartermaster sergeants.—*Provided,* That hereafter the Secretary of War is authorized to appoint such number of quartermaster sergeants, Quartermaster Corps, not to exceed the number provided for by law, as he may deem necessary for the interest of the service, said quartermaster sergeants to be selected from the most competent noncommissioned officers of the Army, who shall have served therein at least five years, three years of such service having been rendered as noncommissioned officers, and whose character and education shall fit them to take charge of public property and to act as clerks and assistants to the proper officers of the Army in charge of public property. *Act of Mar. 4, 1915 (38 Stat. 1066), making appropriations for the support of the Army.*

The act of Mar. 4, 1915, above, superseded a similar provision of act Apr. 27, 1914 (38 Stat. 354).

Eighty post quartermaster sergeants were provided for by act of July 5, 1884 (23 Stat. 109), 25 were added by the act of July 8, 1898 (30 Stat. 728), and 150 provided for by sec. 16, act of Feb. 2, 1901 (31 Stat. 751). These were to be known as quartermaster sergeants, according to sec. 3, act of Aug. 24, 1912 (37 Stat. 592).

The act of Apr. 23, 1904 (33 Stat. 261), provided for 200 post commissary sergeants, whose title was changed to quartermaster sergeants by sec. 3, act of Aug. 24, 1912 (37 Stat. 592).

Sec. 9, act of June 3, 1916 (39 Stat. 170), provided that the master electricians authorized by law for the Quartermaster Corps should thereafter be known as quartermaster sergeants, senior grade, and included in the number of such sergeants authorized by that section. That section was stricken out by sec. 9, act of June 4, 1920 (41 Stat. 766). But see 1671, post.

712. Prizes for bakers and cooks.—* * * for providing prizes to be established by the Secretary of War for enlisted men of the Army who graduate from the Army schools for bakers and cooks, the total amount of such prizes at the various schools not to exceed $900 per annum; * * * *Act of June 5, 1920 (41 Stat. 957), making appropriations for the support of the Army.*

713. Civilian employees replaced by enlisted men.—That as soon as practicable after the creation of a Quartermaster Corps in the Army not to exceed four thousand civilian employees of that corps, receiving a monthly compensation of not less than thirty dollars nor more than one hundred and seventy-five dollars each, not including civil engineers, superintendents of construction, inspectors of clothing, clothing examiners, inspectors of supplies, inspectors

of animals, chemists, veterinarians, freight and passenger rate clerks, civil service employees, and employees of the classified service, employees of the Army transport service and harbor-boat service, and such other employees as may be required for technical work, shall be replaced permanently by not to exceed an equal number of enlisted men of said corps, and all enlisted men of the line of the Army detailed on extra duty in the Quartermaster Corps or as bakers or assistant bakers shall be replaced permanently by not to exceed two thousand enlisted men of said corps; * * * *Sec. 4, act of Aug. 24, 1912 (37 Stat. 593).*

714. Pay of civilians.—* * * *Provided further,* That the number of and total sum paid for civilian employees in the Quartermaster Corps shall be limited to the actual requirements of the service, and that no employee therein shall receive a salary of more than $150 per month, except upon the approval of the Secretary of War. *Act of July 8, 1918 (40 Stat. 829), making appropriations for the support of the Army.*

For additional employees in the office of the Quartermaster General, $543,140: *Provided,* That no person shall be employed hereunder at a rate of compensation exceeding $1,800 per annum except one at $4,000, two at $3,000 each, two at $2,400 each, one at $2,250, and five at $2,000 each. *Act of Mar. 3, 1921 (41 Stat. 1278), making appropriations for legislative, executive, and judicial expenses: Office of Quartermaster General.*

In addition to the sum of $250,000 heretofore authorized, the sum of $90,000 of appropriations available during the fiscal year 1921 for the "Disposition of remains of officers, soldiers, and civilian employees, War Department," may be expended for personal services in the Cemeterial Division, Office of the Quartermaster General, for compiling, recording, preparing, and transmitting data incident to bringing home and disposition of remains from abroad. *Act of Mar. 1, 1921 (41 Stat. 1164), making appropriations to supply deficiencies: Office of Quartermaster General.*

The sum of $180,000 of appropriations available during the fiscal year 1922 for the "Disposition of remains of officers, soldiers, and civilian employees, War Department," may be expended for personal services in the Cemeterial Division, office of the Quartermaster General, for compiling, recording, preparing and transmitting data incident to bringing home and disposition of remains from abroad: *Provided,* That no person shall be employed under this allotment at a rate of compensation exceeding $1,800 per annum except one person at $2,000. *Act of Mar. 3, 1921 (41 Stat. 1278), making appropriations for legislative, executive, and judicial expenses: Office of Quartermaster General.*

Appropriations for the pay of civilian employees in the office of the Quartermaster General are made annually in sundry civil expenses acts.

715. Hire of civilians.—* * * for expenses * * * of escorts to officers or agents of the Quartermaster Corps to trains where military escorts can not be furnished; hire of laborers in the Quartermaster Corps, including the care of officers' mounts when the same are furnished by the Government, and the hire of interpreters, spies, or guides for the Army; compensation of clerks and other employees of the Quartermaster Corps and Finance Service, and clerks, foremen, watchmen, and organist for the United States disciplinary barracks, * * * *Act of June 5, 1920 (41 Stat. 959), making appropriations for the support of the Army: Quartermaster Corps, Incidental expenses.*

Similar provisions appear in previous appropriation acts.

716. Selection of superintendents of national cemeteries.—The superintendents of the national cemeteries shall be selected from meritorious and trustworthy soldiers, either commissioned officers or enlisted men of the Volunteer or Regular Army, who have been honorably mustered out or discharged from the service of the United States, and who may have been disabled for active field service in the line of duty. *R. S. 4874.*

717. Pay of superintendents of national cemeteries.—The superintendents of the national cemeteries shall receive for their compensation from sixty dollars to seventy-five dollars a month each, according to the extent and importance of the cemeteries to which they may be respectively assigned, to be determined by the Secretary of War, except the superintendent of the Arlington, Virginia, Cemetery, whose compensation may be one hundred dollars per month, at the discretion of the Secretary of War; and they shall also be furnished with quarters and fuel at the several cemeteries. *R. S. 4875, as amended by act of July 30, 1912 (37 Stat. 240).*

For pay of seventy-six superintendents of national cemeteries, including not to exceed $1,300 for the superintendent at Mexico City, $63,720.

* * * * * * *

For pay of superintendent of Antietam battle field, said superintendent to perform his duties under the direction of the Quartermaster Corps and to be selected and appointed by the Secretary of War, at his discretion, the person selected and appointed to this position to be an honorably discharged Union soldier, $1,500. *Act of Mar. 4, 1921 (41 Stat. 1385–1386), making appropriations for sundry civil expenses: Quartermaster Corps.*

718. Supervision of the Chief of Staff.— * * * *Provided further*, That the Quartermaster Corps shall be subject to the supervision of the Chief of Staff to the extent the departments hereby consolidated into said corps have heretofore been subject to such supervision under the terms of the existing law: * * * *Sec. 3, act of Aug. 24, 1912 (37 Stat. 593), making appropriations for the support of the Army.*

719. Duties of the Quartermaster Corps.—* * * The Quartermaster General, under the authority of the Secretary of War, shall be charged with the purchase and procurement for the Army of all supplies of standard manufacture and of all supplies common to two or more branches but not with the purchase or the procurement of special or technical articles to be used or issued exclusively by other supply departments; with the direction of all work pertaining to the construction, maintenance, and repair of buildings, structures, and utilities other than fortifications connected with the Army; with the storage and issue of supplies; with the operation of utilities; with the acquisition of all real estate and the issue of licenses in connection with Government reservations; with the transportation of the Army by land and water, including the transportation of troops and supplies by mechanical or animal means; with the furnishing of means of transportation of all classes and kinds required by the Army; and with such other duties not otherwise assigned by law as the Secretary of War may prescribe: * * * *Sec. 9, act of June 3, 1916 (39 Stat. 170), as amended by sec. 9, act of June 4, 1920 (41 Stat. 766).*

The above appears to supersede R. S. 1133:

"It shall be the duty of the officers of the Quartermaster's Department, under the direction of the Secretary of War, to purchase and distribute to the Army all military stores and supplies, requisite for its use, which other corps are not directed by law to provide; to furnish means of transportation for the Army, its military stores and supplies, and to provide for and pay all incidental expenses of the military service which other corps are not directed to provide for and pay."

So much of R. S. 1133 and of sec. 9, act of June 3, 1916 (39 Stat. 170), as restricted the purchase and distribution of military stores and supplies to officers of the Quartermaster Corps was suspended "for the period of the present war" by Ch. VII, act of July 9, 1918 (40 Stat. 881), which provision also appears to be superseded by the above section.

The Quartermaster General and his officers were required to receive and transport property turned over to them by the officers or agents of any Government survey for the National Museum, or for the civil or naval departments of the Government, in Washington or elsewhere, by a further provision of act July 5, 1884, post, 1212.

Notes of Decisions.

Civilian purchasing agents.—A commanding general can not appoint a civilian purchasing agent of the Government, nor invest him with discretion to make express contracts, nor transfer to him the responsibility which the law imposes on quartermasters; neither has such agent power to bind the Government by express contract. Reeside *v.* U. S. (1866), 2 Ct. Cl. 1.

720. Duties of regimental, battalion and squadron quartermasters.—* * * *Provided further*, That whenever the Secretary of War shall decide that it is necessary and practicable, regimental, battalion, and squadron quartermasters and commissaries shall be required to perform any duties that junior officers of the Quartermaster Corps may properly be required to perform, and regimental and battalion quartermaster and commissary sergeants shall be required to perform any duties that noncommissioned officers or pay clerks of the Quartermaster Corps may properly be required to perform, but such regimental, battalion and squadron quartermasters and commissaries shall not be required to receipt for any money or property which does not pertain to their respective regiments, battalions, or squadrons, and they shall not be separated from the organization to which they belong: * * * *Sec. 3, act of Aug. 24, 1912 (37 Stat. 592–593), making appropriations for the support of the Army.*

No further appointments of pay clerks were to be made by a further provision of act Mar. 2, 1913 (37 Stat. 708). But see 497, ante.

721. Receipting for money or property by regimental, battalion and squadron quartermasters.—* * * *Provided further*, That regimental, battalion, and squadron quartermasters and commissaries shall hereafter be required to perform the duties of officers of the Quartermaster Corps, including the receipting for any money or property pertaining to said corps, when no officer of the Quartermaster Corps is present for such duties, and nothing contained in the Army appropriation Act approved August twenty-fourth, nineteen hundred and twelve, shall hereafter be held or construed so as to prevent competent authority from requiring any officers of the Army to act temporarily as quartermasters wherever there shall be no officers of the Quartermaster Corps and no regimental, battalion, or squadron quartermasters or commissaries present for such duty. *Act of Mar. 2, 1913 (37 Stat. 706), making appropriations for the support of the Army.*

722. Vacant.

723. Agents of disbursing officers, Quartermaster Corps.—Hereafter, under such regulations as may be prescribed by the Secretary of War, officers of the Quartermaster Corps accountable for public moneys may intrust such moneys to other officers for the purpose of having them make disbursements as their agents, and the officers to whom the moneys are intrusted, as well as the officers who intrust it to them, shall be held pecuniarily responsible therefor to the United States. *Act of May 12, 1917 (40 Stat. 50), making appropriations for the support of the Army.*

But see 497, ante.

CHAPTER 20.

PUBLIC PROPERTY.

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724. Contracts under direction of Secretary of War.—All purchases and contracts for supplies or services for the military and naval service shall be made by or under the direction of the chief officers of the departments of War and of the Navy, respectively. *R. S. 3714.*

* * * Under the direction of the Secretary of War chiefs of branches of the Army charged with the procurement of supplies for the Army shall report direct to the Assistant Secretary of War regarding all matters of procurement. * * * *Sec. 5a, added to the act of June 3, 1916, by sec. 5, act of June 4, 1920 (41 Stat. 765).*

For amendment of R. S. 3714, see 725, post.

Provisions for administrative examination of accounts before transmission to the Treasury Department for settlement were made by the Dockery Act of July 31, 1894, sec. 12, ante, 263, 265, 266.

Notes of Decisions.

Powers and duties of officers in general.—The War Department by its proper officers may make a valid contract for the slaughtering, curing, and packing of pork. U. S. v. Speed (1868), 8 Wall. 77, 82, 19 L. Ed. 449.

Until approved by the Secretary of War, a contract by a surgeon and medical purveyor in a military department with parties for furnishing ice for the Government hospitals was invalid. Parish v. U. S (1869), 8 Wall. 489, 490, 19 L. Ed. 472.

The President's power is limited by the legislation of Congress, and, that legislation existing, the discharge of the duty devolving on the Secretary necessarily requires him to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him. When contracts are suspended by him he is authorized to agree on the compensation for their partial performance, and when a settlement in such case is made on a full knowledge of all the facts, without concealment, misrepresentation, or fraud, it must be equally binding on the Government as on the contractor. U. S. v. Corliss Steam Engine Co. (1875), 91 U. S. 321, 322, 323, 23 L. Ed. 397.

The Secretary of the Navy may direct or consent to a change in a contract for the construction of a dry dock for the United States, which he was authorized by law to construct, although such contract provides that changes can only be made upon written order of the Bureau of Yards and Docks, as, under R. S. sec. 420, the duties of the bureaus of the Navy Department are performed under his control, and their orders are considered as emanating from him, and have "full force and effect as such." U. S. v. Barlow (1902), 22 Sup. Ct. 468, 473, 184 U. S. 123, 46 L. Ed. 463, affirming judgment (1900), 35 Ct. Cl. 514.

Where the Secretary of the Navy in the exercise of inherent power vested in him by virtue of his office and the statute relating thereto modified, extended, or enlarged a contract, his action involved an obligation to pay any sums that might have been expended in making the modification. U. S. v. Newport News Shipbuilding & Dry Dock Co. (1910), 178 Fed. 194, 101 C. C. A. 514.

The Quartermaster General can not arbitrarily change the terms of a written contract, nor order a retroactive reduction of the charter rate of a vessel, without the consent of the contracting parties. But where he issues such an order of reduction, in a case where he has the right to discharge the vessel at any time, and the owners permit the Quartermaster's Department to remain under the false impression that they acquiesced in the reduction, they are estopped from claiming the original charter rate, both before and after notice. And they are so estopped,

although they sell their vessel immediately after notice of reduction. Clyde v. U. S. (1869), 5 Ct. Cl. 134, citing and approving Pratt's Case (1867), 3 Ct. Cl. 105, and Emery and Blake's Case (1868), 4 Ct. Cl. 401; Thorne v. U. S. (1869), 5 Ct. Cl. 242.

An officer of Volunteers neither mustered into the United States service nor specially empowered to make contracts for subsisting his troops can not bind the United States by express contract; nor are vouchers given by him evidence to bind the Government. Kirkham & Brown v. U. S. (1868), 4 Ct. Cl. 223.

Where a party applies to a public officer for his vessel's discharge from the military service because of a reduction on her charter rate, the demand must be clear, positive, and unequivocal. If it is argumentative merely, so that the officer is misled and does not discharge the vessel, the owner will be deemed to have left her in the service at the reduced rate. Cobb v. U. S. (1869), 5 Ct. Cl. 176.

Where in a contract for the furnishing of flour to the Army it was stipulated that the commanding officer of the post should reject all or any part of the flour tendered, when pronounced by the inspectors as not being in accordance with the contract, it was held that the decision of the officer commanding the post was subject to review by the War Department. (1859) 9 Op. Atty. Gen. 389.

The lowest bidder who complies with the requirements as to security, etc., is entitled to an award of the contract for certain supplies for the Navy, but the Secretary of the Navy is charged with the duty of ascertaining the facts in this regard, and his decision is not reversible by any court. (1894) 21 Op. Atty. Gen. 56.

The Secretary of War has authority to refrain from compelling full performance of a contract for the delivery of 800,000 pairs of men's gloves, to be made in Germany, where, after a partial performance of the contract, an act of Congress increased the duty on the gloves 120 per cent. He should not, however, relieve the contractor with regard to gloves delivered or which should have been delivered prior to the taking effect of that act. The Attorney General does not concur in the view that executive officers are limited in matters of this kind wholly to considerations affecting the pecuniary interests of the Government. (1899) 23 Op. Atty. Gen. 121.

The Secretary of the Navy may insert in the contracts for vessels constructed under authority of the act of Mar. 4, 1911 (36 Stat 1265), a provision for making changes in said contracts and for determining the amount of increased or diminished compensation arising therefrom, whether such compensation be of the nature of liquidated or unliquidated damages. (1911) 29 Op. Atty. Gen. 285.

Under this statute the Secretary of War is the source of all authority to make contracts or purchases in all branches of the Military Establishment. "Whether he makes the contracts himself, or confers the authority upon others, it is his duty to see that they are properly and faithfully executed; and if he becomes satisfied that contracts which he has made himself are being fraudulently executed, or those made by others were made in disregard of the rights of the Government, or with the intent to defraud it, or are being unfaithfully executed, it is his duty to interpose, arrest the execution, and adopt effectual measures to protect the Government against the dishonesty of subordinates." U. S. v. Adams, 7 Wall. 463, 477; Parish v. U. S., 8 Wall. 489.

The head of an executive department may, when not prejudicial to the interests of the Government, or for its benefit, alter or modify the terms of a contract made under his direction, but his subordinates may not take such action without express authority from him. 2 Comp. Dec. 182.

The laws governing the purchase of supplies for the Army are equally applicable whether the purchases are made from funds received from the sale of stores or from the regular appropriations available therefor. 3 Dig. 2d Comp. Dec. 287.

The Secretary of War has authority to extend the time for the execution of a contract made on behalf of his department when the interests of the Government are not thereby prejudiced, and particularly when its noncompletion within the time limited is not due to the negligence of the contractor. 2 Comp. Dec. 242; Salomon v. U. S., 19 Wall. 17; U. S. v. Corliss Steam Engine Co., 91 U. S. 321; 18 Op. Atty. Gen. 101; 2 Comp. Dec. 635.

Approval of contract by superior authority.—Where a contract in terms "is subject to the approval of the Quartermaster General," approval is a condition precedent to the legal effect of the agreement. Darragh v. U. S., 23 Ct. Cls. 377; Monroe & Richardson v. U. S., 35 Id. 199; Cathell v. U. S., 46 Id. 368; Monroe v. U. S., 184 U. S. 524.

The refusal of the Quartermaster General to approve a contract after work has been begun by the contractor is not a rescission. The contractor who begins work before approval does so at his own risk; and if he is paid for the work done, he can not recover profits as if there had been a breach. Id. Such approval need not be in writing. Speed's Case, 8 Wall. 77

Government contracts, by whom made, binding force, etc.—Where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal. They inure to the benefit of and are obligatory on the Government, not the officer. Hodgin *v.* Dexter, 1 Cranch 345, 363; Parks *v.* Ross, 11 How. 362.

The Government is not bound by the act of its agent, unless it clearly appear that he acted within the scope of his authority, or was employed as a public agent to do, or was held out as having authority to do, such act. Whiteside *v.* U. S., 93 U. S. 247; Lee *v.* Munroe, 7 Cranch 366; Filer *v.* U. S., 9 Wall. 45.

A commanding general can not appoint a certain purchasing agent with the powers of a quartermaster. Reeside *v.* U. S. (1866), 2 Ct. Cl. 1.

Where service was performed under a general appropriation, the contractor is not bound to know the condition of the appropriation. Myerle *v.* U. S., 33 Ct. Cls. 1.

The United States in its political capacity may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the departments to which those powers are intrusted, enter into contracts not prohibited by law and appropriate to the just exercise of these powers; no legislative authorization is required, such power being incident to the general right of sovereignty. Dugan *v.* U. S., 3 Wheat. 172; U. S. *v.* Tingey, 5 Pet. 114; U. S. *v.* Bradley, 10 id. 343; U. S. *v.* Linn, 15 id. 290; Cotton *v.* U. S., 11 How. 229; Fowler *v.* U. S., 3 Ct. Cls. 43; Allen *v.* U. S., id. 91.

Action to replevy goods contracted to be furnished—Parties.—Where a manufacturer contracted to furnish certain goods to the commissary general in payment of a debt due the latter and a third party, held, that the United States could not alone maintain replevin for such goods. U. S. *v.* Kennan (C. C. 1815), Fed. Cas. No. 15,521.

Recovery for extras.—Under this section and sections 854, 855, 873, 879, and Army Regulations, par. 825, no recovery can be had by a contractor for extra work for items which were never the subject of any agreement, nor authorized by the officer in charge as extras, nor submitted by him to the War Department. Churchyard *v.* U. S. (C. C. 1900), 100 Fed. 920.

Deprivation of contractor of money due by head of department.—The head of an executive department can not impose terms upon a contractor which will deprive him of money due if he at the same time gives notice of his intention to insist upon payment. Pneumatic Gun Carriage & Power Co. *v.* U. S. (1901), 36 Ct. Cl. 71.

Act directing Secretary of Navy to contract—Effect.—An act directing the Secretary of the Navy to enter into a contract provided it could be done on terms previously offered does not create a contract. Gilbert *v.* U. S. (1869), 8 Wall. 358, 361, 19 L. Ed. 303.

725. Accounts of contractors presented to accountants of departments.—Section thirty-seven hundred and fourteen is amended by adding at the end of the section the following:

"And all agents or contractors for supplies or service as aforesaid shall render their accounts for settlement to the accountant of the proper department for which such supplies or services are required, subject, nevertheless, to the inspection and revision of the officers of the Treasury in the manner before prescribed." *Act of Feb. 27, 1877 (19 Stat. 249), amending R. S. 3714.*

For R. S. 3714, see ante, 724.

Notes of Decisions.

Settlement of accounts of Army contractors.—The accounts of Army contractors should be settled by the accounting officers. If they have any doubts on questions of law, arising in the course of the settlement, they will state them to the head of the department, who, if he please, may call for the opinion of the Attorney General. (1824) 1 Op. Atty. Gen. 678.

The interference of the President in any form with the settlement would be illegal. Id.

726. Unauthorized contracts prohibited.—No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year. *R. S. 3732.*

* * * *Provided*, That no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year. *Act of June 12, 1906 (34 Stat. 255), making appropriations for the support of the Army: Medical Department.*

For prohibition of expenditures beyond appropriations, see ante, 224.

Apportionment of appropriations for contingent expenses in monthly or other allotments, ante, 226.

Appropriations for printing not to be exceeded, limitation on number of reports, etc., post, 987, 995.

Notes of Decisions.

Operation in general.—In actions on contract, express or implied, the Government is to be regarded as the principal, and its officers as its agents; and no acts of theirs can bind the Government for a greater amount than that to which it has limited its liability by statute. Curtis v. U. S. (1866), 2 Ct. Cl. 144.

Contracts to be valid must be shown to come under one or the other of these provisions. Shipman v. U. S. (1883), 18 Ct. Cl. 138.

These provisions apply to the public service in general, and must yield to special provisions relating to a particular department. New York Cent. & H. R. R. v. U. S. (1886), 21 Ct. Cl. 468.

The absence of an appropriation out of which payment can be made is no defense to a valid claim. Collins's Case (1879), 15 Ct. Cl. 35; Shipman's Case (1883), 18 Ct. Cl. 147; Winchester & Potomac R. Co. v. U. S. (1892), 27 Ct. Cl. 494, citing Collins's Case (1879), 15 Ct. Cl. 35; Shipman's Case (1883), 18 Ct. Cl. 147.

The exception of the section favoring contracts or purchases in the War and Navy Departments for clothing, subsistence, forage, fuel, etc., withdraws such contracts or purchases from the operation of the prohibition in sections 224, 226, ante. Therefore such contracts may be made in such departments though there is no appropriation adequate to their fulfillment, provided such contracts do not exceed the necessities of the current year. (1876) 15 Op. Atty. Gen. 124.

This section and sections 224, 226, ante, should be construed together. (1877) 15 Op. Atty. Gen. 209.

The object of the section was to prevent executive officers from involving the Government in expenditures and liabilities beyond those authorized by the legislature. (1895) 21 Op. Atty. Gen. 248.

Contracts "authorized by law."—No person can make a valid contract in behalf of the United States unless expressly or impliedly authorized by statute so to do; but, if so authorized, the right to make such contract is not necessarily limited to contracts with persons who are not enemies of the United States. (1870) 13 Op. Atty. Gen. 315.

Whether the right to make the contract is a right to make it with an enemy depends upon the true construction of the statutes authorizing the making of the contract, and not upon any general principles of public law. Id.

To be "authorized by law," within the meaning of the section, a contract must appear to have been made either in pursuance of express authority given by statute, or of authority necessarily inferable from some duty imposed upon or from some power given to the person assuming to contract on behalf of the Government. (1877) 15 Op. Atty. Gen. 236.

The first clause of this section applies to direct authority to contract granted by statute; the second clause covers an implied authority arising out of the appropriation of means to fulfill. This section and sections 224, 226, ante, are to be construed together. If public moneys are involved an appropriation may give power to contract. If public moneys are not involved the department is prohibited from making the contract "unless the same is authorized by law." (1890) 19 Op. Atty. Gen. 654.

The Secretary of the Navy is authorized by implication from statutes authorizing him to enter into contracts for certain equipment, to contract for the compensation of persons furnishing information of frauds practiced upon the Government in supplying such equipment, the compensation to be regarded as money paid for inspectors' wages, or for defective work. (1893) 21 Op. Atty. Gen. 1.

Unless authorized by Congress the head of a department has no power to adjust

and pay claims for unliquidated damages, even when arising from the breach of a contract, except where such claims are for work and labor done or materials furnished under a contract, silent as to price and the amount thereof liquidated. (1899) 22 Op. Atty. Gen. 437.

Particular contracts and expenditures.—Where Congress authorizes an executive officer to procure suitable rooms for a new executive department, and he enters into a lease for the term of one year with the right reserved to the Government of continuing the occupancy for a term of years, it is a proper exercise of his discretion. Freedman's Savings & Trust Co. *v.* U. S. (1880), 16 Ct. Cl. 19.

A failure by Congress to appropriate the full amount of the rent reserved in a valid lease does not imply a new lease, nor relieve the Government from liability for the rent reserved in the old lease. Id.

Leases entered into under an appropriation of one fiscal year, though for a term of years, are binding on the lessee, the Government, only for the year covered by the appropriation act, but the extended term named in the lease in effect gives an option to the Government to continue it, holding if subsequent appropriations be made, until the expiration of the designated term. McCollum *v.* U. S. (1881), 17 Ct. Cl. 92.

Where no office exists by law, the appointment of a special agent for the protection of timber on the public lands at a designated salary is subject to this section. Peden *v.* U. S. (1886), 21 Ct. Cl. 189.

The section clearly limits the liability of the Government by the appropriations made for each fiscal year, and applies to leases. Smoot *v.* U. S. (1903), 38 Ct. Cl. 418.

Appropriation for general purpose.—Though an executive department has no authority to bind the Government in excess of appropriations, yet, where an appropriation has been made by Congress for a general purpose contemplating a multitude of acts to be done by the department, its agency is general within those limits; and where persons act in good faith under orders of the department, no excess of authority in giving orders above the prescribed limits will be presumed, and the burden of proving this defense is upon the Government, when the facts are peculiarly within its power, and the creditor was not in circumstances to ascertain them. Leavitt *v.* U. S. (D. C. 1888), 34 Fed. 623.

Contract with patentee.—The Secretary of the Navy can not legally contract with the patentee for the purchase of his patent, or for a license to use it, under an appropriation limited to the purchase of material and the employment of labor in the manufacture of such article out of it. (1889) 19 Op. Atty. Gen. 407.

Contract conditional upon future appropriations.—A contract for postal-car facilities which makes the liability of the Government conditional upon future appropriations is valid, and becomes operative if appropriations be subsequently made. New York Cent. & H. R. R. *v.* U. S. (1886), 21 Ct. Cl. 468.

Exhaustion of appropriation.—The Government having appropriated $10,000 to enable the State Department to participate in the World's Industrial Exposition, at New Orleans, the department sent to the petitioner, then consul at Nicaragua, a circular letter, "suggesting" that he procure certain characteristic articles as souvenirs of his consulate for the exposition, referring to an appropriation by Congress, and stating that dependence should not be placed upon voluntary contributions. A few articles were accordingly purchased by the petitioner, and forwarded to the representative of the department, and accepted. A year and a half afterwards, when his bill was presented, he was told that the appropriation was exhausted. Held, that the reasonable construction of the circular was a request to order or procure the articles at the expense of the Government. Leavitt *v.* U. S. (D. C. 1888), 34 Fed. 623.

The fact that the appropriation was found, one and a half years after, to be exhausted, is not proof that the department had no authority to make the order. Id.

Where an alleged liability of the Government rests wholly on an appropriation, they must stand or fall together, so that when the latter is exhausted the former comes to an end. Shipman *v.* U. S. (1883), 18 Ct. Cl. 138.

If a contract, dependent upon an appropriation for its validity, does not exceed the appropriation, it will be deemed valid, though the appropriation be exhausted. New York Cent. & H. R. R. *v.* U. S. (1886), 21 Ct. Cl. 468.

The fact that an appropriation is exhausted justifies an officer in stopping a contractor's work, but does not constitute a defense in a suit for breach of contract. Ferris *v.* U. S. (1892), 27 Ct. Cl. 542.

Under the section the Secretary of the Navy has no authority to incur any obligation for work on an uncompleted dry dock when the appropriation has been exhausted, even though immediate action is very important. (1896) 21 Op. Atty. Gen. 288.

New contract in case of additional appropriation.—Executive officers are prohibited from continuing the employment of the contractors and involving the Government in expenditures or liabilities beyond those contemplated by Congress, or authorized by law, and, if further appropriations are made, there must be a new contract for their expenditure. (1895) 21 Op. Atty. Gen. 244.

Effect of authority to officer to do work without limitation of cost.—If an officer is vested with authority to do a piece of work, without limitation as to cost, the contracts made by him therefor are binding on the Government, whether money is appropriated for the purpose or not. Shipman v. U. S. (1883), 18 Ct. Cl. 138.

Implied contracts.—In view of this section and sections 224, 226, ante, owners of a building who have received full rent of quarters of the Civil Service Commission from the Secretary of the Interior under act Jan. 16, 1883 (22 Stat. 403), can not sue the Government under act Mar. 3, 1887 (24 Stat. 505), to recover difference between such sums and the fair rental value of the property on the theory that the claim is founded either on a contract, express or implied, or on the constitutional obligation to make just compensation for property taken for public use. Hoge v. U. S. (1910), 31 Sup. Ct. 85, 218 U. S. 322, 54 L. Ed. 1055.

The statute does not relate to implied contracts arising from the acts of public officers in the performance of their duties. Symmes v. U. S. (1891), 26 Ct. Cl. 119.

No contract can be implied from the occupancy of buildings which will involve the Government in a greater liability than that fixed by Congress. Hoge v. U. S. (1908), 43 Ct. Cl. 265.

Ratification of contract of officer.—The rule of the common law relative to the ratification of the unauthorized acts of an agent is as applicable to the obligations of the Government as of individuals. Freeman v. U. S. (1866), 2 Ct. Cl. 461.

Where Congress authorizes an executive officer to procure suitable rooms for a newly established executive department, and subsequently appropriates for the rent of the building the precise rent reserved in the lease, it must be deemed a ratification. Freedman's Savings & Trust Co. v. U. S. (1880), 16 Ct. Cl. 19.

Ratification by the head of an executive department, or other responsible officer, will render an unauthorized contract effective and valid. Ford v. U. S. (1881), 17 Ct. Cl. 69.

Where a service, additional to that required by an express contract, is accepted by an executive department with the understanding that compensation must be dependent upon the future action of Congress, and Congress pass an act referring the claim and directing the manner in which damages, if any, shall be computed, the effect of the statute is to validate the service. Wightman v. U. S. (1888), 23 Ct. Cl. 144.

Ratification.—Where the chief quartermaster of a military department orders an assistant quartermaster to accept a bid and award a contract, it is a ratification of the previous acts of the assistant, and renders them as valid as though expressly authorized. Tenney v. U. S. (1874), 10 Ct. Cl. 269.

Incorporation in contract.—Parties to an indenture of a lease of a building for the use of the Post Office Department in Washington held to have intended to incorporate into the instrument the substance of this section. Bradley v. U. S. (1878), 98 U. S. 104, 114, 25 L. Ed. 105.

Knowledge of statute and of amount of appropriation. A statute limiting the amount of an expenditure is notice in law and in fact to the contractor that the officers of the Government can not exceed the prescribed bounds. If they are exceeded, the claimant must be deemed to have gone beyond the fixed limit at his own risk. Act July 3, 1852 (10 Stat. 11). Curtis v. U. S. (1866), 2 Ct. Cl. 144.

Where one contract on its face assumes to provide for all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation, and can not recover beyond it. Dougherty v. U. S. (1883), 18 Ct. Cl. 496.

Persons contracting with the Government for partial service, under general appropriations, are not bound to know the condition of the appropriation or the contract books of the department. Id.

A contractor, building a vessel under general appropriations, is not chargeable with a knowledge of the condition of the fund. Myerle v. U. S. (1896), 31 Ct. Cl. 105.

Where service was performed under a general appropriation, the contractor is not bound to know the condition of the appropriation account at the Treasury. Myerle v. U. S. (1897), 33 Ct. Cl. 1.

The contractor is bound to know the restrictions imposed by statute. Sanger & Moody v. U. S. (1904), 40 Ct. Cl. 47.

727. Contracts for supplies for one year.—It shall not be lawful for any of the Executive Departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made. *R. S. 3735.*

This section was not to apply to contracts for mail bags, mail locks and keys, postal cards, postage stamps, newspaper wrappers, or stamped envelopes by resolution Mar. 24, 1874, No. 6 (18 Stat. 286).

Notes of Decisions.

Operation in general.—It is unlawful for an executive department to make a contract for supplies for a longer term than one year from the time the contract was made. (1896) 21 Op. Atty. Gen. 304.

Quartermaster's authority to contract for indefinite quantity of supplies.—A quartermaster has no authority to contract for indefinite and unlimited quantities of articles which the contractors may buy in the future for an indefinite period, and to bind the Government to take such purchases without reference to its own wants. Cobb, Blasdell & Co. *v.* U. S. (1883), 18 Ct. Cl. 514.

728. Reserve supplies.— * * * *Provided further,* That hereafter funds appropriated for support of the Army may be used for the procurement of supplies to be held in store for issue to the Army during subsequent fiscal years: * * * *Act of Mar. 4, 1915 (38 Stat. 1078), making appropriations for the support of the Army.*

729. Procurement by officers outside the Quartermaster Corps.— * * * *Provided,* That special and technical articles used or issued exclusively by other branches of the service may be purchased or procured with the approval of the Assistant Secretary of War by the branches using or issuing such articles, and the chief of each branch may be charged with the storage and issue of property pertaining thereto: * * * *Sec. 9, act of June 3, 1916 (39 Stat. 170), as amended by sec. 9, act of June 4, 1920 (41 Stat. 766).*

The words "other branches," above, refer to branches other than the Quartermaster Corps.

730. Procurement by one bureau for another.—Hereafter when one bureau of the War or Navy Departments procures by purchase or manufacture stores or material of any kind or performs any service for another bureau of such departments the funds of the bureau or department for which the stores or material are to be procured or the service performed may be placed subject to the requisition of the bureau or department making the procurement or performing the service for direct expenditure by it: *Provided,* That when the stores being procured are for current issue during the year stores of equal value may be issued from stock on hand in place of any of those aforesaid. *Act of Mar. 4, 1915 (38 Stat. 1084), making appropriations for the support of the Army.*

731. Allocation of appropriations in return for services or purchase by another department.—That whenever any Government bureau or department procures, by purchase or manufacture, stores or materials of any kind, or performs any service for another bureau or department, the funds of the bureau or department for which the stores or materials are to be procured or the service performed may be placed subject to the requisitions of the bureau or department making the procurement or performing the service for direct expenditure: *Provided,* That funds so placed with the procuring bureau shall remain available for a period of two years for the purposes for which the allocation was made unless sooner expended. *Sec. 7, act of May 21, 1920 (41 Stat. 613).*

732. Procurement of supplies near the locality where used.— * * * That hereafter all purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster's Department and by the Commissary Department for immediate use shall be made by the officers of such Department, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: * * * *Act of July 5, 1884 (23 Stat. 109), making appropriations for the support of the Army.*

Contracts by Quartermaster General, or officers of Quartermaster Corps, post, 766.

Notes of Decisions.

Statutes relative to contracts for quartermaster's stores.—Review of the statutes relative to the making of contracts in behalf of the United States for quartermaster's stores down to and including act July 4, 1864, from which it appears that, under the law as it stood after the passage of that act, Congress has not authorized purchases or contracts for such stores to be made except in the following manner: 1. By or under the direction of the chief officer of the Department of War (act July 16, 1798). 2. By the officers of the Quartermaster's Department, under the direction of the Secretary of War (acts Mar. 28, 1812, and Aug. 23, 1842), or under the direction of the Quartermaster General, or, in cases of emergency, by the chief quartermaster of an army or detachment under the order of the commanding officer (act July 4, 1864). 3. All contracts to be made after previous advertisement for proposals respecting the same, except in cases of emergency (act July 4, 1864). (1870) 13 Op. Atty. Gen. 315.

Machinery parts, stoves, and patented articles for quartermaster's supplies.—When parts of machinery or of stoves or ranges or patented articles are needed, such articles are required to be purchased in the same way as other quartermaster's supplies—that is, by contract after advertisement, except in cases of emergency, in which cases the purchases are to be reported to the Secretary of War for approval. (1886) 18 Op. Atty. Gen. 349.

733. Advertising for bids for supplies or services.—All purchases and contracts for supplies or services in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same when the public exigencies do not require the immediate delivery of the articles or performance of the service. * * * *R. S. 3709.*

R. S. 3709 was amended by act Jan. 27, 1894 (28 Stat. 33), by the addition of provisions that the advertisements for such proposals should be made by all the executive departments on the same days and should be opened at 2 p. m. on such days as the Secretary of the Treasury should designate. The provisions thus added to this section were limited so as to apply only to advertisements for proposals for fuel, ice, stationery, and other miscellaneous supplies to be purchased at Washington for the use of the executive departments and other Government establishments named by a provision of the urgent deficiency appropriation act for the fiscal year 1894, act Apr. 21, 1894, sec. 2 (28 Stat. 62). As thus limited the provisions added to this section by the said amending act were superseded by the above act. See 735, post.

So much of above section as required advertisement before purchase was not to be applicable to the purchase of medicines and medical supplies for the medical department of the Army by act Feb. 27, 1893, post, 759. The Secretary of War was empowered to select types and makes of motor ambulances for the Army and authorize their purchase without regard to the laws prescribing advertisement for proposals by a provision of act Aug. 29, 1916 (39 Stat. 639).

The Secretary of War was authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department by post, 745, 746.

The purchase of supplies and the procurement of services for all branches of the Army service in open market when the aggregate does not exceed $500 were authorized by post, 752.

Advertisements, notices, or proposals for any executive department, or any bureau thereof, or any office connected therewith, were not to be published in any newspaper whatever without written authority for such publication from the head of the proper department, and bills for such publications can not be paid unless accompanied by a copy of such written authority by R. S., sec. 3828, post, 740.

In the Army appropriations for the fiscal year 1917 of $10,000,000 for "manufacture and purchase of ammunition for small arms and for hand use," of which "not more than $5,000,000" might be used in the purchase of such ammunition; of $5,000,000 for "manufacturing, repairing, procuring, and issuing arms at the national armories"; and of $10,000,000 for "manufacturing reserve ammunition for Field Artillery for the National Guard," of which "not more than $5,000,000" might be used in the purchase of such ammunition—it was provided that in purchases of such ammunition or arms the existing laws prescribing competition in the procurement of supplies by purchase should not govern in orders not to exceed $50,000 in any one case by the Army appropriation act of Aug. 29, 1916, sec. 1 (39 Stat. 644).

Notes of Decisions.

Necessity of submission to competition in general.—The validity of a contract does not depend on the degree of skill or wisdom with which an officer's discretion as to dispensing with advertising is exercised. U. S. v. Speed (1868), 8 Wall. 77, 83, 19 L. Ed. 449.

Where the public exigencies do not require the immediate delivery of the articles, or performance of the service, it is necessary to advertise previously for proposals respecting the same, but where immediate delivery is necessary the article must be obtained by open purchase. (1829) 2 Op. Atty. Gen. 257.

Executory contracts for supplies and materials for the departments must be duly advertised. (1853) 6 Op Atty. Gen. 99.

Although a contract may require in some of its details personal service, this does not make the whole contract one for personal service within the meaning of this section. (1876) 15 Op. Atty. Gen. 538.

Contracts for supplies or services in any of the departments of the Government, except for personal services, or when the public exigency requires the same immediately, must be made after advertisement for proposals in accordance with the statute. (1894) 21 Op. Atty. Gen. 59; (1897) 22 Op. Atty. Gen. 11.

Contract for naval ordnance—Supplies—Services.—A contract for 100 guns, manufacture of materials to be subject to the inspection and approval of the Navy Department, supplemented by an agreement providing for the manufacture of the guns at the naval gun factory in Washington, D. C., and for keeping an account of the cost of labor involved, in order to arrive at the remuneration ultimately to be paid the company, is a contract for supplies and not for services, and a contract with another company for the manufacture of any of said guns may be made by the Navy Department as a contract for ordnance without submitting the matter to competition by public advertisement as required by the section. (1897) 21 Op. Atty. Gen. 577.

Public exigency excusing submission to competition.—The authority of a general commanding a military department to bind the Government by express contract in time of actual hostilities and of great public danger must be derived from the Constitution and laws of the United States. Reeside v. U. S. (1866), 2 Ct. Cl. 1.

A contract made in a season of great public exigencies and peril to immediately construct 100 railroad cars at a price agreed upon, 50 to be delivered in eighteen days, and 50 in thirty days, is an immediate performance. Mowry v. U. S. (1866) 2 Ct. Cl. 68.

An officer in command of a military department may decide as to the existence of an "exigency" which will excuse the omission to advertise, and his contracts will be upheld; there being nothing in the case to show that the exigency was not real, nor that the transaction was not one of good faith and the result of necessity. Stevens v. U. S. (1866), 2 Ct. Cl. 95.

When an "exigency" actually exists, hospital stores may be purchased by a medical purveyor, acting under the orders of the commanding general, without advertisement, and notwithstanding the existence of a contract for the same article made by the Surgeon General. Crowell v. U. S. (1866), 2 Ct. Cl. 501.

When the claimants, during a public exigency, sell Army clothing to the proper assistant quartermaster, and the purchase is approved by the chief quartermaster of the department, the goods sold being used in the military service, and the price charged being the fair value thereof, the claimants should recover. Livingston v. U. S. (1867), 3 Ct. Cl. 131.

Contracts made in emergencies need not await advertising for bids. Brady v.

U. S. (1867), 3 Ct. Cl. 203; Caballos v. Same (1907), 42 Ct. Cl. 318.

Where an emergency exists, requiring the immediate procurement of supplies for the movements of an army, and they can not be procured in the usual manner, its commanding general may order the chief quartermaster to procure them without advertisement "during the continuance of the emergency," under act July 4, 1864, sec. 4 (13 Stat. 394). And the Quartermaster General has no power to annul and disregard such a charter party on the ground that the rate agreed to be paid exceeds the rate which he has prescribed. Baker v. U. S. (1867), 3 Ct. Cl. 343.

The power to declare an "emergency" or "exigency" is vested exclusively in the commanding officer; an executory contract to supply an army with wood, authorized by the chief quartermaster of a military department, without previous advertisement and the express order of the commissary general, is void. Henderson v. U. S. (1868), 4 Ct. Cl. 75.

The section intended that in a proper exigency supplies for the Army should be procured by lawful means, and is not to be construed as declaring contracts illegal which, as nearly as possible, comply with its requirements. Child, Pratt & Fox v. U. S. (1868), 4 Ct. Cl. 176.

A statute relating to national exigencies must necessarily be construed liberally, but a case under it can form no precedent for other cases. Id.

The provision which authorizes a commanding general to order the procurement of supplies in a military emergency without advertisement is limited to the continuance of the emergency, and where a vessel remains in service voluntarily after the emergency is past, she must remain at the rate prescribed by the Quartermaster General, and can not receive that agreed upon in her charter party. Emery v. U. S. (1868), 4 Ct. Cl. 401.

A contract made without advertisement for a future supply of wood for the use of the Army is within the prohibition of the act. McKinney v. U. S. (1868), 4 Ct. Cl. 537.

A contract made by an assistant quartermaster to meet an exigency is void, unless ordered by the commanding general. Id.

Where a commanding general in a military exigency orders a purchase of a limited number of horses within a brief, prescribed time, at an unusually high price, to be inspected by a board of officers, and the contractor complies with all the conditions, the sale is valid. The Quartermaster General has no power to reduce the price. Wilcox v. U. S. (1869), 5 Ct. Cl. 76.

In the absence of any exigency in fact or of one determined by the officer in charge of a public work, or of one that can be judicially inferred, the statute is mandatory, and a contract made in violation thereof is void. Salomon v. U. S. (1871), 7 Ct. Cl. 482; Schneider v. Same (1884), 19 Ct. Cl. 547.

Where service is performed by the day under parol contract without previous advertisement, and a portion of the service is performed after the commanding general has declared a military exigency, the contract is valid so far as relating to service performed subsequent to the order. Updegraff v. U. S. (1872), 8 Ct. Cl. 514.

A military emergency can not be measured by precise rules. It may continue equally imminent over a period of months. In such a case, where supplies can not be procured by immediate purchase, literally in the open market, and the quartermaster charged with procuring them contracts without advertisement for their delivery within thirty days, the contract is valid, if it be as immediate a purchase as the circumstances admit of. Thompson v. U. S. (1873), 9 Ct. Cl. 187.

A vendor contracting with the Government in an alleged emergency is bound to inquire and know whether the required order declaring it has been made. Cobb, Blasdell & Co. v. U. S. (1883), 18 Ct. Cl. 514.

Where the service required was under an appropriation act to relieve suffering, it must be held that the act intended immediate execution. Pacific Steam Whaling Co v. U. S. (1901), 36 Ct. Cl. 105.

An exigency requiring the immediate completion of a vessel for service in the Quartermaster's Department takes the case out of the operation of the statute. Moran Bros. Co. v. U. S. (1904), 39 Ct. Cl. 486.

The Secretary of War authorized a contract for riding half of the cannon at the forts of the United States, and the contract was made without any advertisements for proposals respecting the service. The execution of the contract would involve an expenditure of nearly $200,000, and would require several years for its fulfillment. Held, that the contract was made in violation of the act requiring all contracts for supplies or services in any of the departments, when the public exingencies do not require the immediate delivery of the articles or performance of the service, to be made by advertising for proposals respecting the same. (1861) 10 Op. Atty. Gen. 28.

The "public exigency," contemplated by this section is one of time only. The provision in same section requiring articles or services to be obtained by "open purchase or contract at the place and in the

manner in which such articles are usually bought and sold, or such services engaged between individuals," does not apply to a contractor with the United States. (1877) 15 Op. Atty. Gen. 254.

Where the public exingency requires the immediately delivery of envelopes, they may be purchased by the head of the Department in which the exigency arises, (1895) 21 Op. Atty. Gen. 181.

Supplies of every name and nature for the Navy are to be purchased by contract upon advertisements, except in cases when the public exigency will not permit of delay, and then by open purchase as between individuals. Id.

Modification or extension of existing contracts.—When the Secretary of War is impliedly authorized by Congress to complete certain mortar boats, and the boats are completed accordingly by the contractor, and delivered to the Government under a contract previously existing, without readvertisement, the Secretary neither objecting to the contract nor proposing another, the defendants are bound thereby, and the previous contract is adopted and ratified. Adams *v.* U. S. (1866), 2 Ct. Cl. 70.

Where one contract is to furnish sandstone for a public building at a designated price, and another is to substitute marble at a different price, the material being the sole subject-matter of either agreement, the latter contract can not be regarded as a modification of the former; it requires a new advertisement. Schneider *v.* U. S. (1884), 19 Ct. Cl. 547.

A clause contained in contracts of the War Department providing for future modifications of the contract, set out, and held to be reasonable and proper, and that a modification of such a contract, which does not prejudice the interests of the Government or violate any statutory provision, is not such a new contract as must be preceded by an advertisement for proposals from bidders. (1895) 21 Op. Atty. Gen. 207.

Purchase in market and purchase by contract.—Distinction in administrative law of United States between purchase in open market, and by contract, discussed and defined. (1853) 6 Op. Atty. Gen. 99.

Bidding by telegraph.—It is customary, but not essential, that a telegraphed proposition or bid should be confirmed by letter. (1898) 22 Op. Atty. Gen. 45.

The signature to a bid by telegram would cure any irregularity in the signature of the original mailed bid. Id.

A bidder under an advertisement for sealed proposals may, previous to the opening of the bids, modify his bid by telegram, and the modified bid, if authentic, would, upon acceptance before withdrawal, bind the bidder. Id.

Necessity that bid comply with directions.—Where the engineer in charge, being required by law to invite proposals by circulars and advertisement for furnishing pipes for a water main from the Washington Aqueduct in the District of Columbia, and to give the contract to the lowest responsible bidder, issued instructions stating that "no bid will be considered which does not comply with" certain directions, and the lowest bid afterward received failed to comply with those directions in material points, such bid can not be considered. (1871) 13 Op. Atty. Gen. 510.

Where the advertisement requires the proposals to be made on blank forms furnished by the department, the omission or erasure of immaterial words in the proposal of a bidder does not affect the validity of his bid. (1877) 15 Op. Atty. Gen. 226.

Withdrawal of bid.—The agents of the Government must be allowed reasonable time for the examination of proposals after the opening of bids before the bidders can be allowed to withdraw. Scott *v.* U. S. (1909), 44 Ct. Cl. 524

The head of an executive department is not at liberty to allow a contractor to withdraw his bid after acceptance for an error in stating the amount he intended to bid. (1881) 17 Op. Atty. Gen. 70.

A bid which, through mistake, erroneously states the amount intended ought not to be considered. It is not binding even after acceptance. (1891) 20 Op. Atty. Gen. 1.

In the absence of any special statutory provision to the contrary, a bidder for a Government contract may withdraw his bid at any time until notice of acceptance. (1894) 21 Op. Atty. Gen. 56.

After a bid for public works has been accepted, the bidders have not the right to withdraw their proposal because of errors in calculation on their part, which mistake was not mutual and was due to their negligence. (1895) 21 Op. Atty. Gen. 186.

Acceptance of bid.—See Scott *v.* U. S. (1909), 44 Ct. Cl. 524.

A bid or proposal, and its acceptance by an executive department, constitute an obligation of the same force and effect as if a formal contract had been written out and signed by the parties. Purcell Envelope Co. *v.* U. S. (1911), 47 Ct. Cl. 1; (1877), 15 Op. Atty. Gen. 226; (1881) 17 Op. Atty. Gen. 70.

Hours of labor of contractor's employees.—In awarding contracts for supplies for the Government under the statute, no account can be taken of the fact that the contractor's employees work over eight hours a day. (1890) 19 Op. Atty. Gen. 685.

Rejection of bid.—The contract of the claimant with the defendants was legally made, and leaves the defendants liable thereon to the amount thereof, although other parties may have offered to furnish the goods at a less price, their bid being defective in security, etc. Thompson v. U. S. (1867), 3 Ct. Cl. 433.

Statutory authority "to reject any and all bids" does not confer the right to arbitrarily or capriciously reject any bid. (1910) 28 Op. Atty. Gen. 384.

Patentee of article as bidder.—If the patentee of an article is the lowest bidder for furnishing it, the Secretary of the Navy may accept his proposal and contract with him. (1889) 19 Op. Atty. Gen. 407.

Requirement of indemnity from contractor using patented article.—Where loss may result to the Government or its officers from the use by contractors of patented inventions, or other property of third persons, a bond of indemnity should be required. (1894) 21 Op. Atty. Gen. 97.

Unlawful monopoly as bidder.—A contract for the purchase of material and equipment for use in the construction of the Panama Canal which, by a joint resolution passed June 25, 1906 (34 Stat. 835), and an Executive order of Jan. 6, 1908, is required to be awarded to the lowest responsible bidder, can not be ignored simply because such bidder has been adjudicated to be a party to an unlawful trust or monopoly. (1910) 28 Op. Atty. Gen. 247.

An adjudication that a person or corporation is a party to an unlawful trust or monopoly, from which decree an appeal has been taken, is not sufficient to exclude such person or corporation from competition in the sale of supplies to the Government. Opinion of Apr. 19, 1910 (28 Op. Atty. Gen. 247) followed. (1910) 28 Op. Atty. Gen. 384.

The contract—Proposals not part of contract.—The advertisement for proposals for Government work required by the statute and the proposals in response thereto form no part of the contract, and can not be admitted to contradict or vary its terms. Harvey v. U. S. (1872), 8 Ct. Cl. 501.

Where the advertisement and proposals refer only to such military protection "as the necessities and interests of the service may admit," the gratuitous insertion of a covenant in the formal contract binding the defendants to furnish "sufficient guards and escorts to protect the contractor while engaged in the fulfillment of this contract" is void under the section. McKee v. U. S. (1876), 12 Ct. Cl. 504.

Award of contract by successor in office.—An advertisement by the Secretary of the Treasury for seal locks to be used on railroad cars in the revenue service is a sufficient compliance with the section to authorize a contract by a subsequent secretary for locks to be used on the cars and on bonded warehouses. International Steamship & Ry. Supply Co. of New York v. U. S. (1877), 13 Ct. Cl. 209.

Rights under unadvertised contracts and effect of partial or complete performance.—Where a contract has been mutually performed, and the contractor sues to recover a part of his compensation erroneously withheld for some minor details, it is not a defense that the contract was illegal because not founded upon advertisement and proposals, the price allowed being reasonable. Mudgett v. U. S. (1873), 9 Ct. Cl. 467.

A public contract not founded upon advertisement, as required by this section, is, at most, only voidable. When the Government allows it to be performed, and does not question its validity, a third person can not come in and set up that it was void at law. Driscoll v. U. S. (1877), 13 Ct. Cl. 15.

Where a naval paymaster buys an article for the service under instruction of his commanding officer, but without advertisement, and pays the price out of public funds in his hands, he is entitled to be credited for the item; and if the accounting officers refuse to credit it and the amount is withheld from his pay, he may maintain an action for it. Carpenter v. U. S. (1879), 15 Ct. Cl. 247.

It is a sufficient objection to a naked unexecuted contract, made by an officer of the Government, that he has neglected to comply with an act of Congress requiring that proposals shall precede the letting of the contract. (1862) 10 Op. Atty. Gen. 416.

After a party has contracted with the Government in good faith, and has so far performed that to rescind or declare the contract illegal, and so incapable of execution, would subject him to loss and injury, whilst the Government would yet enjoy the benefits of his labor or expenditures, the contract can not be avoided, or changed to the injury of the other party, by the Government, on the ground that it was made without advertising for proposals. Id.

An officer who, in giving out a contract, has failed to comply with the statutory provision requiring advertisement previous to letting the contract, can not, by permitting performance thereunder to proceed to any extent, make such contract obligatory upon the Government. (1876) 15 Op. Atty. Gen. 539.

Government as contractor.—The rule that a contract is to be construed most strongly against the party who prepares it applies to the United States with respect to its

contracts with private parties. U. S. v. Newport News Shipbuilding & Dry Dock Co. (1910), 178 Fed. 194, 101 C. C. A. 514.

A contract must be construed in the light of the previous practice of the department, and the Secretary, by ordering a test after being notified of the contractor's construction of the contract, and without objecting thereto, impliedly accepted such construction, and bound the Government to pay the additional expense of such test. Id.

The rule that every contract, legal on its face, imports a consideration, and is presumed to be obligatory until the contrary is shown, if the parties be ostensibly able to contract, applies to Government contracts. U. S. v. Maurice (C. C. 1823), Fed. Cas. No. 15,747.

When the Government contracts, it divests itself of its sovereign character as to the particular transaction, and assumes that of an ordinary citizen, and therefore can not recede from its obligations. U. S. v. North American Commercial Co. (C. C. 1896), 74 Fed. 145, following Cooke v. U. S. (1875), 91 U. S. 398, 23 L. Ed. 237, and judgment reversed, North American Commercial Co. v. U. S. (1898), 18 Sup. Ct. 817, 171 U. S. 110, 43 L. Ed. 98. See, also, Gilbert v. U. S. (1863), 1 Ct. Cl. 28. But see Jones v. U. S. (1865) 1 Ct. Cl. 383.

A contract between the Government and a private party is not deemed to be specially affected by the subsequent enactment of a general law. The United States, as a contractor, is not responsible for the United States as a lawgiver. Deming v. U. S. (1865), 1 Ct. Cl. 190.

For an improper interference with the work of a contractor the Government, like an individual, is liable. The Houston Construction Co. v. U. S. (1903), 38 Ct. Cl. 724.

Implied contracts.—See notes under 726, ante.

Where a Government employee, having property in his possession for a certain purpose, by consent of the owner, uses it by order of his superior officer for another purpose, there is no legal implied contract of hiring for Government use. Carpenter v. U. S. (C. C. 1891), 45 Fed. 341.

If an officer of the United States takes the property of a private person for public use without compensation he is liable in tort for the trespass, although the Government may also be liable on an implied contract. O'Reilly De Camara v. Brooke (D. C. 1905), 135 Fed. 384.

Where the proper officers of the Government receive services or property under a contract made by one who was not an authorized agent of the Government, and they use it for a lawful purpose, so that the Government derives a legal benefit therefrom, the contractor may recover the actual value of the property sold or service rendered. Reeside v. U. S. (1866), 2 Ct. Cl. 1.

Where an express contract is void, the person who has delivered his goods to the Government may recover on the implied contract in quantum merult. Heathfield v. U. S. (1872), 8 Ct. Cl. 213.

The failure of the head of the department to approve the contract until after delivery has begun operates as a waiver of all the time limits specified in the contract, but leaves the contractor bound to deliver within a reasonable time. Little Falls Knitting Mill Co. v. U. S. (1908), 44 Ct. Cl. 1.

Waiver of defects in bids and bonds.—In specific cases the Secretary of War is authorized to waive formal defects in bids and bonds in order to secure the public advantage resulting from competitive bidding. (1897) 21 Op. Atty. Gen. 469.

Reliance upon authority of officer.—The contractor may rely upon the presumption that the officer with whom he deals is authorized to make the purchases. Thompson v. U. S. (1873), 9 Ct. Cl. 187.

Personal liability of officer.—A public agent of the Government contracting for it under his own seal is not personally liable. Hodgson v. Dexter (1803), 1 Cranch, 345, 363, 2 L. Ed. 130.

When a commissioned officer or other agent of the United States makes a contract with any person for their use and benefit, and with due authority of law, such officer or other public agent is not responsible to the party, whose only remedy is against the Government. (1855) 7 Op. Atty. Gen. 88. But, in making contracts with anyone claiming to act for the Government, it is the duty of the party contracting to inquire as to the authority of such agent or officer, without which it is doubtful whether the contract affects the Government. Id. If a public officer, however, make a Government contract without authority, and which, therefore, does not bind the Government, such officer is himself personally responsible to the contracting party. Id. But a public officer or other agent, though contracting for the Government, may, if he see fit, make himself the responsible party, either exclusively or in addition to the Government. Id.

Undisclosed principal.—The rule of the law of agency that, when a contract is made by an agent, the principal may maintain an action upon it in his own name, although it was not disclosed to the Govern-

ment at the time of making the contract, can not be upheld in suits against the Government since this section and act July 17, 1862 (12 Stat. 411, 597), which require public contracts to be signed by the contracting parties, and forbid their transfer. Gill v. U. S. (1871), 7 Ct. Cl. 522.

The doctrine that an action may be brought by the principal, though the contract was in the name of the agent, is not applicable to contracts made with the War, Navy, and Interior Departments. Chapter of Calvary Cathedral v. U. S. (1894), 29 Ct. Cl. 269.

734. Advertising by the Secretary of the Treasury.—That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. * * * *Sec. 4, act of June 17, 1910 (36 Stat. 531), making appropriations for legislative, executive and judicial expenses.*

735. Advertising through a general supply committee.— * * * There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committee shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids, and shall perform such other similar duties as he may assign to them: *Provided*, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments; but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further*, That telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him. *Sec. 3, act of June 17, 1910 (36 Stat. 531), making appropriations for legislative, executive, and judicial expenses.*

R. S. sec. 3709, mentioned in this section, is set forth ante, 733, post, 751.

Recent legislative, executive, and judicial appropriation acts have deducted certain sums from the appropriations for contingent expenses of various bureaus, etc., and added them to the appropriation for contingent expenses of the Department of Commerce

and Labor in order to facilitate the purchase of supplies through the central purchasing office, as provided in this act. See 39 Stat. 115, 118.

Notes of Decisions.

Operation in general.—The word "miscellaneous" in sec. 2 of the act of Apr. 21, 1894 (28 Stat. 62), refers to that class of commodities which must be purchased on a considerable scale and used alike by many or all of the various departments and Government establishments in the city of Washington. (1894) 21 Op. Atty. Gen. 59.

The word "him" in the last proviso of this section refers to the Secretary of the Treasury, and the word "so" refers to the method of contracting for other supplies, which method is to be followed in contracting for telephone, electric light, and power service. (1912) 29 Op. Atty. Gen. 380.

This section supersedes 733, ante, and 751, post, as amended by act Jan. 27, 1894, and act Apr. 21, 1894, as to the supplies mentioned therein, and prescribes the method by which such supplies should be purchased. (1910) 28 Op. Atty. Gen. 380.

Supplies for detached bureaus.—Detached bureaus or offices having a field or outlying service may, by permission of the head of the department, under this section, order all their supplies directly from the contractor, whether needed for use in the city of Washington or elsewhere. (1910) 28 Op. Atty. Gen. 380.

"Stationery."—The word "stationery" has no special legal definition, but is ordinarily defined as the "articles usually sold by stationers;" the various materials employed in writing, such as paper, pens, pencils, ink. (1894) 21 Op. Atty. Gen. 59.

Stationery of staple character.—Blank books, press copy books, stenographers' notebooks, etc., which have been scheduled by the general supply committee, and are of a staple character, usually carried in stock by commercial houses, do not come within the terms of 981, post, which requires only that "printing, binding, and blank books," which it is necessary to have specially executed, manufactured, or made at the Government Printing Office, shall be "done" there, except as otherwise provided by law. (1911) 28 Op. Atty. Gen. 581.

Number of supply bureaus or offices.—The provision that "no department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau" contained in this section does not limit the number of supply bureaus or offices in the several departments and establishments. (1911) 28 Op. Atty. Gen. 573.

Suitability of articles for two or more departments.—This section does not make it mandatory upon the Secretary of the Treasury to purchase all supplies required by the several executive departments, of the character named, regardless of whether such articles are "in common use by or suitable to the ordinary needs of two or more such departments or establishments." (1911) 28 Op. Atty. Gen. 573.

Common supply schedule.—The fact that a similar article is listed upon the general supply committee's schedule authorized by this section which might possibly subserve the purpose desired is a matter that concerns only the head of the department making the requisition. (1911) 28 Op. Atty. Gen. 612.

In purchasing articles or supplies not listed in the schedule of the general supply committee, or contracted for by the Secretary of the Treasury, the head of a department making the requisition is not required to state the specific reasons why such articles are necessary in lieu of other articles of a more or less similar nature which are listed on the schedule. Nor is the head of a department required to submit a similar statement in making a requisition upon the Public Printer for an article within the description of articles enumerated in the act of June 28, 1902 (32 Stat. 481), but which is not required to be made to order, or "done," at the Government Printing Office under the provisions of sec. 87 of the act of Jan. 12, 1895 (28 Stat. 622). Id.

The power given the Secretary to add other articles to the common supply schedule is discretionary. If he does not choose to exercise the power and add to it after his attention is called to the matter, then the department or establishment concerned may purchase the article in the manner theretofore authorized by law; but if he does add it to the schedule, it must be purchased through the general supply committee. (1911) 28 Op. Atty. Gen. 573.

The secretary of the Treasury has authority under this section to amend the annual common supply schedule by adding other articles of the character covered by the act at any time during the year that he may deem proper. Id.

General supply committee.—Telephone, electric light, and power service purchased or contracted for from companies or individuals should be obtained through the general supply committee. (1911) 28 Op. Atty. Gen. 573.

Advertisement for bids, proposals, and acceptance or rejection thereof.—A head of department, advertising according to law for proposals for stationery, is the competent and only judge of the matters of fact involved in the acceptance or rejection of any of the proposals. (1853) 6 Op. Atty. Gen. 226.

In a matter which the law confides to the pure discretion of the executive, the decision by the President, or proper head of department, of any question of fact involved, is conclusive, and is not subject to revision by any other authority in the United States. Id.

736. Procurement of Army supplies.— * * * *Provided further*, That hereafter, except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments and posts of the Army and of the branches of the army service shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered; * * * *Act of June 30, 1902 (32 Stat. 514), making appropriations for the support of the Army.*

Provisions more or less similar to this proviso were repeated in subsequent Army appropriation acts.

A provision of this act immediately preceding the provision set forth here required the printing for the Quartermaster's Department to be done on contract after due notice and competition, except in emergency cases. It was superseded by provisions, regulating such printing, of later Army appropriation acts. See 997, post.

A further provision of this act, relating to purchase of supplies in the open market was not repeated in the Army appropriation acts after that for the fiscal year 1905, but a general provision authorizing the purchase of supplies and the procurement of services for all branches of the Army service in open market, when the aggregate does not exceed $500, was made by 752, post.

Recent Military Academy appropriation acts contain a provision that all technical and scientific supplies for the departments of instruction of the academy shall be purchased by contract or otherwise, as the Secretary of War may deem best.

Notes of Decisions.

Operation in general.—A statutory provision that supplies shall be purchased where they can be had cheapest, "the interests of the Government considered," does not enlarge the authority of the contracting officer, but has reference to the cost and adaptability of the supplies. (1910) 28 Op. Atty. Gen. 384.

Risk of loss of supplies.—(1831) 2 Op. Atty. Gen. 408; (1836) 3 Op. Atty. Gen. 115.

Right of contractor to escort through enemy country.—(1819) 1 Op. Atty. Gen. 260.

Contractor's liability on failure to furnish supplies. See (1819) 1 Op. Atty. Gen. 270.

737. Procurement of means of transportation.— * * * *Provided further*, That hereafter all purchases of horses, mules, or oxen, wagons, carts, drays, ships and other seagoing vessels, also all other means of transportation, shall be made by the Quartermaster's Department, by contract, after due legal advertisement, except in cases of extreme emergency; * * *. *Act of July 5, 1884 (23 Stat. 110), making appropriations for the support of the Army.*

A further provision of this proviso, omitted here, required all purchases and contracts of every kind made by the Quartermaster's Department to be promptly reported to the Secretary of War, for transmission annually to Congress. It was repealed by act Mar. 2, 1895, sec. 1 (28 Stat. 787).

See also 954, post.

Notes of Decisions.

Approval of quartermaster's purchase by district quartermaster—Necessity.—A purchase of horses and mules for military purposes by the quartermaster of a military depot, under orders of the general commanding, which is regular and in due form of law, is not subject to the supervision or approval of the quartermaster of the district, and constitutes a valid sale. Akers v. U. S. (1866), 2 Ct. Cl. 375.

738. Purchase of steel.—*Provided*, That no contract for the expenditure of any portion of the money herein provided, or that may be hereafter provided, for the purchase of steel shall be made until the same shall have been submitted to public competition by the Department by advertisement. *Act of Feb. 24, 1891 (26 Stat. 769), making appropriations for fortifications, etc.*

739. Purchases of medicines and medical supplies.—Hereafter so much of section thirty-seven hundred and nine, Revised Statutes, as requires advertisement before purchase shall not apply to the purchase of medicines and medical supplies. *Act of Feb. 27, 1893 (27 Stat. 485).*

R. S. 3709, mentioned in this provision, is set forth 733, ante, 751, post.

For the purchase of supplies and the procurement of services for all branches of the Army service in the open market, see 752, post.

740. Written authority to advertise.—No advertisement, notice, or proposal for any Executive Department of the Government, or for any bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such department; and no bill for any such advertising, or publication, shall be paid, unless there be presented, with such bill, a copy of such written authority. *R. S. 3828.*

Notes of Decisions.

Location of offices.—The provisions of this section extend to offices connected as therein specified, no matter where located. (1878) 16 Op. Atty. Gen. 616.

Sufficiency of order.—A general order addressed to the predecessor of a superintendent of Indian affairs by the commissioner stating that the Secretary of the Interior had directed the publishing of advertisements authorizes the publication of advertisements under this section. U. S. *v.* Odeneal (C. C. 1882), 10 Fed. 616, 617.

Advance authority.—The written authority must precede the publication; a subsequent approval or ratification will not be sufficient. (1898) 5 Comp. Dec. 166; (1908) 14 id. 747.

741. Advertising rates.—That hereafter all advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several departments of the Government may be paid for at a price not to exceed the commercial rates charged to private individuals, with the usual discounts; such rates to be ascertained from sworn statements to be furnished by the proprietors or publishers of the newspapers proposing so to advertise: *Provided*, That all advertising in newspapers since the tenth day of April, eighteen hundred and seventy-seven, shall be audited and paid at like rates; but the heads of the several departments may secure lower terms at special rates whenever the public interest requires it. *Act of June 20, 1878 (20 Stat. 216), making appropriations for sundry civil expenses.*

742. Advertising in the District of Columbia.—That all advertising required by existing laws to be done in the District of Columbia by any of the departments of the Government shall be given to one daily and one weekly newspaper of each of the two principal political parties and to one daily and one weekly neutral newspaper: *Provided*, That the rates of compensation for such service shall in no case exceed the regular commercial rate of the newspapers selected; nor shall any advertisement be paid for unless published in accordance with section thirty-eight hundred and twenty-eight of the Revised Statutes. *Act of Jan. 21, 1881 (21 Stat. 317), making appropriations for sundry civil expenses.*

R. S. 3828, mentioned, is set forth, ante, 740.

Notes of Decisions.

Proposals for work on Government buildings.—Advertisements, such as those for proposals for the interior finish of the post office building in the city of Washington, need not be made in six newspapers published in District of Columbia, as provided by this act. (1897) 21 Op. Atty. Gen. 595.

The selection of newspapers in which to publish advertisements of this character in the District of Columbia is in the discretion of the heads of the departments. Id.

743. **Advertising for supplies to be used near the Pacific Coast.**—The Quartermaster's Department of the Army, in obtaining supplies for the military service, shall state in all advertisements for bids for contracts that a preference shall be given to articles of domestic production and manufacture, conditions of price and quality being equal, and that such preference shall be given to articles of American production and manufacture produced on the Pacific coast, to the extent of the consumption required by the public service there. In advertising for Army supplies the Quartermaster's Department shall require all articles which are to be used in the States and Territories of the Pacific coast to be delivered and inspected at points designated in those States and Territories and the advertisements for such supplies shall be published in newspapers of the cities of San Francisco, in California, and Portland, in Oregon. *R. S. 3716.*

744. **Period allowed for entering proposals.**—* * * *Provided also*, That all purchases of said supplies, except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids. *Act of June 3, 1884 (23 Stat. 109), making appropriations for the support of the Army.*

See 732, ante.

745. **Secretary of War to prescribe regulations for proposals.**—That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department. * * * *Act of Apr. 10, 1878 (20 Stat. 36).*

Notes of Decisions.

Effect as to repeal of other statutes.—This section is not effective to repeal sections 765, 770, post. U. S. v. Lamont (1894), 2 App. D. C. 532.

746. **Bidders' bonds.**—And he may require every bid to be accompanied by a written guaranty, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will, at such time as may be prescribed by the Secretary of War, or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed or to perform the service required. If after the acceptance of a bid and a notification thereof to the bidder he fails within the time prescribed by the Secretary of War or other duly authorized officer to enter into a contract and furnish a bond with good and sufficient security for the proper fulfillment of its terms, the Secretary or other authorized officer shall proceed to contract with some other person to furnish the supplies or perform

the service required, and shall forthwith cause the difference between the amount specified by the bidder in default in the proposal and the amount for which he may have contracted with another party to furnish the supplies or perform the service for the whole period of the proposal to be charged up against the bidder and his guarantor or guarantors, and the sum may be immediately recovered by the United States for the use of the War Department in an action of debt against either or all of such persons. *Act of April 10, 1878 (20 Stat. 36), as amended by act of March 3, 1883 (22 Stat. 488).*

Notes of Decisions.

Omission to date bond with bid.—A bond accompanying a bid to build certain public works, duly signed, sealed, and delivered, the separate proposals constituting the bid and the bond being on printed blanks bound together and consecutively paged in print, is not sufficiently defective to be regarded as invalid because the date of the bid and bond are not inserted in the blanks left for that purpose in printing the instrument. (1897) 21 Op. Atty. Gen. 469.

The date is no part of the substance of a sealed instrument, and need not necessarily be inserted. The real date is the time of its delivery, which may always be proved. Id.

Formal defects in bids and bonds—Waiver.—In specific cases the Secretary of War is authorized to waive formal defects in bids and bonds in order to secure the public advantage resulting from competitive bidding. (1897) 21 Op. Atty. Gen. 469.

A bidder on a Government contract can not withdraw his bid before a reasonable time is allowed the Government for acceptance after the opening of the bids.

Where certain bids for the purchase of copper scrap located on the Isthmus of Panama were to be opened and tabulated at Washington and were then to be referred to the Isthmus for final decision: Held, That a delay of seven days before notice of acceptance was not unreasonable as a matter of law. (1913) 30 Op. Atty. Gen. 56.

747. Separate proposals.—Whenever the Secretary of War invites proposals for any works, or for any material or labor for works, there shall be separate proposals and separate contracts for each work, and also for each class of material or labor for each work. *R. S. 3717.*

Nothing in this section to prohibit or prevent the cumulation of two or more works of river and harbor improvement in one proposal and contract, etc., post, 1532.

748. Opening bids.—Whenever proposals for supplies have been solicited, the parties responding to such solicitations shall be duly notified of the time and place of opening the bids, and be permitted to be present either in person or by attorney, and a record of each bid shall then and there be made. *R. S. 3710.*

749. Bids reported to Congress.—Whenever the Secretary of War invites proposals for any works, or for any materials or labor for any work, he shall report to Congress, at its next session, all bids therefor, with the names of the bidders. *R. S. 230.*

750. Compulsory orders in time of war.—The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such

individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, * * *. *Sec. 120, act of June 3, 1916 (39 Stat. 213).*

Notes of Decisions.

Validity.—In view of the paramount war-making power of Congress, sec. 120, national defense act, is valid. Moore & Tierney *v.* Roxford Knitting Co. (D. C. 1918), 250 Fed. 278; William Moore Knitting Co. *v.* Same, id. 288; judgment affirmed in both cases (C. C. A. 1920), 265 Fed. 177, and certiorari denied (1920), 64 L. Ed. 671; 40 Sup. Ct. 588; Crown Embroidery Works *v.* Gordon (1920), 190 N. Y. App. Div. 472; 180 N. Y. Supp. 158.

Powers of President.—In performance of contract with Government, even for military supplies, precedence over civilian contracts does not necessarily inhere, nor may be imported or imposed otherwise than as provided by act of Congress, notwithstanding Const. U. S., art. 2, sec. 2, making the President Commander in Chief of the Army and Navy. Mawhinney *v.* Millbrook Woolen Mills (Sup.), 172 N. Y. S. 461.

Presumptions.—As great publicity was given to sec. 120, national defense act, and Navy appropriation act, Mar. 4, 1917, which authorize the Government in time of war to place compulsory orders with manufacturers and for supplies, manufacturers and private persons with whom they contract must be presumed to have contracted with reference to such laws. Moore & Tierney *v.* Roxford Knitting Co. (D. C. 1918), 250 Fed. 278; William Moore Knitting Co. *v.* Same, id. 288; judgment affirmed in both cases (C. C. A. 1920), 265 Fed. 177, and certiorari denied (1920), 64 L. Ed. 671; 40 Sup. Ct. 588.

The power of the Government to commandeer being a power to be resorted to only where public danger is immediate, imminent, and impending, the exercise of such power under this section will not be presumed until it clearly appears that such power was intended to be exercised. Mawhinney *v.* Millbrook Woolen Mills (1918), 172 N. Y. Supp. 461; affirmed (1919), 176 N. Y. Supp. 910; leave to appeal refused (1919), 177 N. Y. Supp. 920.

Placing of order.—Where a manufacturer voluntarily enters into contracts with the United States, which prevent him from carrying out earlier contracts, he is not relieved from an action of damages for breach; but where, after communication with a member of the Advisory Board of National Defense, he contracted to supply underwear for the Navy the order must be deemed to have been placed in accordance with this section and Navy appropriation act, Mar. 4, 1917, making compliance obligatory; so the manufacturer was not liable for breach of contracts with private persons which he was unable to carry out because of the Navy contract. Moore & Tierney *v.* Roxford Knitting Co. (D. C. 1918), 250 Fed. 278; William Moore Knitting Co. *v.* Same, id. 288; judgment affirmed in both cases (C. C. A. 1920), 265 Fed. 177, and certiorari denied (1920), 64 L. Ed. 671; 40 Sup. Ct. 588.

But where in an action for nondelivery of woolen cloth defendants answer that delivery of yarn to defendants by yarn mills was prohibited by the War Industries Board, acting under the national defense act, making performance of the contract impossible, but do not allege that performance of the particular contract was forbidden, or that defendants could not have obtained yarn within a reasonable time after the contract was made and before such action was taken by the War Industries Board, the answer does not state a good defense. Crown Embroidery Works *v.* Gordon (1920), 190 App. Div. 472; 180 N. Y. Supp. 158 (distinguishing Mawhinney *v.* Millbrook Woolen Mills, *infra*).

This section is not self-executing, but requires the Government to place an order, within the meaning of the act, in order to obtain precedence over other orders, and the making of a contract between the Government and a private corporation for military supplies, in form an ordinary contract, although referred to as an order, does not constitute the "placing of an order" with the corporation, within its purview. Mawhinney *v.* Millbrook Woolen Mills (1918), 172 N. Y. Supp. 461.

751. Purchases made in an exigency.— * * * When immediate delivery or performance is required by the public exigency the articles or service required may be procured by open purchase or contract at the places and in the manner

in which such articles are usually bought and sold or such services engaged between individuals. *R. S. 3709.*

See notes to 733, ante.

752. Open market purchases under $500.—Hereafter the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among business men, when the aggregate of the amount required does not exceed five hundred dollars; but every such purchase exceeding one hundred dollars shall be promptly reported to the Secretary of War for approval, under such regulations as he may prescribe. *Act of June 12, 1906 (34 Stat. 258), making appropriations for the support of the Army.*

Previous provisions similar to some extent to those of this paragraph authorizing the purchase of signal stores, etc., and the engagement of services by the Signal Corps, the purchase of medicines, etc., and the engagement of services by the Medical Department, and the purchase of ordnance and ordnance stores, etc., and the procurement of services by the Ordnance Department, were contained in act Mar. 2, 1903 (32 Stat. 929, 940, 942), and act Apr. 23, 1904 (33 Stat. 275). All these provisions may be regarded as superseded by the more comprehensive provisions of this paragraph.

753. Bunting.—The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury may enter into contract, in open market, for bunting of American manufacture, as their respective services require, for a period not exceeding one year, and at a price not exceeding that at which an article of equal quality can be imported. *R. S. 3729.*

754. Purchase of exceptional subsistence stores.— * * * And hereafter exceptional articles of subsistence stores for officers and enlisted men, which are to be paid for by them, regardless of condition upon arrival at posts, may, under regulations to be prescribed by the Secretary of War, be obtained by open purchase without advertising. *Act. of Feb. 12, 1895 (28 Stat. 658), making appropriations for the support of the Army.*

755. Purchase of articles involving a secret process.—Whenever proposals are invited for the furnishing of articles of ordnance property, the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them, the Chief of Ordnance is authorized to purchase such articles in such manner as he may deem most economical and efficient. *Act of May 11, 1908 (35 Stat. 125), making appropriations for the support of the Army.*

756. Purchases from Indians.—The Secretary of War is hereby authorized and directed when making purchases for the military posts or service on or near Indian reservations to purchase in open market, from the Indians as far as practicable, at fair and reasonable rates, not to exceed the market prices in the localities, any cattle, grain, hay, fuel, or other produce or merchandise they may have for sale and which may be required for the military service. *Sec. 4, act of Jan. 19, 1891 (26 Stat. 721).*

757. Stipulation that no member of Congress has interest in a contract.—In every such contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no member of Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon. *R. S. 3741.*

Section thirty-seven hundred and forty-one is amended by inserting, in the third line, after the words "member of," the words "or delegate to." *Act of Feb. 27, 1877 (19 Stat. 249).*

Notes of Decisions.

Effect of contractor's election.—In June, 1876, R. entered into a contract with the Quartermaster's Department for the fiscal year ending June 30, 1877. He was afterwards (in the fall of 1876) elected a delegate to the Forty-fifth Congress. That Congress not having as yet (in May, 1877) met, and R. not being as yet a member of that body, held, that the provision of the section has no application to him. Whether, if the Congress should meet, and R. should be sworn in as a delegate during the continuance of his contract, the latter would thereby be annulled, is not considered. (1869) 5 Op. Atty. Gen. 697; (1877) 15 Op. Atty. Gen. 281.

Congressman partner in contracting firm.—A partnership of which a Member of Congress is a member can not enter into a contract with the Government; but, if he withdraw from it, the contract may be concluded with the other partners. (1842) 4 Op. Atty. Gen. 47.

Employment of Congressman as special counsel.—Although the employment of Members of Congress as assistant counsel to the district attorneys of the United States was not within the view of Congress at the passage of the act, yet the language of the act is so broad as to include and forbid a contract for professional services in such a case. (1826) 2 Op. Atty. Gen. 39.

Congressman as surety.—Under the section a Member of Congress may be lawfully accepted as a surety on the bond of a contractor with the United States. (1885) 18 Op. Atty. Gen. 286.

Railroad contracts.—The express condition that no Member of Congress has an interest in the contract need not be inserted in those contracts made with railroad corporations. (1885) 18 Op. Atty. Gen. 112.

758. Member of Congress aiding in obtaining a contract.—Whoever, being elected or appointed a Member of or a Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring, or aiding to procure, any contract, appointive office, or place, from the United States or from any officer or department thereof, for any person whatever, or for giving any such contract, appointive office, or place to any person whomsoever; or whoever, directly or indirectly, shall offer, or agree to give, or shall give, or bestow, any money, property, or other valuable consideration whatever, for the procuring, or aiding to procure, any such contract, appointive office, or place, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States. Any such contract or agreement may, at the option of the President, be declared void. *Sec. 112, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1108).*

Notes of Decisions.

See notes under 759, post.

"Member of Congress" within statute.—A person elected to the office of Senator of the United States, until he has been accepted by the Senate as a member and has assumed the duties of the office, is not a "Member of Congress" within the meaning of R. S. sec. 1781 (embodied herein), making it a criminal offense for a "Member of Congress or any officer or agent of the Government" to receive or agree to receive a bribe for procuring or aiding to procure for another any contract, office, or place from the Government. U. S. v. Dietrich (C. C. 1904), 126 Fed. 676.

Department clerk as subject to indictment.—A clerk in one of the departments is subject to indictment under R. S. sec. 1781 (embodied herein), or R. S. sec. 1782 (embodied in 759, post), as an "officer and agent" or an "officer and clerk" of the United States. McGregor v. U. S. (1904), 134 Fed. 187, 69 C. C. A. 477.

Agreement to receive bribe and agreement to give bribe as distinct offenses.—The act of agreeing to receive a bribe is a substan-

tive offense, and the act of agreeing to give a bribe another. Chadwick v. U. S. (1905), 141 Fed. 225, 236, 72 C. C. A. 343.

Two persons can not be severally charged in the same indictment under R. S. sec. 1781 (embodied herein), and in a single count, the one with agreeing to receive a bribe as a Member of Congress and the other with agreeing to give such bribe, which constitute distinct and several offenses. U. S. v. Dietrich (C. C. 1904), 126 Fed. 664.

Giving note to Member of Congress.—R. S. sec. 1781 (embodied herein), and sec. 1782 (embodied in 759, post), make it a criminal offense for any Member of Congress to receive or agree to receive any money, property, or other valuable consideration for procuring or aiding to procure any contract from the Government, or to receive any compensation for services rendered in relation to any claim or contract in which the United States is a party. Sec. 1781 also makes it an offense for any person to give or agree to give any money, property, or other valuable consideration for the procuring or aiding to procure such contract by a Member of Congress. Held, that the delivery to a Member of Congress of a nonnegotiable note made by a Government contractor, promising to pay a certain sum as the proceeds of the contract were received, and executed pursuant to an agreement to pay such Member for his services in procuring the contract, did not constitute the giving or receiving of "property" or a "valuable consideration," within the meaning of the statute, such note being made unlawful and invalid by the statute itself. U. S. v. Driggs (C. C. 1903), 125 Fed. 520.

Limitations.—Indictments under the statute, based on payments subsequently made and received in accordance with the terms of the note, were not barred by limitation, where such payments were made within three years, though the note was delivered more than three years prior to the finding of the indictment. U. S. v. Driggs (C. C. 1903), 125 Fed. 520.

Indictment.—When a nonnegotiable note, made by a Government contractor, promising to pay a certain sum as the proceeds of the contract were received, was executed pursuant to an agreement to pay the Congressman for his services in procuring the contract, it was held that indictments under the statute based on payments subsequently made and received in accordance with the terms of the note, were not barred by limitation, where such payments were made within three years, though the note was delivered more than three years prior to finding the indictment. U. S. v. Driggs (C. C. 1903), 125 Fed. 520.

Conspiracy.—Charges against the same defendants for conspiracy to defraud the United States, based on R. S. sec. 5440, and for receiving money from their alleged coconspirator for aiding to procure a contract from the Government, and for services rendered in relation to the same, based on R. S. sec. 1781 (embodied herein), and sec. 1782 (embodied in 759, post), defendants being clerks in a department, and such charges all relating to the same transaction, may properly be joined in different counts in the same indictment under R. S. sec. 1024. McGregor v. U. S. (1904), 134 Fed. 187, 69 C. C. A. 477.

R. S. sec. 1781 (embodied herein) makes it a criminal offense for a Member of Congress to take, receive, "or agree to receive" any money, property, or other valuable consideration for procuring or aiding to procure any office from the Government, and also a like offense for any person to offer, give, "or agree to give" any money or other consideration to any Member of Congress for procuring or aiding to procure such office. Held, that an agreement between a Member of Congress and another, the one to receive a bribe for aiding to procure an office and the other to pay the same, constitutes a substantive offense under said section by each of the parties thereto, and can not be made the basis of an indictment under R. S. sec. 5440, for a conspiracy to commit an offense against the United States. U. S. v. Dietrich (C. C. 1904), 126 Fed. 664.

759. Member of Congress not to be compensated for any service in relation to a contract, etc.—Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil,

military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States. *Sec. 113, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1109).*

Notes of Decisions.

See also notes under 758, ante.

Prohibition of statute in general as to contracts or connection therewith.—Secs. 1781, ante 758, and 1782 (embodied herein) of the Revised Statutes, make it illegal for an officer of the United States to have that sort of connection with a Government contract which an agent, attorney, or solicitor assumes when he procures, or aids in procuring, such contract for another, or when he prosecutes for another any claim against the Government founded thereon. (1874) 14 Op. Atty. Gen. 483.

But there is in the statutes no general provision whereby officers of the executive branch of the Government are forbidden to contract directly with the Government as principals, in matters separate from their offices and in no way connected with the performance of their official duties; nor are those officers forbidden to be connected with such contracts, after they are procured, by acquiring an interest therein. Id.

There is no prohibition against pension agents contracting directly with the Government, or becoming connected with Government contracts, in the manner just adverted to. Id.

Statute as excluding powers of Government.—The powers of the Federal Government were not exceeded by the enactment of this section. Burton *v.* U. S. (1906), 26 Sup. Ct. 688, 692, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 372.

Retired Army or naval officer as within statute.—An officer of the United States Army or Marine Corps, retired from active service only, and not wholly retired from service, is an officer in the employ of the Government, and so within the prohibition of this section. (1912) 29 Op. Atty. Gen. 397.

Member of Congress.—By act June 11, 1864, a Member of Congress-elect is, previous to as well as after taking the oath of office, debarred from acting as counsel for parties, and from prosecuting claims against the Government, before any department court-martial, bureau officer, or any civil, naval, or military commission, if he has received or has agreed to receive any compensation whatever, directly or indirectly, therefor. (1872) 14 Op. Atty. Gen. 133.

Separate and distinct offenses.—The agreement to receive, and the receipt of, the forbidden compensation, are made two separate and distinct offenses by R. S. sec. 1782 (embodied herein), making it a misdemeanor of a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested. Burton *v.* U. S. (1906), 26 Sup. Ct. 688, 697, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 392.

Proceeding in which United States is "interested."—The United States has a direct interest, within the meaning of R. S. 1782 (embodied herein), in all its public lands and in the right of entry or purchase thereof through proceedings to be had at any of its land offices. U. S. *v.* Booth (C. C. 1906), 148 Fed. 112.

760. Member of Congress interested in a contract.—Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement, made or entered into in behalf of the United States by any officer or person authorized to make contracts on its behalf, shall be fined not more than three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced by the United States, in consideration of any such contract or agreement, it shall forthwith be repaid; and in case of failure or refusal to repay the same when demanded by the proper officer of the department under whose authority such

contract or agreement shall have been made or entered into, suit shall at once be brought against the person so failing or refusing and his sureties, for the recovery of the money so advanced. *Sec. 114, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1109).*

Notes of Decisions.

Agreements or contracts within statute in general.—Agreements for the purchase of lands, for water rentals, for conveyance of water rights, and similar instruments, contractual in form, relating to the adjustment of vested water rights, executed in behalf of the United States by some officer of the Reclamation Service for purposes within the purview of the reclamation act (32 Stat. 388), are "agreements" or "contracts" within the meaning of R. S. secs. 3739–3742 (found or embodied in this compilation in secs. 760, 762, 757, 761), which prohibit any Member of Congress from being a party to, or interested in, any contract with, or on behalf of, the United States which is in its nature executory and continuous as to future performance, and require the insertion therein of the condition prescribed by R. S. sec. 3741. (1908) 26 Op. Atty. Gen. 537.

Termination of contract by operation of law.—Under R. S. sec. 3739 (embodied herein), where a contract was made between the United States and one who was not at the time a Member of or a Delegate to Congress, but who became such while the contract was still executory, on his becoming a member, the contract was at once dissolved, and his obligation to further perform it, and his right to hold and enjoy further benefit from it, were terminated by operation of law. U. S. *v.* Dietrich (C. C. 1904), 126 Fed. 671.

Prohibition of statute as extending to holding and enjoying contract.—The purpose and effect of the legislation contained in this and the two sections next following is to absolutely inhibit all contractual relations with the United States on the part of any Member of or Delegate to Congress through "any contract or agreement made or entered into in behalf of the United States, by any officer or person authorized to make contracts on behalf of the United States," save in the instances specifically excepted by R. S. sec. 3740 (embodied in 762, post). The inhibition is not alone against undertaking or executing (that is, making or entering into) such a contract or agreement, but also against holding or enjoying one (that is, having or retaining the title thereto or receiving the benefits thereof). U. S. *v.* Dietrich (C. C. 1904), 126 Fed. 671, 673.

Meaning of word "advanced."—The word "advanced" in this section, which requires the return of money advanced by the United States on any contract wherein a Member of Congress is benefited, is used in its ordinary legal meaning, and does not apply to contracts that have been fully executed and payment thereon fully made. (1903) 25 Op. Atty. Gen. 71.

761. Officer contracting with a Member of Congress, etc.—Whoever, being an officer of the United States, shall on behalf of the United States, directly or indirectly make or enter into any contract, bargain, or agreement, in writing or otherwise, with any Member of or Delegate to Congress, or any Resident Commissioner, after his election or appointment as such Member, Delegate, or Resident Commissioner, and either before or after he has qualified, and during his continuance in office, shall be fined not more than three thousand dollars. *Sec. 115, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1109).*

762. Exception as to corporations.—Nothing contained in the two preceding sections shall extend, or be construed to extend, to any contract or agreement made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company; nor to the purchase or sale of bills of exchange or other property by any Member of or Delegate to Congress, or Resident Commissioner, where the same are ready for delivery, and payment therefor is made, at the time of making or entering into the contract or agreement. *Sec. 116, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1109).*

Notes of Decisions.

See notes under 760, ante.

Contract as surety.—The provisions of R. S. secs. 3739–3741 (this compilation, 757, 760, 762), considered, and held that upon a fair construction thereof a Member of Congress may be lawfully accepted as a surety on the bond of a contractor with the United States. (1885) 18 Op. Atty. Gen. 286.

Signing a contractor's bond would give the surety no immediate personal interest in its benefits. He is not a contractor with the Government, nor does he, under any circumstances, become so under the statute. 18 Op. Atty. Gen. 113.

763. Agent of a corporation, etc., acting as an agent of the United States.—No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years. *Sec. 41, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1097).*

Notes of Decisions.

Agent of Emergency Fleet Corporation.—An inspector of the United States Shipping Board Emergency Fleet Corporation is not an agent of the United States, within the meaning of this section. U. S. *v.* Strang (1921), 41 Sup. Ct. 165; 65 L. Ed. 174.

Awarding contract to firm, member of which is an officer.—This section does not prevent the awarding of a contract for furnishing coal for the Post Office Department to a firm one of the members of which is an officer in that department, provided it is the lowest bidder, and the officer does not "act as an officer or agent of the United States" with reference to the purchase of the coal. Such section, being quasi-penal in character, must be strictly construed; and, under such construction, a partner can not be held to be an "agent," for he is a principal, and the act is essentially the act of principals. (1903) 24 Op. Atty. Gen. 557.

764. Officers in Quartermaster's Department not to be interested in purchases or sales.—No officer belonging to the Quartermaster's Department, or doing the duty of a quartermaster or assistant quartermaster, shall be concerned, directly or indirectly, in the purchase or sale of any article intended for or appertaining to said department of service, except on account of the United States; nor shall any such officer take or apply to his own use any gain or emolument for negotiating or transacting any business connected with the duties of his office, other than that which may be allowed by law. *R. S. 1138.*

No officer belonging to the Subsistence Department, or doing the duty of a subsistence officer, shall be concerned, directly or indirectly, in the purchase or sale of any article entering into the composition of the ration allowed to troops in the service of the United States, or of any article designated by the inspectors-general of the Army, and furnished for sale to officers and enlisted men at cost prices, or of tobacco furnished for sale to enlisted men, except on account of the United States; nor shall any such officer take or apply to his own use any gain or emolument for negotiating or transacting any business connected with the duties of his office, other than that which may be allowed by law. *R. S. 1150.*

The Quartermaster's Department was consolidated with the Subsistence Department and the Pay Department to form the Quartermaster Corps by act Aug. 24, 1912, secs. 3 and 4, ante, 708, 710.

765. Formal written contracts.—It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause

and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; * * *. *R. S. 3744.*

River and harbor works have been excepted. See 1530, post.

While raising forces for the World War, quarters for draft boards were rented without contracts, under authority granted by the act of July 9, 1918 (40 Stat. 851).

Notes of Decisions.

Operation in general.—Failure to reduce a contract made by authority of Secretary of Navy to a writing signed by the contracting parties as required by this section does not preclude enforcement of contract by the Government, though it is unenforceable against the Government. U. S. *v.* New York & Porto Rico S. S. Co. (1915), 36 Sup. Ct. 41.

As between the Government and its contractor the act operates as a statute of frauds; it does not prohibit contracts, but regulates the manner of making them. Lindsley *v.* U. S. (1868), 4 Ct. Cl. 359.

This section is a statute of frauds as clearly as the statute of 29 Car. II, both having the same purpose, and using the same means, and being subject to the same rules of construction. Jones *v.* U. S. (1875), 11 Ct. Cl. 733.

Since the act a contract for the erection of military barracks must be in writing, and signed by the parties; and where such a contract is lost, the loss must be shown, and the contents proved, to sustain an action, with all the particularity required by the rules of the common law. Travers *v.* U. S. (1869), 5 Ct. Cl. 329.

Since this act the doctrine that an action may be brought by the principal, though the contract was in the name of the agent, is not applicable to contracts with the War, Navy, and Interior Departments. Chapter of Calvary Cathedral *v.* U. S. (1894), 29 Ct. Cl. 269.

No action can be maintained for breach of contract unless the statute has been complied with. St. Louis Hay & Grain Co. *v.* U. S. (1902), 37 Ct. Cl. 281.

A contract which does not comply with the statute is void. Gillespie *v.* U. S. (1912), 47 Ct. Cl. 310.

A statement made by the engineer in charge, if it conflicts with the provisions of the contract, does not bind the Government. Richtman *v.* U. S. (1912), 47 Ct. Cl. 483.

A parol agreement, while a contract is executory, is not obligatory on the Government. (1898) 22 Op. Atty. Gen. 98.

Contracts that must be in writing.—No recovery can be had by contractor for extra work for items which were never the subject of any agreement, nor authorized by the officer in charge. Churchyard *v.* U. S. (C. C. 1900), 100 Fed. 920, 921.

A contract, not in writing, as required by the act for the sale of sand, to be taken from time to time from the owner's bed by the defendants, is void; and if the claimant can recover in any event, it will rest with him to show the value of the sand taken. Lindsley *v.* U. S. (1868), 4 Ct. Cl. 359.

Where a contract for the use of a sloop was not in writing, as required by the act, the owner can not recover upon it. Lender *v.* U. S. (1871), 7 Ct. Cl. 530.

This requirement necessarily excludes an unwritten alteration or substitution; nor can the time of delivery be extended, where time is of the essence of the contract, unless the extension be evidenced by writing. Jones *v.* U. S. (1875), 11 Ct. Cl. 733.

The statute applies to contracts made in an emergency without advertisement. Cobb, Blasdell & Co. *v.* U. S. (1883), 18 Ct. Cl. 514, overruling on this point Cobb, Christy & Co.'s Case (1871), 7 Ct. Cl. 470.

An oral agreement to accept corn instead of oats under a written contract is void under the statute. Mitchell *v.* U. S. (1884), 19 Ct. Cl. 39.

An oral direction to a contractor to prepare to do lighterage followed by the contractor getting the necessary tugs, but not being allowed to perform, is not a valid contract. Johnston *v.* U. S. (1906), 41 Ct. Cl. 76.

Where the contractor did work without demanding that the order for it be reduced to writing, there can be no recovery for extras. Kilmer *v.* U. S. (1913), 48 Ct. Cl. 180.

Contracts that need not be in writing.—This provision is not infringed by the proper officer having charge of the matter accepting delivery of supplies after the time stipulated in the contract therefor, and a verbal agreement to extend time of performance is not invalid. Salomon *v.* U. S. (1873), 19 Wall. 17, 19, 22 L. Ed. 46.

If a contract is silent on the subject of an allowance for shrinkage, and the general custom prevailing among ordinary contractors is applicable to contracts with the Government, the contractor is entitled to

recover, notwithstanding that the general law has been modified as to public contracts by this act. Lyons v. U. S. (1895), 30 Ct. Cl. 352.

When the service required was under an appropriation act to relieve suffering, contracts therefor were valid, though unwritten. Pacific Steam Whaling Co. v. U. S. (1901), 36 Ct. Cl. 105.

A commanding officer in conquered country, or the Secretary of War, can make reasonable expenditures incident to the removal of prisoners, without the formality of a written agreement. Ceballos v. U. S. (1907), 42 Ct. Cl. 318.

Contracts made in emergencies and under exigencies need not be reduced to writing nor await advertising for bids. Id.

Effect of statutes prescribing forms.—The formal execution of contracts for Government work, as a prerequisite to their legality and binding effect, after the acceptance of proposals was not dispensed with by act Mar. 3, 1883, ante, 745, 746, and act Aug. 11, 1888, post, 1531, empowering the Secretary of War to regulate and prescribe forms for the letting of such contracts. U. S. v. Lamont (1894), 2 App. D. C. 532.

Effect of special statutes.—The provisions of this section are waived by a special act conferring equity jurisdiction in the case; but in common-law suits the provisions are mandatory. Harvey v. U. S. (1883), 18 Ct. Cl. 470.

The case is taken out of the statute by a private act directing judgment, if it appear that the purchase was made according to "the practice or custom" of the department. Finn v. U. S. (1891), 26 Ct. Cl. 435.

Executed contract.—The invalidity of a public contract, because of noncompliance with this section is immaterial after the contract has been performed. St. Louis Hay & Grain Co. v. U. S. (1903), 191 U. S. 159, 163, 24 Sup. Ct. 47, 48 L. Ed. 130; U. S. v. R. P. Andrews & Co. (1907), 28 Sup. Ct. 100, 207 U. S. 229, 52 L. Ed. 185.

Mandatory character of act.—The law is mandatory, and makes it as much the duty of the contractor as of the officer to see that the requirement is fulfilled. Clark v. U. S. (1877), 95 U. S. 539, 541, 24 L. Ed. 518; Henderson v. U. S. (1868), 4 Ct. Cl. 75; Danold's Case (1869), 5 Ct. Cl. 65; P. H. McLaughlin & Co. v. U. S. (1902), 37 Ct. Cl. 150; (1892) 20 Op. Atty. Gen. 496.

The section held mandatory; and hence the United States could not recover damages for breach of a parol contract of carriage, where the contractor, after the acceptance of its bids, refused to enter into a formal written contract. New York & P. R. S. S. Co. v. U. S. (1913), 206 Fed. 443, 124 C. C. A. 325, reversing judgment U. S. v. New York & P. R. S. S. Co. (D. C. 1912), 197 Fed. 995.

The court can not, on mandamus, dispense with the formalities prescribed and declare a contract to be complete and binding without such formalities. U. S. v. Lamont (1894), 2 App. D. C. 532.

There is no express penalty inflicted for a failure to reduce the contract to writing. Henderson v. U. S. (1868), 4 Ct. Cl. 75.

The statute extends to all officers in the War, Navy, and Interior Departments and to the Secretaries themselves, and embraces every contract made by them. Danold's Case (1869), 5 Ct. Cl. 65.

What constitutes the contract.—It is the final written instrument that must be executed and signed. Monroe v. U. S. (1902), 184 U. S. 524, 527, 22 Sup. Ct. 444, 46 L. Ed. 670.

An act of Congress directing the Secretary of the Navy to enter into a contract is not a contract per se; the Secretary makes the contract, and may vary the details. Gilbert v. U. S. (1863), 1 Ct. Cl. 28.

The acceptance by an executive officer acting within the scope of his authority of a proposal by an individual creates a contract having the same force and effect that a formal written agreement would have if one had been signed by the parties. McCollum v. U. S. (1881), 17 Ct. Cl. 92.

The preliminary advertisements, specifications, and proposals, and acceptance of proposals, must be viewed as only a part of the negotiations looking to a formal contract. P. H. McLaughlin & Co. v. U. S. (1902), 37 Ct. Cl. 150.

The preliminary advertisement and bid, though sufficient to constitute a contract between individuals, do not constitute a contract with the Government. Sanger & Moody v. U. S. (1904), 40 Ct. Cl. 47.

Acceptance of contract.—In answer to an advertisement under R. S. 3709, claimant made the lowest bid for furnishing envelopes and wrappers to the Post Office Department, which was duly accepted. Held, that a contract was completed with the same force and effect as if a formal writing had been executed, and bond approved, by the department, and that the Postmaster General or his successor had no discretion to revoke it. U. S. v. Purcell Envelope Co. (1918), 249 U. S. 313, affirming 51 Ct. Cl. 211.

A contract to furnish and deliver promptly in quantities as ordered the envelopes and newspaper wrappers the contractor may be called upon by the Post Office Department to furnish during four years,

construed as entitling the contractor to supply all needed by the department in that period. Id.

A written bid and the acceptance thereof constitute the contract so far as regards the question whether the provisions of the one are contained in the other. Milliken Imprinting Co. *v.* U. S. (1904), 40 Ct. Cl. 81.

Whether a letter is a valid contract, query. Johnston *v.* U. S. (1906), 41 Ct. Cl. 76.

The contractual relation may be created by legislative action if consented to by the other party. Drury *v.* U. S. (1908), 43 Ct. Cl. 237.

A contract providing for the approval of the superior officer is not a valid subsisting agreement until approved. Little Falls Knitting Mill Co. *v.* U. S. (1908), 44 Ct. Cl. 1; Cathell *v.* Same (1911), 46 Ct. Cl. 368.

An engineer's advertisement, a contractor's bid, and the engineer's acceptance of the bid (all in writing), followed by the contractor's performance, do not amount to a valid contract. Gillespie *v.* U. S. (1912), 47 Ct. Cl. 310.

When contract's obligation attaches.—When a bid which binds the bidder to perform is accepted, and he is ready and able to perform, the other party can not escape liability by refusing to enter into the formal written contract contemplated by the terms of his acceptance but he is liable to the same extent as he would have been had the formal contract been executed. Garfielde *v.* U. S. (1876), 93 U. S. 242, 23 L. Ed. 779, reversing on other grounds (1875), 11 Ct. Cl. 592.

Where a party furnishes sureties and binds himself for the performance of his bid if accepted, the contract becomes mutual and binding from the moment of its acceptance, although a formal written contract is to be subsequently executed. Adams *v.* U. S. (1865), 1 Ct. Cl. 192.

Advertisement and specifications with the proposals of the contractor and the acceptance of the Government may constitute a contract binding upon both parties, though the acceptance states that "a contract is now being prepared and will be forwarded to you for execution." Schneider *v.* U. S. (1884), 19 Ct. Cl. 547.

The preliminary advertisements, specifications, and proposals, and acceptance of proposals, must be viewed as only a part of the negotiations looking to a formal contract. P. H. McLaughlin & Co. *v.* U. S. (1901), 36 Ct. Cl. 138.

Form and contents of writing.—H. wrote to the Secretary of the Navy offering to construct new boilers for certain vessels of the Navy. The Navy Department answered by letter, accepting the offer according to the conditions thereof, and saying that the drawings and specifications would be furnished as soon as possible. Held, on a notification soon afterwards from the Navy Department to discontinue the work on the boilers, that said letters did not constitute a "contract in writing," within the meaning of this section. South Boston Iron Co. *v.* U. S. (1886), 6 Sup. Ct. 928, 118 U. S. 37, 30 L. Ed. 69; South Boston Iron Co. *v.* U. S. (1883), 18 Ct. Cl. 165.

It is not essential to a contract between an individual and the Government that it should express the circumstances under which it was made so precisely and distinctly as to show the motives inducing it, and the objects to be effected. U. S. *v.* Maurice (C. C. 1823), Fed. Cas. Co. 15747.

A bid or proposal, and its acceptance by an executive department, constitute an obligation of the same force and effect as if a formal contract had been written out and signed by the parties. (1881) 17 Op. Atty. Gen. 70.

In specific cases the Secretary of War is authorized to waive formal defects in bids and bonds in order to secure the public advantage resulting from competitive bidding. (1897) 21 Op. Atty. Gen. 469.

While it has been held in some instances that proposals duly accepted without formal agreement may constitute a contract, this is not the case with contracts for public works and other contracts under the section. (1894) 21 Op. Atty. Gen. 98.

Reference to other writing.—If the condition of a bond does not specify the purposes for which it is given, but refers to a paper which does specify them, this is equivalent to an enumeration of those purposes in the bond itself. U. S. *v.* Maurice (C. C. 1823), Fed. Cas. No. 15747.

Where a covenant in a contract for the construction of a dispatch boat, the Dolphin, provided that the vessel should be constructed in accordance with the provisions of certain acts of Congress, one of which stipulated that it should be constructed in conformity with the recommendations of the Naval Advisory Board, which board recommended that the vessel should "have a sea speed of 15 knots," held, that the covenant bound the contractor as effectually to make a vessel of that speed as though it had been agreed to in express words. (1885) 18 Op. Atty. Gen. 207.

Where a contract is duly executed and approved, and the advertisements and specifications are in terms made a part thereof, these papers constitute the contract and resort can not be had allunde. If the proposal as accepted is not attached and made a part thereof in fact, it ought at least,

in order to be regarded, be identified and included by appropriate reference. (1898) 22 Op. Atty. Gen. 98.

Signing of contract.—The effect of the section is that to bind the United States contracts by the Navy Department must be in writing and signed by the contracting parties, and signing preliminary memoranda for a contract will not suffice. South Boston Iron Co. v. U. S. (1886), 6 Sup. Ct. 928, 118 U. S. 37, 30 L. Ed. 69.

A contract for a public work must be regarded as signed by the United States where it recites that it is made by the United States by a specified officer described as Chief of a Bureau of Yards and Docks, and is signed by such officer, with his official title appended. U. S. v. McMullen (1912), 32 Sup. Ct. 128, 131, 222 U. S. 460, 56 L. Ed. 269, reversing judgment McMullen v. U. S. (1909), 167 Fed. 460, 93 C. C. A. 96.

Where the statute requires contracts to be in writing and signed by the contracting parties, it is the duty of the contractor to see that the contract correctly expresses his intentions before signing it; if it does not do so, he must bear the consequences of his own neglect. Ackerlind v. U. S. (1914), 49 Ct. Cl. 635.

No binding contract is entered into where a bid materially alters the specifications of the advertisement by providing for additional time for the completion of the work and for the cessation of work in certain contingencies, even though notice of acceptance has been given, but where no formal contract is actually signed. (1892) 20 Op. Atty. Gen. 486.

Ratification of contract.—An unwritten agreement, executory in its nature, but invalid because not in writing and signed by the parties, may receive a legal ratification from the acts of the parties. Danolds v. U. S. (1869), 5 Ct. Cl. 65.

Return of contract to department.—A contract may be valid though not signed and returned to the head of a department until 11 days after it was to have gone into effect, and although the Secretary of War then refuses to accept it. Moore & Love v. U. S. (1863), 1 Ct. Cl. 90.

A contract reduced to writing and executed with all the necessary formalities will not be invalidated by failure of the officer to make return. Henderson v. U. S. (1868), 4 Ct. Cl. 75.

Where a contract is made in writing and signed as required by law, the contractor need not show that it has been filed in the returns office by the officer signing the same. Power v. U. S. (1883), 18 Ct. Cl. 282.

In making the return of a contract on behalf of the Government, as provided for in the section, it is not required to accompany such contract with copies of plans that are confidential, and can not be divulged without detriment to the public interests, and the affidavit may except such plans from the return. (1912) 29 Op. Atty. Gen. 293.

While the sufficiency of the return of a contract by the Secretary of the Navy is not a question of law arising in the administration of the Department of the Interior, and therefore is not one upon which the Attorney General is required to render an opinion, it is proper that the Secretary of the Interior should be advised whether the case submitted presents a violation of the statute since it is his duty to call apparent violations of the statute to the attention of the Department of Justice. Id.

Carey Act agreements are not within the purview of this and the following section, and there is no necessity for filing copies thereof in the Returns Office. (1912) 29 Op. Atty. Gen. 437.

Terms of contract and variance thereof by acts of officers or other extrinsic circumstances.—Oral waiver by the Quartermaster General of the United States Army of the time limit in a contract for construction of a vessel is not forbidden by this act. Maryland Steel Co. of Baltimore County v. U. S. (1915), 35 Sup. Ct. 190, 235 U. S. 451, 59 L. Ed. 312, reversing judgment Maryland Steel Co. v. U. S. (1912), 48 Ct. Cl. 50.

Waiver of Quartermaster General of the United States Army in his discretion of the time limit in a contract for construction of a vessel carries with it a release of any claim by the Government for liquidated damages under the contract for such delay after the waiver. Id.

Where a written contract, entered into by the War Department, contains full specifications of a building to be erected, and limits the cost, with a provision that no extra charge for modification shall be allowed unless agreed upon in writing, and where an appropriation therefor is made by Congress agreeing with the contract price, yet if the contractor is directed by an agent of the War Department to furnish extra materials and perform extra labor, so that the building is rendered more valuable and useful, and is thus accepted and used by the Government, the defendants become liable in an action on an implied contract for the fair and reasonable value of the extra materials furnished, and for the extra labor performed, notwithstanding the cost exceeds the appropriation, and notwithstanding the section. Grant v. U. S. (1869), 5 Ct. Cl. 71; Moran Brothers Co. v. U. S. (1904), 39 Ct. Cl. 486.

A parole agreement enlarging the quantity of work required by a written contract is not obligatory upon the Government, where the contract is required by law to be in writing. But compensation for work actually done thereunder may be recovered on an implied assumpsit. Wilson & Goss *v.* U. S. (1888), 23 Ct. Cl. 77.

Verbal agreements and oral understandings are not sufficient to change the terms of a written contract to the prejudice of the Government. New York Market Gardeners' Assn. *v.* U. S. (1908), 43 Ct. Cl. 114.

In a contract for public works, although the representations of an officer of the Government have been relied upon, they must be regarded as wholly personal and of no effect as against the United States. (1894) 21 Op. Atty. Gen. 78.

Variance construed.—The contract in this case calls for the delivery of *about* 300,000 cubic yards of stone and provides that the quantities " are approximate only " and that no claim shall be made against the United States on account of any excess or deficiency in the same. A contention that the defendants were thereby obligated to receive and pay for the full amount of stone stated can not be sustained. Brawley *v.* United States, 11 Ct. Cl. 522; 168 U. S. 172, followed; Killebrew *v.* U. S. (1917), 52 Ct. Cl. 440.

Supplemental contract.—Where a supplemental contract is entered into between the Government and the contractor and the supplemental contract departs from the original document, the same being in the nature of an accommodation to the Government and prepared by an officer of the Government, if the same be ambiguous in its terms the court will adopt such construction as will be more to the advantage of the plaintiff. Sheridan-Kirk Contract Co. *v.* U. S. (1917), 52 Ct. Cl. 407.

Having annulled a construction contract for default, the United States relet the contract at higher cost. Under supplemental agreements with the new contractor, certain deviations from the contract were made, involving a cost of about 6 per cent of the total contract price and requiring estimates of the attendant expenses. Notwithstanding that these changes, on the whole, reduced the cost of the work, Held, because of the deviations, that the difference between the cost and the original contract price was not a proper measure of the original contractor's liability. U. S. *v.* California Bridge Co. (1917), 245 U. S. 337.

Recovery on quantum meruit for work done under parole contract.—That a contract for the sale of hay to the United States is invalid under this section does not entitle the contractor after performance to maintain a quantum valebant on the ground that the value of the hay had increased from the time of contract to the time of delivery. St. Louis Hay & Grain Co. *v.* U. S. (1903), 24 Sup. Ct. 47, 48, 191 U. S. 159, 48 L. Ed. 130.

Army Regulations, sec. 1542 (compare sec. 1476, A. R., 1913), provides that when medical attendance is required by an officer or enlisted man on duty, and the attendance of a medical officer can not be had, the officer, or, in his absence, such enlisted man, may employ a civilian physician, and a just account for his services and necessary medicines will be paid by the medical department. Sec. 1457 (compare sec. 1477, A. R., 1913) requires that accounts for board, lodging, nursing, and medical attendance of sick soldiers in private hospitals shall be sent to the surgeon general for settlement. Held, that where a corporal was taken sick while detached on recruiting service, and required immediate medical attention, which could not be afforded by the department, and he was sent to a private hospital by his captain in command, who requested that board, lodging, medical attendance, etc., be furnished to him, an implied contract was thereby created, which entitled plaintiff to recover against the United States for the reasonable value of the services so furnished. Davis *v.* U. S. (D. C. 1903), 120 Fed. 190.

A written contract, as required by the act, is not necessary to sustain a recovery where goods have been delivered to and used by the Government. There is a distinction between an action on an executory contract to recover damages for nonperformance and one on the implied obligation to pay for articles actually purchased and used by the defendants. Burchiel *v.* U. S. (1868), 4 Ct. Cl. 549.

The inferior agents of the Government have no right to retain a vessel in service at her original charter rate, after the receipt of the Quartermaster General's order to reduce it. Unless the owner assents to the reduction, he can not leave her in the service. In such cases it is for the defendants to bring knowledge of the Quartermaster General's order home to the claimant; and it is for the claimant to show that he sought to take his vessel out of the service, and was refused a discharge. If he voluntarily left her in the service after knowledge of the Quartermaster General's order, he left her subject to the Quartermaster General's restrictions. Cobb *v.* U. S. (1869), 5 Ct. Cl. 176.

Where the owner allows his vessel to remain in the military service, after knowledge of an order of the Quartermaster General directing that the charter rate be reduced or the vessel be discharged, he will be deemed to have assented to the reduction. But where the order to reduce

is not communicated to the owner until after his vessel has gone into service, under a new charter, he should recover at the agreed rate. Crary v. U. S. (1869), 5 Ct. Cl. 231.

The statute does not prevent the recovery for supplies actually delivered and used by the Government without such contract. Lafferty v. U. S. (1883), 18 Ct. Cl. 496.

The employment by competent authority of a physician in civil life to care for sick soldiers in time of war is a contract entitling him to reasonable compensation for the service. Coffin v. U. S. (1902), 37 Ct. Cl. 476.

Where there is no written contract, the claimant may recover in quantum meruit; but where there is an express contract, the defendant's liability must be measured thereby. Sanger & Moody v. U. S. (1904), 40 Ct. Cl. 47; Ceballos v. U. S. (1907), 42 Ct. Cl. 318.

Where a contractor renders services or furnishes goods under an oral contract, he may recover in quantum meruit; but he can not recover as upon a valid executed contract for his expenses where, being required to prepare, he suffered damages by not being allowed to perform. Johnston v. U. S. (1906), 41 Ct. Cl. 76; Ceballos v. U. S. (1907), 42 Ct. Cl. 318.

Contract provisions; final settlement; waiver.—Where a contract specifies the method of survey to determine the amount of material removed upon which basis final settlement is to be made, and the defendants fail to observe this provision or ignore it, it is too late for them to invoke it now in this court. Tacoma Dredging Co. v. U. S. (1917), 52 Ct. Cl. 447.

Rejection of contract and extra work.—An order of the Secretary of the Navy directing contractors, against their protest, to work by the "water jet system" the piles required in the construction of a dry dock for the United States, is not a "change or modification," within the meaning of the contract, which will prevent the contractors from recovering the expense incurred in the unsuccessful experiment with such system because not agreed upon in writing by the parties. Pitcher v. Barlow (1902), 22 Sup. Ct. 468, 190 U. S. 123, 46 L. Ed. 470.

The expense caused to contractors engaged in the construction of a dry dock for the United States, by the suspension of regular work, due to an unsuccessful experiment with the "water jet system" in driving piles undertaken against their protest in obedience to an improper order of the Secretary of the Navy, is properly allowed as for extra work, as well as the expenditure in the experiment. Id.

The additional cost to contractors engaged in the construction of a dry dock for the United States of additions required by the Navy Department to be made in correcting a mistake in the performance of the contract, which had no relation to such mistake, but would have been required irrespective thereof, is properly allowed as for extra work. Id.

A claim as for extra work of the additional cost to contractors engaged in a public work of replacing defective work at the command of the engineer in charge, which has been approved and accepted by his predecessor, will be disallowed, where the contract provides that all labor and materials shall be of the best kind and quality, and subject, not only to the approval of the engineer at a particular time, but to the approval of any engineer subsequently appointed with full power to reject any material or work which he may deem unsuitable for the purpose intended, and to cause any inferior work to be taken down, and satisfactorily replaced at the contractor's expense. Id.

The sureties on the bond of a public contractor, conditioned upon the faithful performance of a contract for dredging a channel, were not discharged by an extension of the time fixed for performance accorded by the Government to the contractor, where the contract definitely contemplated what the nature of the work made manifest, that it might be necessary or very convenient to extend the time, and expressly provided for a per diem deduction from the contract price for a delay beyond the time prescribed for the completion of the work. U. S. v. McMullen (1912), 32 Sup. Ct. 128, 222 U. S. 460, 56 L. Ed. 269, reversing judgment McMullen v. U. S. (1909), 167 Fed. 460, 93 C. C. A. 96.

Where a contract contains a provision that if it "*be found advantageous or necessary to make any change or modification in the project*" which would "*increase or diminish the cost of the work*," such change or modification "*must be agreed upon in writing * * * and before taking effect must be approved by the Secretary of War*," there was no breach of the contract if at the time the change or modification was agreed to between the contractor and the engineer officer in charge it appeared that it would be advantageous by way of facilitating progress and that it would not involve any increase in cost, although subsequently the cost was increased by reason of conditions wholly outside those reasonably to be anticipated. Burton & Co. v. U. S. (1916), 51 Ct. Cl. 362.

Breach of contract. Where a sum of money was rightfully paid under one con-

tract, there is no authority to deduct it from money due under another contract because of an alleged breach of the first contract. Id.

Modern tendencies to depart from the strict letter in discovering intent do not alter the principle that, within the scope of his undertaking, a party contracting assumes the risks of intervening obstacles. Day v. U. S. (1917), 245 U. S. 159, affirming 48 Ct. Cl. 128 and 50 Ct. Cl. 421.

One contracting to complete unfinished public work in accordance with the original contract held not entitled to compensation for extra work, where the Secretary of the Interior has decided against his claim under provision in contract. Plumley v. U. S. (1913), 33 Sup. Ct. 139, 226 U. S. 545, 57 L. Ed. 342, modifying judgments (1908) 43 Ct. Cl. 266 and (1910) 45 Ct. Cl. 185.

Failure to comply with the provisions of a contract for a public work that changes increasing or diminishing the cost must be agreed on in writing by the contractor and architect, with a statement of the price of the substituted materials and work, and must, in every instance, be approved by the Secretary of the Interior, defeats any claim of the contractor for compensation for extra work. Id.

The plaintiffs contracted to dredge a channel in the Detroit River, the material to be removed according to the contract consisting of clay, sand, gravel, and bowlders of unknown proportions. During performance a natural bed of limestone rock was discovered. Defendants' engineer in charge ordered plaintiffs to remove the limestone rock. Plaintiffs protested and asked for extra price for this work, which request was refused, the engineer holding the material to be clay, sand, gravel, and bowlders and threatening to have the work done at plaintiffs' expense if it did not perform the same. Held, under the circumstances plaintiffs are entitled to recover. L. P. and J. A. Smith v. U. S. (1919), 54 Ct. Cl. 119.

A contract for the construction of a foundry at a navy yard contained a provision that, if during the progress of the work it should "be deemed necessary or desirable" by the United States to make any changes or modifications in the plans or specifications affecting the cost of the work in a sum exceeding $300, the increased or diminished compensation to be paid for the work should be assessed by a board of naval officers appointed for the purpose, and should be based upon the actual cost. During the progress of the work, it was found that the wood called by the contract and required to be fi proofed, would not be improved by su treatment, and it was decided to omit su fireproofing, and a board was appoint who assessed the decreased cost by rea of such omission. Held, that the char was within such provision of the contra and that the assessment made thereun was conclusive on the parties, and exclud the jurisdiction of the courts over a co troversy between them as to the amou to be deducted from the contract pric Conners v. U. S. (1905), 141 Fed. 16, 72 C. C. A. 272, affirming judgment (C. C. 1904 130 Fed. 609.

A Government contractor is not liable fo extra work done by a subcontractor by di rection of the Government superintenden without proof that the work was embraced in the contract with the Government, an not embraced in the subcontract. Deadm v. Culley (C. C. 1844), Fed. Cas. No. 3,991

Quære, whether, if Congress, after au thorizing the construction of a bridge ac cording to certain plans, arbitrarily changes the plans while the bridge is in course of construction, there is any breach of contract which will render the United States liable for the expenses necessary to make the change. Newport & C. Bridge Co. v. U. S. (C. C. 1874), Fed. Cas. No 10,186.

Where a party not only chargeable with knowledge but actually having knowledge o changed conditions proceeds with perform ance of his contract without a protest or assertion of a right to additional compensa tion, he will be held to have waived all rights on account of such ascertained changed conditions. Monad Engineering Co. v. U. S. (1918), 53 Ct. Cl. 179.

Where a Government contract provides that the work done and the materials fur nished shall be subject to the inspection of a certain officer, who shall have full power to reject any work or materials which in his opinion do not conform to the plans and specifications of the contract, the con tractor can have no extra claim against the Government for work done and ma terials furnished under the requirements of such officer, or for delay in the work caused by such requirements, where the officer made his requirements in good faith, in order to compel the execution of the contract as he understood it, and the con tractor failed to make, at the time, any claim for extra compensation for work or material which he now insists were outside of the contract. Bowe v. U. S. (C. C. 1890), 42 Fed. 761.

Under this section and sections 724–725, 745–746, ante, and Army Regulations, providing that all contracts for extras in the construction of Government buildings shall be in writing, and made under the direction of the chief officer of the War Department, and that no expenditure of over $500 shall be made without the approval of the Secretary of War, no recovery can be had by a contractor for extra work for items which were never the subject of any agreement, nor authorized by the officer in charge as extras, nor submitted by him to the War Department. Churchyard v. U. S. (C. C. 1900), 100 Fed. 920.

Where the engineer in charge of the construction of a Government fortification, having authority to designate the work to be done and the materials to be used by a contractor, requires work or materials which are not fairly within the contract, and the contractor complies with such requirement, as he is compelled to do or suffer loss by the abandonment of his contract, he is entitled to recover the extra cost of such work or materials, notwithstanding a provision of the contract that no claim for extra work or material should be made or allowed unless previously agreed upon in writing. Venable Const. Co. v. U. S. (C. C. 1902), 114 Fed. 763.

A Government contractor who agreed to construct the work in accordance with detail drawings, to be thereafter furnished, is not entitled to extra compensation because the drawings first furnished were changed before the work was done, and the cost of certain work was greater under the second drawing that it would have been under the first; nor can he recover extra pay because the drawings, which were consistent with the specifications, required certain work to be done in a better and more expensive manner than he supposed would be required. Id.

A contractor for the construction of a Government fortification, required by his contract to erect a building suitable for use in testing cement, who at the request of the engineer in charge built a cottage at a considerably greater cost than was necessary for the purpose of testing cement, but without objection or protest, will be deemed to have voluntarily incurred the extra expense, and is not entitled to recover the same from the United States. Id.

Where alterations or additions are ordered by an officer or agent of the Government authorized to contract, a contract will be implied to the extent of the benefit which the Government has received, notwithstanding a provision in the original contract that such orders must be in writing. Barlow v. U. S. (1900), 35 Ct. Cl. 514.

Where the contract requires that any modification must be with the approval of the Secretary of War, the officers charged with its execution can not vary its terms, and the contractor can not thereby be relieved from his obligations. Brant v. U. S. (1911), 46 Ct. Cl. 409.

"Modification" means to change slightly, as in the form or in the external qualities of a thing, or to change somewhat the form or qualities of. (1895) 21 Op. Atty. Gen. 207.

Where parties agree in advance upon a sum which shall be paid in liquidation of damages in the event of breach, the court should enforce the provision. Sorensen v. U. S. (1916), 51 Ct. Cl. 69.

While it was not expected or believed by any of the parties to the contract so perfected that it could be performed within the time prescribed by its terms, by said act the same was given life from its date with all of its conditions and obligations, including the payment of liquidated damages for the nonperformance within the time limit, and no waiver of the liquidated damage clause was thereby contemplated. Stannard et al. v. U. S. (1916), 51 Ct. Cl. 251.

Where a contractor agrees to "complete the said work *in all its part*" within a stated period, and in default thereof to pay a liquidated sum for damages that are uncertain, a contention that a breach has not been committed where he completed only one part within the specified time, is untenable. Wise v. U. S. (1917), 52 Ct. Cl. 490.

Where a contractor agrees to complete certain work in a specified time and for every day the work is delayed to pay a certain sum as liquidated damages, and where it appears that the delay which occurred was not caused by "the act of God, the law, or the other party," there is no legal ground upon which plaintiff can escape from the terms of the contract to which he has agreed. J. E. Hathaway & Co. v. U. S., 52 Ct. Cl. 267; affirmed (1918), 249 U. S. 460.

Transportation; railroad contract price.—Where a contract is entered into by a railroad with the United States for transportation and the contract is fulfilled in accordance with the contract provisions, the railroad is entitled to the full amount specified in the contract without deductions by reason of any claim by another railroad participating in the haul, and without regard to any amount the United States may have paid the other railroad for so participating. C., N. O. & T. Ry. Co. v. U. S. (1917), 53 Ct. Cl. 25.

Where the United States contracts with a railroad for specially expedited transportation of equipage and troops, and the contract in all respects conforms to the

provisions of the acts of Mar. 3, 1909 (35 Stat. 745), and Mar. 23, 1910 (36 Stat. 256), no reduction can be made from the contract rates not authorized by a provision in the contract. Southern Pacific Co. *v.* U. S. (1918), 53 Ct. Cl. 332.

Full performance of a special contract for a special service at a stated price requires payment of the contract rate. Id.

The publication by a railroad of a net tariff rate for an expedited or special service covering camp equipage and impedimenta, without further deduction for land-grant roads, constitutes a contract rate binding on the Government when it orders and secures the services specified by the tariff without stipulating for a different rate or objecting to the published rate as unreasonable and unjust. Yazoo & Miss. Valley R. R. Co. *v.* U .S. (1919), 54 Ct. Cl. 165.

Indemnification agreement from Government.—Where in an indemnifying contract the defendants agree to hold "*harmless*" the manufacturers against suits for patent infringement, it is an express covenant upon their part to assume all expenses incident to an attack by alleged patentees, and plaintiff was entitled to the full consideration of the contract undiminished by the cost of defending suits for infringement of patent. Winchester Repeating Arms Co. *v.* U. S. (1916), 51 Ct. Cl. 118.

Government liable for delays due to it.—The Government is, of course, responsible in damages for delaying a contractor's work and for noncompliance with contract provisions respecting the prompt delivery of materials undertaken to be furnished by it. U. S. Fidelity & Guar. Co. *v.* U. S. (1918), 53 Ct. Cl. 561.

Payment.—Where a contractor made no protest when the several payments were made under the contract, and when the final payment, which purported to be in full of the amount stated in the voucher, was made, it is assumed that he acquiesced in the interpretation put upon the contract by the defendant's officer. Joice *v.* U. S. (1916), 51 Ct. Cl. 439.

Where the Government upon rejection of a shipment of cement called upon the contractor to replace the same, which he did, the Government could not after accepting the second shipment deduct from the contract price an amount paid in the open market for a similar amount of cement upon the theory that it was purchased to supply the rejected cement. Anderson *v.* U. S. (1916), 51 Ct. Cl. 228.

Waiver of test.—The Government having failed to apply the prescribed test to the hose furnished, there was no breach of the express warranty on the part of plaintiff that the hose furnished under the contract be the equal of the sample furnished for test. This warranty in itself did not serve to extend the time or manner of inspection and made no change in the contract in reference thereto. United and Globe Rubber Mfg. Co. *v.* U. S. (1916), 51 Ct. Cl. 238.

Interpretation of specifications.—Where in a contract it is given to the officer in charge to determine the true intent and meaning of the specifications where the same are ambiguous and difficult of interpretation, their interpretation by him is conclusive in the absence of any showing of an abuse of such discretion. McBride Electric Co. *v.* U. S. (1916), 51 Ct. Cl. 448.

Changes; extra work.—Where slight changes were made in the location of trenches and manholes, the right to make such changes being specifically given in the contract to the officer in charge, no claim for extra work can be predicated thereon when it appears that the changes were advantagious to the contractor both in the amount of work required and in the avoidance of unduly expensive conditions, or where it does not appear that the changes in the aggregate entailed additional expense. Id.

Where there is a provision in a contract making the decision of an engineer officer in charge or other official final as to quality and quantity, distance to be ascertained, classification of material, or any other subject matter in the contract which may be matter of dispute and which may arise during the execution of the work, the decision of that officer will be treated as final and will not be subject to review in the absence of fraud or such gross error as implies bad faith, or a failure to exercise an honest judgment. Brinck *v.* U. S. (1918), 53 Ct. Cl. 170.

A contract provision making the decision of an officer final as to a subject matter of the contract that may arise during the performance of the work will be so regarded and is not reviewable in the absence of fraud, actual or constructive. Atlantic, Gulf & Pac. Co. *v.* U. S. (1918), 53 Ct. Cl. 339.

Held, that the gun not having passed the test "*satisfactorily*" in the first instance, and the Chief of Ordnance not having thereupon rejected it, as he had a right to do under the contract, but instead granted the plaintiffs an opportunity for an additional test *de hors*, the contract was properly annulled. Brown *v.* U. S. (1915), 51 Ct. Cl. 22.

Liquidated damages.—In a provision for liquidated damages in which the aggregate of damages is to be determined with a per diem rate as the basis of computation, a definite date from which the liquidated damage clause is to operate must be determined from the contract, and the court can not

assume or otherwise fix a date from which the liquidated clause is to operate. Camden Iron Works v. U. S. (1915), 51 Ct. Cl. 9.

Parties having liquidated the damages for failure to deliver, it can not be held that the basis of liquidation was so unreasonable as to impair the validity of the provision, where no proof is submitted other than that the provision was burdensome. It must be assumed that the contractor regarded it as in his interest to and did therefore assume all the obligations of the contract with its attendant burdens. Fowler v. U. S. (1916), 51 Ct. Cl. 52.

Validity of contracts.—Where no fraud or gross error is charged against public officers in obtaining a contract, a contractor is bound by the terms thereof. Ripley v. U. S. (1908), 43 Ct. Cl. 490.

Where a contract is procured, directly or indirectly, through the corrupt or improper influence of an official of the Government, and it appears that said official derived financial profit by reason of the contract, or was actuated by gratuities given him by the contractor, the transaction is fraudulent and the contract unenforceable. Columbia Supply Co. v. U. S. (1918), 54 Ct. Cl. 10.

766. Contracts entered into by the Quartermaster Corps to be reduced to writing.— * * * *Provided*, That hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster General, or by officers of the Quartermaster Corps authorized to make them, and are in excess of $500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General: * * * *Act of Mar. 4, 1915 (38 Stat. 1078), making appropriations for the support of the Army.*

767. Contracts entered into by the Signal Corps to be reduced to writing.— *Provided further*, That hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Chief Signal Officer, or by officers of the Signal Corps authorized to make them, and are in excess of $500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Chief Signal Officer. *Act of Aug. 29, 1916 (39 Stat. 622), making appropriations for the support of the Army.*

768. Contracts entered into by the Medical Department to be reduced to writing.— * * * *Provided further*, That hereafter, whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Surgeon General or by officers of the Medical Department authorized to make them, and are in excess of $500 in amount, such contracts shall be reduced to writing and signed by the contracting parties, but in all other cases contracts shall be prepared under such regulations as may be prescribed by the Surgeon General; * * * *Act of Aug. 29, 1916 (39 Stat. 639), making appropriations for the support of the Army.*

769. Contracts entered into by the Ordnance Department to be reduced to writing.—Hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Chief of Ordnance, or by officers under him authorized to make them, and are in excess of five hundred dollars in amount, such contracts shall be reduced to writing and signed by the contracting parties with their names at the end thereof. In all other cases contracts shall be prepared under such regulations as may be prescribed by the Chief of Ordnance. *Act of Mar. 23, 1910 (36 Stat. 261), making appropriations for the support of the Army.*

For purchases of special articles of ordnance property, see ante, 755.

770. Contracts filed in the Returns Office.— * * * a copy of which shall be filed by the officer making and signing the contract in the Returns Office of

the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return. *R. S. 3744.*

Section thirty-seven hundred and forty-four, Revised Statutes, is hereby amended by adding the following at the end of the last sentence: "*Provided*, That the Secretary of War or the Secretary of the Navy may extend the time for filing such contracts in the returns office of the Department of the Interior to ninety days whenever in their opinion it would be to the interest of the United States to follow such a course." *Act of June 15, 1917 (40 Stat. 198), amending R. S. 3744.*

The Secretary of the Interior shall from time to time provide a proper apartment, to be called the returns office, in which he shall cause to be filed the returns of contracts made by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior, and shall appoint a clerk of the first class to attend to the same. (R. S. 512.)

Notes of Decisions.

Contracts by Navy Department to be in writing and signed.—The effect of R. S. secs. 512-515 is to require that contracts by the Navy Department must be in writing and signed by the contracting parties. South Boston Iron Co. v. U. S. (1886), 6 Sup. Ct. 928, 118 U. S. 37, 30 L. Ed. 69.

771. Contracts to be filed with the auditors of the Treasury.—All contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in the offices of the Auditors of the Treasury, according to the nature of the contracts: *Provided*, That this section shall not apply to the existing laws in regard to the contingent funds of Congress. *R. S. 3743, as amended by sec. 18, act of July 31, 1894 (28 Stat. 210).*

772. Copies of contracts to be filed with the Commissioner of Internal Revenue.—That every person who on or after April 6, 1917, has entered into any contract, undertaking, or agreement, with the United States, or with any department, bureau, officer, commission, board, or agency under the United States or acting in its behalf, or with any other person having contract relations with the United States, for the performance of any work or the supplying of any materials or property for the use of or for the account of the United States, shall, within thirty days after a request of the Commissioner therefor, file with the Commissioner a true and correct copy of every such contract, undertaking, or agreement.

Whoever fails to comply with such request of the Commissioner shall be guilty of a misdemeanor and shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or both.

The Commissioner shall (when not violative of the technical military or naval secrets of the Government) have access to all information and data relating to any such contract, undertaking, or agreement, in the possession, control or custody of any department, bureau, board, agency, officer or commission of the United States, and may call upon any such department, bureau, board, agency, officer or commission for a full statement and description of any allowance for amortization, obsolescence, depreciation or loss, or of any valua-

tion, appraisal, adjustment or final settlement, made in pursuance of any such contract, undertaking, or agreement. *Sec. 1408, act of Feb. 24, 1919 (40 Stat. 1151).*

Notes of Decisions.

Return of contract—Question of law.—While the sufficiency of the return of a contract by the Secretary of the Navy is not a question of law arising in the administration of the Department of the Interior, and therefore is not one upon which the Attorney General is required to render an opinion, it is proper that the Secretary of the Interior should be advised whether the case submitted presents a violation of the statute since it is his duty to call apparent violations of the statute to the attention of the Department of Justice. (1912), 29 Op. Atty. Gen. 293.

Exception of plans from return.—In making the return of a contract on behalf of the Government, as provided by this section, it is not required to accompany such contract with copies of plans that are confidential, and can not be divulged without detriment to the public interests, and the affidavit may except such plans from the return. (1912), 29 Op. Atty. Gen. 293.

773. Oath of a contracting officer when filing a contract.—It shall be the further duty of the officer, before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: "I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ———; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ———, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided." *R. S. 3745.*

Notes of Decisions.

Making of oath.—If the officer who personally makes the contract himself makes the oath of disinterestedness and files the return in the returns office of the Department of the Interior (assuming that the officer manually signing the contract is the officer who makes it in the sense of being responsible for its terms), the letter and spirit of the law are satisfied. 31 Op. Atty. Gen. 336.

774. Penalty for failing to make return of a contract.—Every officer who makes any contract, and fails or neglects to make return of the same, according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred, and imprisoned not more than six months. *R. S. 3746.*

The two preceding sections, mentioned in this section, were R. S., secs. 3744, 3745, ante, 765, 770, 773.

775. Instructions and forms.—It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to furnish every officer appointed by them with authority to make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also to furnish therewith forms, printed in blank, of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible. *R. S. 3747.*

Notes of Decisions.

Construction of printed contracts.—Where contracts are prepared by the Government on printed blanks, it is of consequence that the unchanging portions should receive a general and unvarying construction. Yates v. U. S. (1879), 15 Ct. Cl. 119.

776. Bond of a contractor.—That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further*, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last

[Notice to be at least three months before the time limited therefor. *Act of Feb. 16, 1894 (28 Stat. 278), as amended by act of Feb. 24, 1905 (33 Stat. 812).*

Notes of Decisions.

Right to exact bond.—Where loss and injury may result to the Government from the appropriation by its contractors of a patented invention or other property of third persons, a bond of indemnity should be required as a part of the contract. 24 Op. Atty. Gen. 97.

Construction of statute in general.—This statute as originally enacted was passed in recognition of the inability of contractors for labor and material to take liens upon the public property of the United States. U. S. v. Ansonia Brass & Copper Co. (1899), 31 Sup. Ct. 49, 54, 218 U. S. 452, 54 L. Ed. 1107.

This section as originally enacted, so far as it requires a bond to secure persons supplying labor and materials, should receive the liberal construction necessary to effect its purpose. It is not to be strictly limited as mechanic's lien statutes, so as to protect only those supplying labor or materials which add to the value of the improvement or structure, nor, on the other hand, should it be extended to claims for labor or materials which only incidentally relate to the prosecution of the work, such as the construction or permanent improvement of the plant or equipment of the contractor, which are capable of use in other work, or to the ordinary claims of a public carrier for freight, for which the law gives a lien; but this limitation does not apply to those making incidental repairs to equipment, or to truckmen or others who transport materials for short distances, and who, although having a lien, are not expected, in the usual course of business, to exact payment before delivery. American Surety Co. of New York v. Lawrenceville Cement Co. (C. C. 1902), 110 Fed. 717.

This act is to be liberally construed in favor of those persons who furnish labor and materials. Equitable Surety Co. v. Hill (1914), 34 Sup. Ct. 803, 805, 234 U. S. 448, 58 L. Ed. 1394; Bankers' Surety Co. of Cleveland, Ohio, v. Maxwell (1915), 222 Fed. 797, 138 C. C. A. 345; U. S. v. Bergdorf (1898), 13 App. D. C. 506. And its practical effect is to confer a special lien in favor of persons supplying labor and materials and to substitute the bond in the place of the building on which the lien is charged. U. S. v. City Trust Safe Deposit & Security Co. (1903), 21 App. D. C. 5; But see Sears v. Mahoney (C. C. 1905), 136 Fed. 960.

It was to provide an equivalent or substitute for the legislation for the protection of laborers and materialmen. U. S. v. Carnegie (C. C. 1904), 132 Fed. 82; Judgment affirmed (1907), 27 Sup. Ct. 381, 204 U. S. 349, 51 L. Ed. 516. And to protect materialmen and laborers and give all an opportunity to have protection in an action on the bond. U. S. v. Stannard (D. C. 1913), 206 Fed. 326. And does not merely give the relief afforded by the foreclosure of a mechanic's lien on a building erected for a private owner, but protects persons furnishing materials in the prosecution of the work, though they do not become a part of the permanent structure. U. S. v. Henningsen (1905), 82 P. 171, 40 Wash. 87.

Those provisions, if any, governing procedure, contained in the amendment of 1905, for the protection of persons furnishing materials and labor for the construction of public works, will not be given a retroactive effect so as to apply to existing causes of action. U. S. Fidelity & Guaranty Co. v. U. S. (1908), 28 Sup. Ct. 537, 539, 209 U. S. 306, 52 L. Ed. 804.

The "usual penal bond" is such an obligation for the Government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. U. S. v. National Surety Co. (1899), 92 Fed. 540, 34 C. C. A. 520.

A mechanic's lien will not lie against property of the United States. (1894), 21 Op. Atty. Gen. 18, 78.

This section makes the surety liable to a subcontractor for the subcontractor's profits, the act not restricting liability to the value of labor and materials furnished. Burton v. Frank A. Seifert Plastic Relief Co. (1908), 61 S. E. 933, 108 Va. 338.

Contracts within the statute.—A contract to furnish all necessary labor and materials in the construction of a Government building, which provides for the work, prescribes how it shall be done, and in which the Government agrees to pay for the construction, is within this section. U. S. v. Murdock (1904), 59 A. 60, 99 Me. 258.

Public works within the statute.—Whether a work is public or not does not depend on it being attached to the soil, and when it belongs to the representative of the public it is public. Title Guaranty & Trust Co. v. Crane Co. (1910), 31 Sup. Ct. 140, 219 U. S. 24, 55 L. Ed. 72; U. S. v. Perth Amboy Shipbuilding & E. Co. (C. C. 1905), 137 Fed. 689; contra (1900), 23

Op. Atty. Gen. 174; Penn Iron Co. v. William R. Trigg Co. (1907), 56 E. S. 329, 106 Va. 557.

A vessel building for the United States, the title to which passes to the Government as fast as paid for, is a "public work" within this section. Title Guaranty & Trust Co. v. Crane Co. (1910), 31 Sup. Ct. 140, 219 U. S. 24, 55 L. Ed. 72, affirming judgment Title Guaranty & Trust Co. v. Puget Sound Engine Works (1908), 163 Fed. 168, 89 C. C. A. 618. But see U. S. v. Empire State Security Co. (1906), 100 N. Y. Supp. 247, 114 App. Div. 755, holding that this section relates only to the construction of public buildings and works, and does not apply to construction of lifeboats under contract stipulating for payment after delivery of each boat and for inspection of each boat before delivery. And see Penn Iron Co. v. William R. Trigg Co. (1907), 56 S. E. 329, 106 Va. 557, holding that this section relates only to the contractor under contract for the construction of a seagoing dredge is not entitled to sue in the name of the United States for his benefit on a bond given by the contractor, conditioned on his paying persons supplying labor or materials in the prosecution of the work. And see (1900), 23 Op. Atty. Gen. 174, declaring that this section as originally enacted does not apply to cases of construction of a mere movable article, the whole title to which remains in the contractor until its completion and acceptance by the Government.

Labor and materials within the statute.—This section as originally enacted is broad enough to include within the protection of a bond condition to pay persons supplying labor and materials in the prosecution of the work one who supplies coal to the contractor which is used to operate hoisting or pumping engines employed in the work. City Trust, Safe Deposit & Surety Co. of Philadelphia v. U. S. (1906), 147 Fed. 155, 77 C. C. A. 397. But furnishing scows to defendant contracting with the United States to purchase and remove certain stone near the Harlem River, and executing a bond under this section as originally enacted, to be used in removing the stone and in other work prosecuted by defendant, did not constitute "labor and materials." U. S. v. Conkling (1905), 135 Fed. 508, 68 C. C. A. 220.

Lubricating oils furnished and used in operating a dredge by a contractor for dredging work are not materials. U. S. v. City Trust, Safe Deposit & Security Co. (1903), 21 App. D. C. 369. And coal so furnished is not material. U. S. v. City Trust, Safe Deposit & Surety Co. of Philadelphia (1904), 23 App. D. C. 153, and coal furnished for use in heating plants and in buildings for heating purposes while work of plastering, laying floors, painting, and varnishing was being done is not material. U. S. v. United States Fidelity & Guaranty Co. (1909), 71 A. 1106, 82 Vt. 94. And feed furnished for teams of a contractor is not within this section. U. S. v. Fidelity & Deposit Co. of Maryland (1912), 169 Ill. App. 1. And a person furnishing board and lodging to laborers on a work does not supply labor or materials. U. S. v. Kimpland (C. C. 1899), 93 Fed. 403. And demurrage for detention of a vessel is not labor and materials. U. S. v. American Surety Co. (1902), 21 Pa. Super. Ct. 159.

Claims for patterns made for the contractor from which to make castings required for the vessel being built, for towing in the delivery of materials, for wharfage, for hauling, are within the statute, but not advances of freight to common carriers by the transfer companies making the deliveries. Title Guaranty & Trust Co. v. Puget Sound Engine Works (1908), 163 Fed. 168, 89 C. C. A. 618.

Subcontractors within the statute.—A superintendent of construction employed by a contractor for a public building held a person supplying labor protected by the contractor's bond. Bankers' Surety Co. of Cleveland, Ohio, v. Maxwell (1915), 222 Fed. 797, 138 C. C. A. 345.

The association by a contractor who has given a bond under this section as originally enacted of another person with him in the performance of the contract does not make the firm so constituted subcontractors so as to take those furnishing materials to the firm out of the protection of the statute. U. S. v. City Trust, Safe Deposit & Security Co. (1903), 21 App. D. C. 369.

Supplying labor and materials.—Where one has agreed to supply materials to a person contracting to construct a Government building, but the materials have never been delivered or used by the contractor in his lifetime, or by his sureties, who completed the contract, the materials have not been supplied to the contractor in the prosecution of the work. U. S. v. Murdock (1904), 59 A. 60, 99 Me. 258.

Form and validity of bonds.—A bond need not name the laborers and material-men for whose benefit it is given, but any person who subsequently furnishes the contractors labor or materials is protected by it. U. S. v. United States Fidelity & Guaranty Co. (1906), 63 A. 581, 78 Vt. 445.

Where a contract contains covenants by the contractors to observe this section as originally enacted, and to promptly make payments to all persons supplying them

labor and materials in the prosecution of the work provided for in the contract, and a bond, contemporaneously executed by the contractors, is conditioned upon the performance by them of all of the covenants and conditions of the contract, the contract by reference is incorporated into the bond and becomes as much a part of the bond as if copied verbatim into it; and an action on the bond can not be defeated by the sureties upon the ground that the bond does not conform to the statute in that the provision of the statute for the protection of the persons supplying labor and materials can not be imported from the contract into the bond, but must be recited in the bond itself. Peake v. U. S. (1900), 16 App. D. C. 415.

A bond conditioned for performance thereof during any period of extension of the contract, granted by the United States, as well as during the original term, was not inconsistent with this section. Illinois Surety Co. v. U. S. (1914), 212 Fed. 136, 129 C. C. A. 584.

Want of consideration can not be urged to defeat an action on bond because not executed until 10 days after the contract was made, especially where the bond was under seal. Title Guaranty & Trust Co. v. Crane Co. (1919), 31 Sup. Ct. 140, 219 U. S. 24, 55 L. Ed. 72, affirming judgment; Same v. Puget Sound Engine Works (1908), 163 Fed. 168, 89 C. C. A. 618.

A statutory bond which contains more than the statute requires is not vitiated by the surplus matter if easily separated, but is vitiated by the omission of a material condition required by the statute. Dixon v. U. S. (C. C. 1811), Fed. Cas. No. 3,934; U. S. v. Amory (C. C. 1811), Fed. Cas. No. 14,413; Same v. Mynderse (C. C. 1870), Fed. Cas. Nos. 15,850a, 15851; Same v. Brown (D. C. 1830), Fed. Cas. No. 14,663.

A statutory bond with penalties and conditions substantially different from those prescribed by the statute is so far void. U. S. v. Howell (C. C. 1826), Fed. Cas. No. 15,405; Same v. Humason (C. C. 1879), Fed. Cas. No. 15,420.

A statutory bond taken in a penalty greater than that prescribed by law is void, whether the statute prescribes a specific sum as a penalty, or a standard by which that penalty is to be measured so as to give a precise sum. U. S. v. Gordon (C. C. 1811), Fed. Cas. No. 15,232.

Where the statute declares that the bond shall be in a prescribed form, and no other, any variance is fatal. U. S. v. Brown (D. C. 1830), Fed. Cas. No. 14,663.

A retrospective condition in the bond is void. Id.

The bond is not governed by the local law, but is, in contemplation of law, given at the seat of the Federal Government. U. S. v. Stephenson's Ex'rs (C. C. 1839), Fed. Cas. No. 16,386.

In a bond conditioned that the parties will perform the decree of the court, "the court" means the court which shall ultimately decide the cause. U. S. v. The Little Charles (C. C. 1819), Fed. Cas. No. 15,613.

A bond made payable to "the United States of America" is binding at common law. Dixon v. U. S. (C. C. 1811), Fed. Cas. No. 3,934.

Liability on bonds in general.—Liability of sureties to labor and material creditors is measured strictly by the terms of the act. Eberhart v. U. S. (1913), 204 Fed. 884, 123 C. C. A. 180. But the rule that the liability of a surety is strictissimi juris is relaxed in cases of suretyship entered into under and pursuant to this act. U. S. v. Lynch (D. C. 1912), 192 Fed. 364. And it has been held that the liability of sureties on bonds to secure payment of laborers and materialmen is to be governed by the same liberal rule of construction that applies in the assertion of ordinary mechanics' liens, rather than by the rule which applies in the case of special private bonds and commercial guaranties, which entitle sureties to have their obligations interpreted with great strictness. U. S. v. Burgdorf (1898), 13 App. D. C. 506.

Under this section as originally enacted the liability of sureties is limited to the penalty, though the bond contains two distinct obligations—one to the United States, and the other to persons furnishing labor or materials in the prosecution of the work. U. S. v. American Surety Co. (1905), 135 Fed. 78, 67 C. C. A. 552, affirming judgment (C. C. 1903), 126 Fed. 811.

A bond is intended: First, to secure to the Government the faithful performance of the contract; and, second, to protect third persons from whom the contractor may obtain labor or materials in the prosecution of the work. In its second aspect, the bond contains a separate and distinct agreement between the obligors and such third persons, as to which the agency of the Government ceases when the bond is given and approved, and subsequent changes in the contract or specifications agreed upon between the Government and the contractor, though without the knowledge or consent of a surety, where the general nature of the work and materials remains the same, will not release the surety from liability to persons who supply labor or materials thereunder. U. S. v. National Surety Co. (1899), 92 Fed. 549, 34 C. C. A. 526. And a bond is intended to cover payments only for the visible material furnished for direct use and incorporation in the work, and of wages to the men

whose services are directly employed in doing the work. U. S. v. Kimpland (C. C. 1899), 93 Fed. 403.

A bond by a bidder conditioned that if his bid was accepted he would enter into a contract and furnish a bond for its performance within 10 days, or, in case of his failure to do so, the sureties would pay to the United States "the difference in money between the amount of the bid of said bidder so accepted and the amount for which the proper officer of the United States may contract with another party to do the work proposed, if the latter amount be in excess of the former," contemplates that, if the bidder fails to enter into a formal and binding contract in accordance with his proposal, the Government may relet the work and enter into an essentially similar contract with another party, and then look to the sureties for indemnity to the extent of its loss. When such second contract is let, the measure of the sureties' liability is fixed at the difference in price under such contract and the bid of their principal, and can not be affected by the fact that the contractor fails to complete the work and a third contract is made, whether at greater or less cost to the Government. Brown v. U. S. (1907), 152 Fed. 964, 82 C. C. A. 318.

A surety is directly liable to laborers employed by the contractor. United Surety Co. v. Iowa Mfg. Co. (1910), 179 Fed. 55, 102 C. C. A. 623.

A bond in the language of this section as originally enacted constitutes a covenant by the contractor to pay all materialmen and laborers for the material and labor furnished by them. U. S. v. United States Fidelity & Guaranty Co. (1906), 63 A. 581, 78 Vt. 445.

Under a contract to construct lifeboats providing that the general superintendent of the Government might revoke the contract when sufficient cause existed for so doing, in which event the contractor should not be entitled to damages, and providing for payment of a specified sum per boat after the delivery of each boat, and that each boat before delivery should be inspected and under bond for protection of persons furnishing materials and labor, a subcontractor furnishing materials could not on the insolvency of the contractor recover on the bond either under the statute or at common law. U. S. v. Empire State Surety Co. (1906), 100 N. Y. S. 247, 114 App. Div. 755.

Plaintiffs erected buildings for the Government under a contract providing that no interest therein should be transferred by the contractor, and that any transfer should work an annulment of the contract so far as the United States Government was concerned. The contractor made a subcontract for the painting, and the subcontractors bought materials from plaintiffs. The contractors gave a bond conditioned that they would make payments to all persons suppiying labor and material, and that any person who furnished labor or materials for which the contractors should fail to pay should have an action in the name of the United States against such contractors on the bond. Held, that such provisions did not apply to plaintiffs who did not furnish materials to the contractor, nor to anyone who had acquired a right as against the United States. Mosier v. Kurchhoff (1906), 101 N. Y. S. 643, 51 Misc. Rep. 432.

A surety on the bond of a contractor to construct a lighthouse and keepers' residences, and to furnish furniture for the keepers' residences, conditioned on the contractor paying persons supplying labor and materials, is liable, independent of this section, for furniture called for in the contract purchased by the contractor. U. S. v. Henningsen (1905), 82 P. 171, 40 Wash. 87.

A bond given by a contractor under this section is in effect two separate instruments; one securing performance of the contract to the United States, and the other the payment by the contractor of bills for labor and for materials furnished. Equitable Surety Co. v. U. S. (1914), 34 Sup. Ct. 803, 805, 234 U. S. 448, 58 L. Ed. 1394; U. S. v. National Surety Co. (1899), 92 Fed. 549, 34 C. C. A. 526; U. S. v. California Bridge & Construction Co. (C. C. 1907), 152 Fed. 559.

Parties to contracts and bonds.—A plaintiff can not recover on a bond on an allegation that the contractor is indebted to him for work and material supplied in the prosecution of the work, where the only evidence is that plaintiff hired barges to a third person, to whom they were charged, and shows no contract relation with defendant. U. S. v. Simon (1899), 98 Fed. 73, 38 C. C. A. 659.

One not an obligor on a bond is not liable for breach of condition in a direct suit on the bond, though he is an indemnitor of an obligor, and, on the contractor giving up, takes up, with the consent of all concerned, the completion of the contract for him. Mullin v. U. S. (1901), 109 Fed. 817, 48 C. C. A. 677; writ of error dismissed, Fidelity & Deposit Co. of Maryland v. U. S. (1902), 22 Sup. Ct. 940, 46 L. Ed. 1266.

One who has furnished labor and material to a contractor who has given a bond to secure laborers and materialmen is entitled to recover the balance due him in a suit on the bond, even though the plaintiff's contract was with the contractor and a

third person, who was associated with the contractor in the doing of the work and who was jointly and severally liable with the contractor to the plaintiff, but who was not a party to the contract with the Government. U. S. v. Burgdorf (1898), 13 App. D. C. 506.

Indemnity agreement.—A surety for a contractor who took an indemnity agreement from the contractor and another can not be prejudiced by any undisclosed relation between the signers of such agreement, as that they were partners in the contract; and the fact that the surety has been reimbursed for a payment of one claim through the indemnity does not enlarge its liability to other creditors of the contractor, as to whom, in the marshaling of claims, the claim paid must be treated as though the surety had not been reimbursed. American Surety Co. of New York v. Lawrenceville Cement Co. (C. C. 1901), 110 Fed. 717.

Labor and materials within bond.—Labor and materials used in a public work, whether furnished under the contract directly to the contractor or to a subcontractor, are within the obligations of a surety. U. S. to Use of Hill v. American Surety Co. of New York (1906), 26 Sup. Ct. 168, 169, 200 U. S. 197, 50 L. Ed. 437.

Claims for cartage and towage to the place where a vessel is building and for patterns furnished to the molding department of the builder are within a bond. Title Guaranty & Trust Co. v. Crane Co. (1910), 31 Sup. Ct. 140, 219 U. S. 24, 55 L. Ed. 72, affirming judgment Same v. Puget Sound Engine Works (1908), 163 Fed. 168, 89 C. C. A. 618. And work of quarrying the stone and transporting it to place of building a breakwater is within bond of contractor to construct the breakwater. U. S. Fidelity & Guaranty Co. v. U. S. (1913), 34 Sup. Ct. 88, 231 U. S. 237, 58 L. Ed. 200, affirming (1911), 111 C. C. A. 71, 189 Fed. 339. And freight and demurrage on timber furnished a contractor may be recovered from the surety as part of the cost of the timber. U. S. v. Hegeman (1903), 54 A. 344, 204 Pa. 438. But a bond does not cover a charge by a railroad for freight on materials which are loaded and unloaded by the contractor. U. S. v. Hyatt (1899), 92 Fed. 442, 34 C. C. A. 445.

A bond to pay persons supplying labor or materials does not apply to a contract by the contractor with the owner of a tugboat to pay for the use of the tug the lump sum of $25 per day, without any regard to the nature or value of the specific work, where the evidence shows that the tug was largely used in carrying workmen of the contractor to and from their work, in carrying messages, and to some extent in towing rafts or logs. U. S. v. Baltimore Const. Co. (1912), 48 Pa. Super. Ct. 502.

A surety is liable, in favor of one supplying materials, for the price of materials so furnished which actually entered into the work, together with the expense of transporting the same to the place where the work was being done, paid by the claimant, which may properly be considered as a part of the price; also for materials used in the construction of false works necessary in the performance of the contract; but he is not liable for repairs or equipment furnished for a steam launch owned and used by the contractor to transport supplies, nor for materials for the construction of dump cars, tracks, derricks, storage sheds for materials, or other similar structures or appliances used by the contractor, or tools for use by the workmen. U. S. v. Morgan (C. C. 1900), 111 Fed. 474.

One who, at the request of the contractor, makes repairs to a dredging machine employed in the performance of a Government contract can not recover the cost from the sureties. U. S. v. City Trust, Safe Deposit & Surety Co. of Philadelphia (1904), 23 App. D. C. 155.

Claim of equipment company under its contract with Government contractor held allowable as for labor and material furnished in the prosecution of the contract work. U. S. v. Illinois Surety Co. (1915), 226 Fed. 653, 141 C. C. A. 409.

Contractor's bond held not to secure payment for groceries and provisions furnished the contractor's boarding house. National Surety Co. v. U. S. (1916), 228 Fed. 577, 143 C. C. A. 99.

Bond of public contractor held not to secure payment for machinery and appliances intended for use in one location after another, though worn out on the contract by reason of the length of the job. Id.

Drills used in drilling machines, and used up currently by contact with rock to be removed as part of work, and materials therefor, held covered by public contractor's bond. Id.

Bond of public contractor held not to secure payment for ordinary and current repairs on machinery and articles used in maintenance and operation of contractor's boats and dredges. Id.

Sums expended by United States for inspection and supervision, after time when contractor should have completed work, held recoverable on his bond. U. S. v. Breymann (D. C. 1915), 228 Fed. 808.

Where a person contracted with the United States to purchase and remove stone near a river executed a bond under this

section conditioned that he would promptly make full payments to all persons supplying him with labor and material, it was held that the furnishing of certain scows to him, to be used in removing the stone and in other work being prosecuted by him, did not constitute the furnishing of "labor and materials" so as to entitle the person suing on the bond to recover the amount due under the charter party. U. S. v. Conkling (1905), 135 Fed. 605, 568, 68 C. C. A. 220.

Liability of sureties on contractor failing to complete work.—Liability of sureties to persons who supplied labor or materials is not affected by the amount which may have been expended by them in completing the contract of the principal after the Government had taken it out of his hands. U. S. v. Rundle (1906), 100 Fed. 400, 40 C. C. A. 450.

Liability of sureties on failure to pay materialmen or laborers.—A contractor gave a bond for benefit of materialmen, conditioned for prompt payment. A person contracted to furnish him materials; 80 per cent of that put in place to be paid for the 1st of each month; the remaining 20 per cent to be paid for on completion of the work. Held, that the contractor having failed to make the 80 per cent payments, and the materialmen having thereupon refused to proceed under the contract, and treated it as rescinded, the 20 per cent became due, with the rest, and could be recovered on the bond before completion of the work. Mullin v. U. S. (1901), 109 Fed. 817, 48 C. C. A. 677; writ of error dismissed, Fidelity & Deposit Co. of Maryland v. Same (1902), 22 Sup. Ct. 940, 46 L. Ed. 1266.

A contractor who has given a bond conditioned that he will "make full payments to all persons supplying him with labor or materials," is not liable thereon for unpaid wages due from a subcontractor who has supplied him with materials, when he paid such contractor in full therefor. U. S. v. Farley (C. C. 1899), 91 Fed. 474.

Where a materialman sues the sureties on a bond, conditioned for payment of persons furnishing material for the value of materials furnished, it is no defense to such a suit that, subsequent to such failure on the part of the contractor, the materialman refused to resume the delivery of the material, and the contractor was compelled to purchase at an advanced price. American Bonding & Trust Co. v. U. S. (1899), 15 App. D. C. 397.

When a contractor who had given a bond as required by this section as originally enacted paid a subcontractor all the contract price for brick he was supplying for the work, except one installment, though he knew he was getting the brick from a materialman, he and the surety on his bond are liable on the bond to the materialman for the purchase price of the brick so furnished the subcontractor, though the materialman gave no notice to them of the subcontractor's default until after the contractor had settled with him, and he had been adjudged a bankrupt. Heine Safety Roller Co. v. U. S. (1910), 35 App. D. C. 273.

Liability to subcontractors.—A bond by a contractor conditioned as required by this section as originally enacted secures payment for labor or materials furnished to a subcontractor and which went into the work, as well as to the principal contractor direct, and in an action thereon based on such a claim it is no defense that the principal contractor paid the subcontractor in full. Smith v. Mosier (C. C. 1909), 169 Fed. 430.

Where R., contractor for Government work, gives up, and K., indemnitor for obligor on bond of R., takes up, with consent of all concerned, the completion of the work under the contract for R., a person who, having a contract with R. to furnish him materials, keeps on and furnishes them to K. under the contract, is within the bond given by R., that he should promptly pay all persons supplying him materials for the work. Mullin v. U. S. (1901), 109 Fed. 817, 48 C. C. A. 677, writ of error dismissed Fidelity & Deposit Co. of Maryland v. U. S. (1902), 22 Sup. Ct. 940, 46 L. Ed. 1266.

Persons who, in view of the financial embarrassment of a public contractor, undertake to superintend the completion of a public work and to furnish the necessary funds for which they are to be paid by an assignment of the reserve fund in the hands of the Government and by checks or payments under the original contract, are not subcontractors, so as to be entitled to the protection of a bond executed pursuant to this section as originally enacted. Hardaway v. National Surety Co. (1909), 29 Sup. Ct. 202, 204, 211 U. S. 552, 53 L. Ed. 321, affirming decree Hardaway & Prowell v. Same (1907), 150 Fed. 465, 80 C. C. A. 283.

The phrase "the person or persons supplying the contractor with labor and materials" in amendatory act, in describing the persons entitled to a copy of the contract and bond for the purpose of suit, does not change the rule that labor and materials used in the prosecution of a public work, though furnished to a subcontractor, are within a bond. Mankin v. U. S. to Use of Ludowici-Celadon Co. (1910), 30 Sup. Ct. 174, 215 U. S. 533, 54 L. Ed. 315, affirming judgment (1908), 158 Fed. 1021, 86 C. C. A. 672.

Claimants furnishing labor and material to original contractor, or to his assignee, held entitled to the benefit of the contractor's bond. U. S. v. Illinois Surety Co. (1915), 226 Fed. 653.

Applications of payments as affecting liability of sureties.—Where plaintiff supplied materials to a contractor for a part of which he was protected by the contractor's bond, and for part of which he was not, as between him and the surety payments made on account generally by the contractor should be applied to the payment for materials furnished and charged prior to the dates of such payments. U. S. v. Morgan (C. C. 1909), 111 Fed. 474.

Representations by creditor as affecting liability of sureties.—A company proposing to act as surety asked a firm whether they knew of any outstanding liabilities of the contractor, to which the firm replied in the negative, though the contractor at the time owed money to the firm. It was partly owing to this reply that the company signed the bond. The firm thereafter supplied the contractor with materials for the work, in reliance on the security furnished by the bond, which was conditioned on full payment of work and materials. Payments were made by the contractor to the firm, nearly sufficient in amount to cover the cost of these materials, but they were applied on the preexisting debt. Held, that the firm could not recover on the bond. U. S. v. American Bonding & Trust Co. (C. C. 1898), 89 Fed. 921.

It was immaterial that the inquiry made of the firm was accompanied by a statement that the reply would be held strictly private and confidential, and as not making the firm in any way responsible. Id.

Extent of liability of sureties.—Recovery on bond for labor and materials furnished a subcontractor is not limited to the amounts remaining unpaid to the subcontractor when notice was given of outstanding claims, where the bond is conditioned, conformably to this section. Mankin v. U. S. to Use of Ludowici-Celadon Co. (1910), 30 Sup. Ct. 174, 215 U. S. 533, 54 L. Ed. 315.

A surety held entitled to deduction from the unpaid claim of a subcontractor of the amount recovered by one furnishing material to such contractor. U. S. v. Empire State Surety Co. (D. C. 1912), 197 Fed. 429.

Interest.—Interest from the date when a building should have been completely finished should be allowed to the Government on advance payments made to the defaulting contractor. U. S. v. United States Fidelity & Guaranty Co. (1915), 35 Sup. Ct. 298, 236 U. S. 512, 59 L. Ed. 696, affirming judgment United States Fidelity & Guaranty Co. v. U. S. (1912), 194 Fed. 611, 116 C. C. A. 187.

Surety on bond of public contractor can only be held for such interest as accrued from its own default after notice of default of principal. Id.

Delay of several years in pressing Government's claim for return of advance payments to a contractor for a public building who fraudulently departed from the contract was not a waiver of the right to interest from the date when the work should have been finished. Id.

A surety on the bond of a contractor for the construction of a public work is not in default until notice or demand, and hence interest does not run, as against him, until then. U. S. v. Quinn (1903), 122 Fed. 65, 58 C. C. A. 401.

Where the amount of claims under a Government contractor's surety bond was liquidated, interest was properly allowed from the commencement of the suit. U. S. v. Illinois Surety Co. (1915), 226 Fed. 653, 141 C. C. A. 409.

Allowance of interest on claims of creditors in a suit on the bond of a contractor for a public work held proper. U. S. v. Illinois Surety Co. (1915), 228 Fed. 304, 141 C. C. A. 409.

Where the penalty of Government contractor's bond was sufficient to pay all claims against the contractor, a claimant was entitled to recover such interest as might have been recovered against the contractor. Fidelity & Deposit Co. v. U. S. (1916), 229 Fed. 127, 143 C. C. A. 403.

A surety which has been ready and willing at all times since default of its principal to fulfill its obligation to the extent of its liability, but has been obliged to invoke the aid of equity to marshal and adjust the claims, which exceed the penalty of the bond, can not be charged with interest on the amount of such penalty because of the delay incident to such proceedings. American Surety Co. of New York v. Lawrenceville Cement Co. (C. C. 1901), 110 Fed. 717.

Set-off.—Where a contract for Government work provided for the retention of percentages until the work was completed, and, the contractor having become a bankrupt, its surety satisfied unpaid claimants to an amount larger than the percentages retained, such surety was entitled to receive the amount so retained in preference to the contractor's general creditors, without reference to whether the complainants had an enforceable right thereto. In re Scofield Co. (C. C. A. 1914), 215 Fed. 45.

Defendant, in an action on bond to recover a balance due for material furnished to a subcontractor, held not entitled to a set-off. U. S. v. Empire State Surety Co. (D. C. 1912), 197 Fed. 429.

Discharge of sureties by change of terms of contract.—Waiving original time limit, and calling on contractor, through correspondence, for extra work, for which he is paid, does not discharge the surety, where the bond contemplated an extension of time as possible, and the contract provided for a waiver of the time limit, and for written modifications. Graham *v.* U. S. (1913), 34 Sup. Ct. 148, 231 U. S. 474, 58 L. Ed. 319. But a surety of a contractor to construct a dry dock was released by a change made by the contracting parties, without his consent, in the location of the dry dock, which required the contractor to make additional excavations and connections with the water at an increased expense, and gave an increased time of performance, as such a change was not contemplated by the contract allowing changes in the plans and specifications as might be found advantageous or necessary. U. S. *v.* Freel (1902), 22 Sup. Ct. 875, 186 U. S. 309, 46 L. Ed. 1177, affirming judgment (1900), 39 C. C. A. 491, 99 Fed. 237, and (C. C. 1899) 92 Fed. 299. And a bonding company, which for a monetary consideration becomes surety for the performance of a contract to do work for the United States, will not be released from liability because of changes in the contract, in accordance with its provisions and with the assent of the contractor, unless it is shown that it was injuriously affected by such changes. Graham *v.* U. S. (1911), 188 Fed. 651, 110 C. C. A. 465.

Where the contract authorizes the parties to enter into auxiliary contracts for alterations of the work from that shown in the plans and specifications, without invalidating the primary contract, the parties may stipulate, without releasing the surety, for such enlargement or extension of the work as, in nature, magnitude, and expense, would be consistent with, and bear a reasonable and subsidiary relation to, the work first undertaken. Although a contract for the construction of a dry dock for the United States authorized the parties to enter into auxiliary contracts for alterations of the work from that shown in the plans and specifications, without invalidating the primary contract, a supplemental contract, changing the location of the dry dock from the water side, as provided in the initial contract, to a location 64 feet inland, and requiring the contractor to make all necessary excavations and connections with the water, at an increased payment of $5,063.18, and with an increased time for performance, releases the sureties, inasmuch as the consent of the sureties, anticipating changes in the contract, related to alterations in the attached plans and specifications, of which the location of the structure was no part. U. S. *v.* Freel (C. C. 1899) 92 Fed. 299. But any agreement between the creditor and the principal in an obligation or debt which essentially varies the terms of the contract without the consent of the surety will release the surety from liability. U. S. *v.* McIntyre (C. C. 1901), 111 Fed. 590.

Subsequent changes in the contract or specifications agreed upon between the Government and the contractor, though without the knowledge or consent of a surety, where the general nature of the work and materials remains the same, will not release the surety from liability to persons who supply labor or materials thereunder. U. S. *v.* National Surety Co. (1899), 92 Fed. 549, 34 C. C. A. 526.

Where a contract to construct a dry dock "to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part," had attached thereto and made a part thereof the plans and specifications for the dock, reserving the right to the United States to make changes in such plans and specifications, the difference in the contract price on account of any such changes to be determined as therein provided, and contained a further provision that "no change herein provided for shall in any manner affect the validity of this contract," a supplemental contract, changing the location of the entire dry dock from the water line, as fixed by the initial contract, to a point 64 feet inland, and requiring the contractor to make all necessary excavations and connections with the water at an increased payment of $5,000, and with an increased time for performance, was not within the terms of such provision, but was a change in substance of the contract, not contemplated thereby, which released the sureties on the contractor's bond, who did not assent thereto, from liability. U. S. *v.* Freel (1900), 99 Fed. 237, 39 C. C. A. 491, affirming judgment (C. C. 1899), 92 Fed. 299.

Defendants became sureties on the bond of a bidder for contract for furnishing and laying in place toward the construction of a riprap breakwater such a quantity of stone "dependent upon the price per ton of stone bid" as could be furnished in place for $45,000; the bond being conditioned that if the bid was accepted and the bidder failed to enter into the contract defendants would pay to the United States the difference in money between the amount of the bid so accepted, and the amount for which the Government might contract with another party to do the work proposed, if the latter amount should be in excess of the former.

The bid was accepted, but the bidder failed to enter into contract, and the work was let under the same conditions to a second bidder at an increased price per ton for stone; the necessary result being that the second bidder was required to furnish a smaller quantity of stone. Held, that such fact did not render the second contract one for doing substantially different work from that proposed by the first bid, so as to relieve defendants from liability, but that they were liable for the value of the stone in place which the Government would have obtained under the first bid in excess of that which it obtained under the second at the price bid by their principal. Brown v. U. S. (1907), 152 Fed. 964, 82 C. C. A. 318.

The surety on a bond is discharged by the Government taking possession of the work in default and making a substantially different contract with a third person, though the contract authorized changes in the work. United States Fidelity & Guaranty Co. of Baltimore, Md., v. U. S. (1912), 194 Fed. 611, 116 C. C. A. 187.

Where the work contracted for is taken over by the Government and finished in a substantially different manner than that specified and at an increased cost, the Government can not recover such excess from the contractor and his surety. U. S. v. Weisberger (1913), 206 Fed. 641, 124 C. C. A. 429.

The failure of the Treasury Department to withhold any part of a payment due to a Government contractor on account of a claim of the United States against him for a prior breach of the contract, as authorized and required by act March 3, 1875, section 355, ante, does not release the sureties on the contractor's bond from liability for such claim. U. S. v. Ennis (C. C. 1904), 132 Fed. 133.

A bond given by a contractor under this section is in effect two separate instruments; one securing performance of the contract to the United States, and the other the payment by the contractor of bills for labor and for materials furnished, and in the latter aspect the surety is not discharged from liability by variation of the contract which might relieve it from liability to the United States, as by a change in the site of a building. U. S. v. California Bridge & Construction Co. (C. C. 1907), 152 Fed. 559.

Two supplemental contracts made with a contractor when the contract itself had contemplated and provided for such changes, which have been made in the manner fixed by the original contract, do not impair the obligations of the sureties on the contractor's bond. (1894) 20 Op. Atty. Gen. 748.

By changes in parties.—A surety is not liable on a claim for labor and materials furnished by the assignees of the contract, where the contract of assignment obligates the assignor only to assign the reserve fund in the hands of the Government, and to turn over the checks or payments under the original contract. Hardaway v. National Surety Co. (1900), 20 Sup. Ct. 202, 205, 211 U. S. 552, 53 L. Ed. 321.

Under this section as originally enacted a surety on a bond of a partnership as contractor is not released from liability thereon for the claim of one who supplied labor or materials in the prosecution of the work because of the fact that other persons were associated with the firm as partners in carrying out the contract. City Trust, Safe Deposit & Surety Co. of Philadelphia v. U. S. (1906), 147 Fed. 155, 77 C. C. A. 397.

Where persons have furnished materials to a firm of contractors, their right to recover on the bond is not defeated by a change in the persons controlling the firm, of which change the subcontractor had no notice until after their goods had been delivered and used. U. S. v. Hegeman (1902), 21 Pa. Super. Ct. 459.

A surety is not discharged by the contractor thereafter agreeing to pay the moneys received by him to some third person, or entering into any partnership or being served with an injunction order restraining him from paying out any of such moneys except to the plaintiff in the injunction suits, the Government not recognizing any of such proceedings in any way. (1893) 20 Op. Atty. Gen. 643.

Surety on bond of contractor for public building held liable for damages sustained through contractor's default, though the Government entered into an entirely new contract with a third person for different work. U. S. v. United States Fidelity & Guaranty Co. (1915), 35 Sup. Ct. 298, 236 U. S. 512, 59 L. Ed. 696, affirming judgment United States Fidelity & Guaranty Co. v. U. S. (1912), 194 Fed. 611, 116 C. C. A. 187.

Without the Government's consent, no new principal can be forced into a contract between a contractor and the Government for the performance of Government work. U. S. v. Illinois Surety Co. (C. C. A. 1915), 226 Fed. 653.

Where a Government contractor's assignment did not damage the surety on his bond, no creditor of the contractor was estopped from asserting his rights against the surety. Id.

By breach by Government of contract.—Where a contractor agreed to remove stone belonging to the United States stored on leased land on or before June 11, 1900, it was an implied condition of the contract

that the Government should keep its lease of the ground in force during such time, and its failure to do so, resulting in the owner's notifying the contractor to deliver immediate possession, and the commencement of dispossession proceedings against him, operated as a breach of the contract by the Government, discharging the contractor's surety from liability on the contractor's bond. And the fact that the contractor resumed work and waived the breach was ineffectual as against the surety. Fidelity & Deposit Co. of Maryland v. U. S. (1905), 137 Fed. 866, 70 C. C. A. 204.

By cancellation of contract for contractor's breach.—Where, after a contractor failed to begin the work within the time fixed as extended, the Government canceled a contract and entered into a subsequent similar contract with another contractor at a higher price, who completed the work at a higher cost, the cancellation of the original contract did not release the contractor or his surety from liability for the loss sustained. U. S. v. Stone, Sand & Gravel Co. (1910), 177 Fed. 321, 100 C. C. A. 651.

By extension of time for performance of work.—If in a contract it is provided that in course of the work one party shall have the right to make specified changes, the contractor's sureties are deemed to assent in advance thereto, and if they are made, though materially varying the contract, the sureties are not released. McMullen v. U. S. (1909), 167 Fed. 460, 93 C. C. A. 98, judgment reversed U. S. v. McMullen (1912), 32 Sup. Ct. 128, 222 U. S. 460, 56 L. Ed. 269.

Provisions requiring that changes in the plans or specifications, deemed desirable by the Government, be agreed to in writing by the parties to the contract before the work contemplated by changes is begun, do not require the assent of the sureties in order not to work their discharge. U. S. v. McMullen (1912), 32 Sup. Ct. 128, 222 U. S. 460, 56 L. Ed. 269, reversing judgment McMullen v. U. S. (1909), 167 Fed. 460, 93 C. C. A. 96.

A surety on a bond conditioned for the performance of the contract according to its true intent and meaning, "as well during any period of extension of said contract that may be granted on the part of the United States as during the original term," was not discharged by an extension of time of performance granted without its consent. Illinois Surety Co. v. U. S. (1914), 212 Fed. 136, 129 C. C. A. 584.

When the contract authorizes the parties to enter into auxiliary contracts for alteration of the work from that shown in the plans and specifications, without invalidating the primary contract, the alteration of the plans and specifications of a contract for the construction of a dry dock for the United States, in consideration of $612,000, so that its length should be 670, rather than 600, feet, with an increased payment of $45,566, and an extension of the time of performance for three months, was within the contemplation of the parties and sureties to the original contract, and the latter were not released thereby. U. S. v. Freel (C. C. 1899), 92 Fed. 299.

Since there is no presumption that a paid surety was injured by an extension of time to the principal, the fact that a materialman accepted the principal's note for four months was insufficient to discharge the surety, whether the extension of time was valid or not, in the absence of allegation and proof of prejudice to the surety in fact. U. S. v. United States Fidelity & Guaranty Co. (C. C. 1910), 178 Fed. 721.

The rule of strictissimi juris, ordinarily applied in relief of an individual voluntary surety, is inapplicable to relieve a paid surety on a contractor's bond because of an extension of time to the principal; but such surety must show, in addition, actual injury. Id.

By extension of time of payment.—The rule that extension of time of payment to the principal in a bond will, if made without the consent of his surety, and on a sufficient consideration, discharge the surety, does not apply to a bond under this section as originally enacted by a Government contractor. Heine Safety Boiler Co. v. U. S. (1910), 35 App. D. C. 273.

That a person furnishing material to a contractor extended time of payment by accepting the contractor's three months' note raised no presumption that the contractor's paid surety was injured thereby sufficient to constitute a defense to an action by the materialman on the bond. United States Fidelity & Guaranty Co. v. U. S. (1910), 178 Fed. 692, 102 C. C. A. 192; affirming judgment, U. S. v. United States Fidelity & Guaranty Co. (C. C. 1909), 172 Fed. 268.

A 60-day extension of time for the payment of a bill for materials furnished to the principal obligor by a third party does not, at least in the absence of any evidence of loss thereby occasioned, discharge the surety on a bond conditioned not only for the faithful performance of the original contract with the United States for the construction of a public work, but for the prompt payment of all persons supplying labor and materials in the prosecution of such work. United States Fidelity & Guaranty Co. v. U. S. (1903), 24 Sup. Ct. 142, 191 U. S. 416, 48 L. Ed 242.

A surety is not released from liability to a subcontractor by the taking by the latter of a note from the contractor for his claim due in three months, but which did not mature until final settlement had been made between the contractor and the United States and a few days after receivers in insolvency had been appointed for the contractor. U. S. v. United States Fidelity & Guaranty Co. (C. C. 1909), 172 Fed. 268; judgment affirmed, United States Fidelity & Guaranty Co. v. U. S. (1910), 178 Fed. 692, 102 C. C. A. 192. And the giving of a note by a contractor for materials does not release the surety; an action on the bond being based on the account, and not on the note. U. S. v. Axman (C. C. 1906), 153 Fed. 982. But a materialman can not recover if he has extended time of payment by taking notes due after termination of contract. U. S. v. American Bonding & Trust Co. (C. C. 1898), 89 Fed. 921. And a subcontractor is bound, as to the surety on the contractor's bond, to apply payments received from the contractor from the proceeds of the work on such material; and if, without notice to the surety, he applies them on a prior indebtedness, accepting the contractor's notes for the material, extending time of payment beyond completion of the contract, the surety is released. U. S. v. American Bonding & Trust Co. (1898), 89 Fed. 925, 32 C. C. A. 420.

Corporate surety held not discharged by binding extension, not in excess of reasonable or customary credit. U. S. v. Lynch (D. C. 1912), 192 Fed. 384.

The taking by a material man of thirty and sixty day notes for materials supplied, will not, because the bond provides for prompt payment, necessarily relieve the surety, where it does not appear that such extension was unreasonable, or that the surety was prejudiced thereby. Guaranty Co. v. Pressed Brick Co. (1903), 24 Sup. Ct. 142, 191 U. S. 416, 422, 48 L. Ed. 242.

By demanding excessive amount.—Claiming an excessive amount under bond does not defeat a right to enforce the bond for amount fairly due, where the excessive demand was not willfully or intentionally made. U. S. Fidelity & Guaranty Co. v. U. S. (1913), 34 Sup. Ct. 88, 231 U. S. 237, 58 L. Ed. 200.

By acceptance of work.—Sureties for the performance of a contract with the Government to build a ship canal, and keep it open for a certain number of years, are discharged where the Government accepts the work done in a different manner than as contracted. U. S. v. Corwine (C. C. 1860), Fed. Cas. No. 14,871.

Subrogation, rights of sureties.—The right of a surety to subrogation to the contractor's right to the reserve fund in the hands of the Government, representing work done prior to assignment of the contract, is superior to any rights of the assignee. Hardaway v. National Surety Co. (1909), 29 Sup. Ct. 202, 205, 211 U. S. 552, 53 L. Ed. 321.

Where a surety was compelled to pay labor and material claims to an amount exceeding the amount due from the Government to the contractor it was entitled to subrogation to the rights of the laborers and materialmen so paid against such sum which claim was prior to that of a mere volunteer lender of funds to the contractor, not shown to have been used in the performance of the contract. Henningsen v. United States Fidelity & Guaranty Co. (1906), 143 Fed. 810, 74 C. C. A. 484; decree affirmed (1908), 28 Sup. Ct. 389, 208 U. S. 404, 52 L. Ed. 547.

Equitable relief in favor of sureties.—A large number of actions at law were brought in a Federal court, against a contractor and his surety by persons who had furnished labor or materials. There were similar actions pending in other jurisdictions, and still other claims outstanding, on which actions had not been brought, including a possible one by the United States for extra cost of completing the work after its abandonment by the contractor. The aggregate of all the claims exceeded the penalty of the bond. Held, to entitle the surety to maintain a suit in equity in such Federal court, ancillary to the actions pending therein through which the fund in its hands can be equitably distributed. American Surety Co. of New York v. Lawrenceville Cement Co. (C. C. 1899), 96 Fed. 25.

Sureties have a right in equity to interpose to prevent the diversion or misapplication of the contract price, and to require it to be paid out to such materialmen and laborers in the first instance, by virtue of the lien and preference given by operation of the statute; and this right of the sureties can not be displaced or derogated from by any action on the part of the contractors looking to the protection of their general creditors. Alfred Richards Brick Co. v. Rothwell (1901), 18 App. D. C. 516.

Actions on bonds in general.—This section confers an independent right of action in favor of each creditor of the principal of the bond having a claim thereunder. U. S. v. Perth Amboy Shipbuilding & Engineering Co. (C. C. 1905), 137 Fed. 689.

The action on a bond is, as regards the kind of process required, an action at law, and not a suit in equity; it being on contract obligations and to recover money, and the fact that all other subcontractors

may come in and prove their claims and share pro rata in the recovery not affecting the question. U. S. v. Stannard (D. C. 1913), 207 Fed. 198.

Provisions governing procedure contained in amendatory act embodied in this section are not retroactive. United States Fidelity & Guaranty Co. v. U. S. (1908), 28 Sup. Ct. 537, 209 U. S. 306, 52 L. Ed. 804. And a suit on a bond, given under the original section is properly brought according to it's provisions. U. S. v. McPhee (Colo. 1911), 118 P. 996.

One furnishing materials to a subcontractor of a general contractor who gave bond held required to pursue the remedy prescribed by this act, and he can not prove a claim under the bankrupt law against the estate of the bankrupt general contractor. In re Hawley (D. C. 1912), 194 Fed. 751.

Under this section it is intended that there shall be one suit in which all creditors shall be given notice, and an opportunity to intervene and share ratably in the fund, and this distinctly marks the proceeding as an equitable one, and hence, where the action was brought at law, it should have been transferred to equity. Illinois Surety Co. v. U. S. (1914), 212 Fed. 136, 129 C. C. A. 584; U. S. v. Illinois Surety Co. (C. C. A. 1915), 228 Fed. 304.

There is strong ground for holding that only one suit shall be instituted under this act by a creditor or creditors and for notice to other creditor of their right to intervene and for pro rata distribution of the judgment among the creditors so that the amount due on the bond is a trust fund. U. S. v. Wells (D. C. 1913), 203 Fed. 146.

A subcontractor for public work, entitled to sue the surety on the statutory bond given by the contractor, did not lose his right of action by proving his claim against the estate of the contractor in bankruptcy. Title Guaranty & Surety Co. v. U. S. (1911), 187 Fed. 98, 109 C. C. A. 106.

Creditors, who had furnished labor or material to Government contractor on the liability of the contractor and his surety, held also to have claim against the bankrupt estates of the contractor and his assignee. U. S. v. Illinois Surety Co. (1915), 226 Fed. 653, 141 C. C. A. 409.

The act, as to parties entitled to intervene in action on contractor's bond, held to be given force in determining what claims are secured. National Surety Co. v. U. S. (C. C. A. 1916), 228 Fed. 577.

The act as amended construed with respect to suits by subcontractors and conditions precedent thereto. U. S. v. Merrick (D. C. 1914), 215 Fed. 256.

A suit on the bond of a contractor for public work by a subcontractor, being statutory, unless the jurisdictional conditions are complied with, the court can not render judgment against the contractor; but such an action should be brought at law. Id.

The act as amended construed with respect to the right of contract creditors to intervene in suits brought by the United States. U. S. v. Marshall (D. C. 1914), 225 Fed. 687, decree affirmed (C. C. A. 1915), Id. 760.

Conditions precedent.—Failure of plaintiff, in an action on bond, to apply for a copy of the bond, and furnish an affidavit that labor or materials have been supplied by him for the prosecution of the work, is not fatal, where no action has been brought by the United States for more than six months from the completion of the work, and affidavits are made and copies filed by intervenors, since under the circumstances, the omission is only a formal defect. Title Guaranty & Trust Co. v. Crane Co. (1910), 31 Sup. Ct. 140, 219 U. S. 24, 55 L. Ed. 72, affirming judgment Same v. Puget Sound Engine Works (1908), 163 Fed. 168, 89 C. C. A. 618. And it is not a condition precedent to right to sue on a bond under this section as originally enacted that claimant shall have filed affidavits with the quartermaster's department, and obtained a certified copy of the bond with leave to sue. U. S. v. Massachusetts Bonding & Ins. Co. (D. C. 1912), 198 Fed. 923. And the filing of an affidavit of claim with the department having charge of the work for which the bond has been given is not required as a condition precedent to the bringing of action. The object of filing the affidavit is simply to secure a copy of the contract and bond. U. S. v. Hegeman (1902), 21 Pa. Super. Ct. 459. And has reference only to the procuring of the copy of the contract and bond, and is not a prerequisite to the right to maintain an action. This requirement is for the purpose of satisfying the Government official that the person has furnished labor or material on the particular contract. American Surety Co. v. U. S. (1898), 77 Ill. App. 106. And an action may be maintained by a subcontractor against a contractor if a copy of the bond and contract referred to in such provision has been obtained, notwithstanding no affidavit as therein mentioned has been filed, and the practice and procedure in such action follows the course of the common law, except as modified by statute. Purington v. U. S. (1906), 126 Ill. App. 323.

Compliance with formal requirements as to the mode of annulling a contract for a public work in case the contractor fails to prosecute the work diligently in the judg-

sent of a designated official is not a prerequisite to an action on the bond, where he has refused to proceed with the work. Graham v. U. S. (1913), 34 Sup. Ct. 148, 231 U. S. 474, 58 L. Ed. 319.

The provision that materialmen's suits on bond be brought within one year after performance and settlement of the contract, as to latter, held a condition of the right to sue, and not a mere limitation relating to the remedy, and therefore available as a defense, though not specially pleaded. Rider Contract Co. v. U. S. (1913), 204 Fed. 280, 122 C. C. A. 560.

Under this section as originally enacted a materialman can not bring suit until the contractor has been paid, though the bond was conditioned that he should "promptly make full payment to all persons supplying labor and material." U. S. v. American Surety Co. (1902), 21 Pa. Super Ct. 153.

In order to be sure that all other creditors shall have a fair opportunity to intervene, the statute makes it a condition of the creditor's right to sue that he shall commence his action at such time only that a three months' notice to all other creditors can be published before the expiration of the year from final settlement within which they are allowed to intervene. Merchants' Nat. Bank v. U. S. (1914), 214 Fed. 200, 130 C. C. A. 548.

In a suit by subcontractors on the bond of a contractor for public work, where due notice by publication has been given, in the absence of concealment or fraud, the plaintiff is required to send personal notice only to such creditors as are actually known to him. U. S. v. Mitchell (D. C. 1914), 215 Fed. 263.

Where contractor with United States dredged below required depth and by mistake was paid therefor, held, that there was no breach of the contract authorizing recovery on contractor's bond. U. S. v. Brennann (D. C. 1915), 228 Fed. 808.

Notice to creditors of the pendency of a suit on the bond of a contractor for public work held in full compliance with the requirements of the act. U. S. v. Illinois Surety Co. (1915), 228 Fed. 304, 142 C. C. A. 586.

Assignability of causes of actions on bonds.—The right of laborers and materialmen to enforce a bond is assignable, and passes by an assignment of their claims. U. S. v. Rundle (1900), 100 Fed. 400, 40 C. C. A. 450; Title Guaranty & Trust Co. v. Puget Sound Engine Works (1908), 163 Fed. 168, 89 C. C. A. 618; judgment affirmed Title Guaranty & Trust Co. of Scranton, Pa., v. Crane Co. (1910), 31 Sup. Ct. 140, 219 U. S. 24, 55 L. Ed. 72.

Time to sue and limitations.—This section, in so far as it prohibits an action by a subcontractor prior to expiration of six months from the completion and final settlement of the contract, is not a statute of limitations, but during such period no right of action accrues to the subcontractor; the right to sue during that time being vested exclusively in the United States. Stitzer v. U. S. (1910), 182 Fed. 513, 105 C. C. A. 51, reversing judgment U. S. v. Stitzer (C. C. 1910), 179 Fed. 567.

The nonaccrual of a cause of action in favor of a subcontractor until six months after final completion and settlement is jurisdictional, and the provision may not be waived by the parties. Id.

If no suit is brought by the United States within six months from the completion and final settlement of a contract, then under this section a person furnishing labor and materials, payment for which has not been made, may bring suit thereon in the name of the United States, and a suit so brought will not be stayed because of the subsequent commencement of a suit by the United States in another jurisdiction. U. S. v. Brown (D. C. 1920), 266 Fed. 555.

In an action on a contractor's bond, the time of final settlement made by the department, which started the running of the six-month period that must elapse, under this section, before materialmen can sue, was not affected by the fact that the department thereafter considered small claims for extras. United States v. Arnold (D. C. 1920), 268 Fed. 131.

In an action by a creditor on a contractor's bond, complainant's failure to sue in time to give the requisite notice to creditors prescribed by the act held not a jurisdictional defect of which advantage may be taken by demurrer. U. S. v. United Surety Co. (D. C. 1912), 192 Fed. 992.

The limitation of time prescribed by the act for bringing suits on a contractor's bond by a laborer or materialman conditions the right to sue, and does not merely bar the remedy. U. S. v. Scheurman (D. C. 1914), 218 Fed. 915.

That action was not brought a sufficient length of time before the expiration of the year to permit the prescribed publication of notice to other creditors held not to defeat the action. Id.

The provision for publication of notice to creditors of action on the bond of a Federal contractor held not a restriction of the limitation of the time when the claims of subcontractors might be asserted, but directory only, so that, if claims are asserted within the last six months of the year after final completion and settlement, they are in time. Vermont Marble Co. v.

National Surety Co. (1914), 213 Fed. 429, 130 C. C. A. 65.

The suit must be brought a sufficient length of time before the expiration of the year to allow for the required publication. Merchants' Nat. Bank of New Haven, Conn., v. U. S. (1914), 214 Fed. 200, 130 C. C. A. 548.

Limitation in amendatory act is not retroactive, and does not affect an action on a bond given before its enactment, though supplemental contracts were made afterwards, where they were with the surety's consent, and expressly provided that they should not affect the bond, which should remain in effect as though the modifications had been included in and made a part of the original contract. Title Guaranty & Surety Co. v. U. S. (1911), 187 Fed. 98, 109 C. C. A. 106, affirming judgment U. S. v. Schofield (C. C. 1910), 182 Fed. 240. Writ of certiorari denied, Title Guaranty & Surety Co. v. U. S. (1911), 32 Sup. Ct. 523, 22 U. S. 720, 56 L. Ed. 629; motion to vacate supersedeas granted (1912), 3. Sup. Ct. 168, 222 U. S. 401, 56 L. Ed. 248. And it is not retroactive, and the limitation therein does not apply to a cause of action which accrued before its passage by the default of the contractor, which gave the laborer or materialman a right of action at once under the original statute without reference to the time when he applied for and obtained from the department certified copies of the contract and bond. U. S. v. United States Fidelity & Guaranty Co. (C. C. 1909), 171 Fed. 247.

Where a contract had been performed prior to amendatory act, the one-year limitation prescribed by it was inapplicable to an action by a materialman against the surety. U. S. v. U. S. Fidelity & Guaranty Co. (C. C. 1909), 172 Fed. 269; judgment affirmed, U. S. Fidelity & Guaranty Co. v. U. S. (1910), 178 Fed. 692, 102 C. C. A. 192; U. S. v. United States Fidelity & Guaranty Co. (C. C. 1910), 178 Fed. 721.

The words "completion and final settlement," were not equivalent, though the latter may by inference include the former, but both constitute an essential prerequisite to a subcontractor's right to sue, and hence where a contract was still open and unsettled as late as July 12, 1909, a suit on the contractor's bond, begun Oct. 21st following, was premature and unsustainable. Stitzer v. U. S. (1910), 182 Fed. 513, 105 C. C. A. 51, reversing judgment U. S. v. Stitzer (C. C. 1910), 179 Fed. 567.

The final settlement dates from settlement and certification of the contractor's accounts after completion of the work by the proper auditor in the Treasury Department. U. S. v. Bailey (D. C. 1913), 207 Fed. 782.

The limitation is not merely a limitation on the remedy, but on the liability itself, for the act creates a new legal liability with a right to a suit for its enforcement within one year after the performance and final settlement of the contract, and not later. U. S. v. Boomer (1910), 183 Fed. 726, 106 C. C. A. 164.

A contractor who had given a bond, and whose contract contained the usual provision giving the United States in case of his default the right to have the contract completed at his cost, became insolvent and abandoned the work. Held, that such abandonment was not a "complete performance of said contract" which gave a right of action to creditors for labor and materials on the bond under the statute, which contemplates a completion of the work, whether by the contractor or the United States, and a final settlement to determine the prior rights and claim of the United States under the contract and the lapse of six months thereafter for the bringing of suit to enforce such rights against the bondsmen before an action can be maintained by such creditors. U. S. v. Winkler (C. C. 1908), 162 Fed. 397.

A subcontractor may sue on a contractor's bond six months after the work is completed and settled for, without regard to stipulations by the contractor to keep the work in repair for one year after completion. U. S. v. Illinois Surety Co. (D. C. 1912), 195 Fed. 306.

Action on contractor's bond, if in equity, held not "commenced" within one year after completion of the contract, because, though complaint was filed, subpœna was not issued until after the expiration of the year. U. S. v. Scheurman (D. C. 1914), 218 Fed. 915.

Action on contractor's bond held not "commenced" against substituted defendant, until filing of amended complaint substituting it as defendant. Id.

The subcontractor's action upon a public contractor's bond is premature, if brought within six months after the settlement of the contract, since the condition of the action imposed by the statute is that the United States shall not have brought an action within the six months' period. U. S. v. American Bonding Co. (1914), 42 App. D. C. 268.

The prematurity of a subcontractor's action upon a public contractor's bond is not waived by pleading to the declaration, since the condition of the action, imposed by the statute, that the United States shall not have brought an action within six months after the final settlement of the contract, is jurisdictional. Id.

Under such act giving laborers, etc., an action on contractor's bond, complete performance and settlement was made when the contractor and the Government finally settled their accounts, though part of the balance was withheld to secure the contractor's covenant to repair. U. S. v. Illinois Surety Co. (1915), 226 Fed. 653, 141 C. C. A. 469.

Where suit against the sureties of such a bond to recover unpaid claims of labor and material creditors had become fully barred by the special limitation in the statute, it could not be revived by a special act of Congress authorizing suit under the original act before amendment, which contained no such limitation. Eberhart v. U. S. (1913), 204 Fed. 854, 123 C. C. A. 140.

Report of the constructing quartermaster that a specified sum was due a contractor for work done for the United States held not to constitute a "final settlement." U. S. v. Massachusetts Bonding & Ins. Co. (D. C. 1913), 215 Fed. 241.

Where, on completion of a contract for a public improvement, the Secretary of the Treasury issued a voucher for the balance due in accordance with a recommendation of the supervising architect, the approval of such voucher constituted a final settlement, and the six months' period prior to the expiration of which contractors and materialmen are barred from suit on the contractor's bond began to run. Illinois Surety Co. v. U. S. (1914), 215 Fed. 334, 131 C. C. A. 476; writ of error to Supreme Court granted (1914), 215 Fed. 1007, 131 C. C. A. 666.

Where, after the completion of a contract for public buildings, the supervising architect submitted to the Secretary of the Treasury a basis of settlement with the contractor, the Secretary's approval thereof, which was subsequently carried out, held a final settlement between the United States and the contractor within the act. U. S. v. Robinson (1914), 214 Fed. 38, 130 C. C. A. 432.

An action by persons supplying labor and materials is prematurely brought if begun within six months from the completion and final settlement of the contract, though after performance and settlement the United States neither had nor asserted any claim, demand, or cause of action against the contractor or his sureties, since a right of action created by this section is conditioned on the fact that no suit shall be brought by the United States within the six months' period. U. S. ex rel. and for Use and Benefit of Texas Portland Cement Co. v. McCord (1914), 34 Sup. Ct. 350, 233 U. S. 157, 58 L. Ed. 893.

The premature bringing of a suit within six months after completion and final settlement of the contract by persons furnishing labor and materials is not cured by filing an amended bill more than one year after completion and final settlement. Id.

Delay of upwards of five years in bringing suit, during which time the contractor became insolvent, is not laches, though coupled with want of previous demand or notice to the surety. U. S. Fidelity & Guaranty Co. v. U. S. (1913), 34 Sup. Ct. 88, 231 U. S. 237, 58 L. Ed. 200.

The requirement that the last publication of notice to creditors must be at least three months before the time limited therefor is not jurisdictional, but is directory only, and can not be construed as cutting down the limitation of one year from the complete performance of the contract and final settlement thereof prescribed for such suits, although giving the entire year for the commencement of such action may preclude the opportunity for intervention given by another proviso. U. S. v. New York S. F. Co. (1914), 35 Sup. Ct. 108, 111, 235 U. S. 327, 59 L. Ed. 253.

Intervention as curing premature bringing of action.—Intervention by other creditors after expiration of the six months' period can not cure the premature bringing of original suit on a bond by persons supplying labor and material. U. S. ex rel. and for Use and Benefit of Texas Portland Cement Co. v. McCord (1914), 34 Sup. Ct. 350, 233 U. S. 157, 58 L. Ed. 893.

Intervention can not be treated as an original suit so as to cure the prematurity of the original bill where no service was made or attempted to be had upon the intervention, as required by the statute when original actions are begun by creditors. Id.

Stipulations in contract.—On failure of a contractor to pay a materialman in accordance with the contract for material, the materialman may regard such contract as rescinded, and sue the sureties for the value of the materials furnished, though the contract provides that payment of a certain percentage of the contract price shall be postponed until the completion of the work. American Bonding & Trust Co. v. U. S. (1899), 15 App. D. C. 397.

Jurisdiction of State and Federal courts.—An action on a bond is within par. First, sec. 24 of the Judicial Code of Mar. 3, 1911. Mullin v. U. S. (1901), 109 Fed. 817, 48 C. C. A. 677; writ of error dismissed, Fidelity & Deposit Co. of Maryland v. U. S. (1902), 22 Sup. Ct. 940, 46 L. Ed. 1266.

An action in the name of the United States for the use of others, though deemed within the jurisdiction of a Federal court within par. First, sec. 24 of the Judicial

Code of Mar. 3, 1911, regardless of the citizenship of the parties, can not be maintained in such court on that ground in any district other than the one of which defendant is an inhabitant. U. S. v. O'Brien (C. C. 1903), 120 Fed. 446.

The amendatory act is not retroactive, and, where a contract was made and the bond given prior to the passage of such amendment, the rights of a subcontractor, although he furnished labor and materials afterward, are governed by the original act, and he may maintain a suit against the surety on the bond thereunder in the district of the surety's residence. U. S. v. Scofield Co. (C. C. 1911) 191 Fed. 944, judgment affirmed Title Guaranty & Surety Co. v. U. S. (1913) 33 Sup. Ct. 614, 228 U. S. 567, 57 L. Ed. 969.

An action by the United States on relation of a materialman against a Government contractor and a surety to recover on the contractor's bond to the Government as required by this act, for materials furnished to enable him to perform the contract, constituted a case arising under the Constitution or laws of the United States, and was therefore within the jurisdiction of the Federal courts. U. S. v. Axman (C. C. 1906), 152 Fed. 816.

In an action on a bond under this section, the United States was a mere nominal party whose presence was insufficient to confer Federal jurisdiction. Burrell v. U. S. (1906), 147 Fed. 44, 77 C. C. A. 308.

United States district court held to have jurisdiction of suit at common law to enforce claims of laborers, etc., especially in view of act Mar. 3, 1915, adding section 274a to Judicial Code. U. S. v. Illinois Surety Co. (C. C. A. 1915), 226 Fed. 653; National Surety Co. v. U. S. (C. C. A. 1916), 228 Fed. 577.

The amendatory act does not affect an action in a State court by a subcontractor whose rights accrued under a bond and contract executed prior to its passage, though part of the labor and material was furnished after its passage. U. S. v. Schofield Co. (1913), 87 A. 14, 239 Pa. 582.

State courts have concurrent jurisdiction with Federal courts over actions on bonds given prior to amendatory act. Id.

Under sec. 14 a subcontractor having sued in a State circuit court Government building contractors and their surety on a bond given under this section as originally enacted, the amendatory act did not oust the State court's jurisdiction, because not affecting existing actions. Burton v. Frank A. Seifert Plastic Relief Co. (1908), 61 S. E. 933, 108 Va. 338.

The restriction as to place of suit to the Federal circuit court for the district in which said contract is to be performed, "and not elsewhere," governs as well where the action is brought by the United States against the principal and sureties on the bond, for the failure to pay certain designated subcontractors for labor and materials. U. S. v. Congress Const. Co. (1911), 32 Sup. Ct. 44, 222 U. S. 199, 56 L. Ed. 163.

Exclusiveness of jurisdiction of the bankruptcy court of proceedings in bankruptcy precludes maintenance in a Federal circuit court of a suit in equity by surety of bankrupt public contractor, involving matters with which creditors of the bankrupt have no concern, for the purpose of controlling distribution of funds in the trustee's possession. United States Fidelity & Guaranty Co. v. Bray (1912), 32 Sup. Ct. 620, 624, 225 U. S. 205, 56 L. Ed. 1055, affirming decree Bray v. United States Fidelity & Guaranty Co. (1909), 170 Fed. 689, 96 C. C. A. 9.

The jurisdiction of the Federal court to enforce the remedy given is exclusive, and the commencement of an action on a bond in a State court of Colorado, which was afterward dismissed, did not extend the time for bringing a new action in the Federal court by virtue of Mills' Ann. St. Colo. sec. 2917, which in certain cases of dismissal permits a new action to be brought within one year thereafter. U. S. v. Boomer (1910), 183 Fed. 726, 106 C. C. A. 164; Id. (1910), 183 Fed. 730, 106 C. C. A. 168.

A statute authorizing persons who have furnished the holder of a Government construction contract with labor and materials to sue in the district where the contract was to be performed does not require the United States to sue on a contractor's bond for the cost of completing an abandoned contract only in such district. U. S. v. Marshall (C. C. A. 1915), 225 Fed. 760.

Under this section, requiring suits on Federal contractors' bonds to be brought in the district where the contract was to be performed, a Federal court in such district had jurisdiction to order the service of process on a defendant residing in another district, notwithstanding General Jurisdiction Act, sec. 1. Baker Contract Co. v. U. S. (1913), 204 Fed. 390, 122 C. C. A. 560.

A domestic corporation, by bringing an action on a bond, impliedly authorizes the court to require security for costs in such case, and hence the court has jurisdiction of the action. Sayre & Fisher Co. v. Griefen (1905), 60 A. 513, 72 N. J. Law 1.

A State court is not prevented from having jurisdiction of an action on a bond, given under this section as originally enacted, by the fact that several persons might be entitled to the protection of the

bond whose aggregate claims would exceed the penalty and require a ratable distribution where no such condition is shown to exist in fact. U. S. v. Rundle (1901), 67 P. 395, 27 Wash. 7.

Parties. The objection that the United States should have been made a party can not avail where the suit was begun in the name of the United States to the real plaintiff's use. Title Guaranty & Trust Co. v. Crane Co. (1910), 31 Sup. Ct. 140, 219 U. S. 24, 55 L. Ed. 72, affirming judgment. Same v. Puget Sound Engine Works (1908), 163 Fed. 168, 89 C. C. A. 618.

Under this section, as originally enacted, an action may be brought in the name of the United States, for the use of the laborer or materialman, in any proper State court. U. S. v. Henderlong (C. C. 1900), 102 Fed. 2. But the United States was a mere nominal or formal party whose presence was insufficient to confer Federal jurisdiction. Burrell v. U. S. (1906), 147 Fed. 44, 77 C. C. A. 308.

This section as originally enacted authorizes an action on a bond in the name of the United States, for the use and benefit of another person, only where such person has supplied the contractor with "labor and materials in the prosecution of the work provided for in such contract," for which payment has not been made. U. S. v. American Surety Co. (C. C. 1903), 127 Fed. 490.

This section has no relation to actions on bonds by the United States, and, while labor and material creditors are authorized to intervene and have their claims adjudicated subject to the prior right of the United States, the Government, in commencing an action, is not required to serve or publish notice to claimant, nor to bring the suit in the district where the contract was to be performed; the act being applicable only to suits brought thereunder. It gives laborers and materialmen a right to intervene and be made parties subject to the ordinary rules and practice governing interventions, and they may not intervene after the action has been dismissed as to the contractor for want of service and as between the plaintiff and the surety has been tried and submitted for decision. U. S. v. McGee (C. C. 1909), 171 Fed. 209.

An action against a surety can only be maintained by one who has title to a claim for labor or material supplied. U. S. v. Kimpland (C. C. 1899), 93 Fed. 403.

An action of covenant lies by a subcontractor in the name of the United States against a contractor by virtue of this section as originally enacted where the bond is under seal. Purington v. U. S. (1906), 126 Ill. App. 323.

Actions for what is due laborers and materialmen can only be brought by the United States at its instance. U. S. v. National Surety Co. (1899), 92 Fed. 549, 34 C. C. A. 526.

Pleading.—A complaint, in an action under this section as originally enacted, is demurrable where it does not set out the bond sued on, or allege that it was conditioned, as required. U. S. v. American Surety Co. (C. C. 1903), 127 Fed. 490.

A petition, alleging the advertising for bids for improvement of public waterways, the execution of a contract on the bid of the S. Co. for the performance of the work, the execution of a bond by defendant surety company to secure performance, the S. Co.'s failure to commence the work within the time prescribed, the granting of additional time by the Government, its refusal to grant a second extension, the S. Co.'s failure to commence work within the time as extended, the cancellation of the contract, and the performance of the work under a subsequent contract with another at a higher price, stated a cause of action both against the S. Co. and the surety. U. S. v. Stone, Sand & Gravel Co. (1910), 177 Fed. 321, 100 C. C. A. 651.

A complaint on bond, alleging that plaintiff furnished board and lodging to laborers employed on the work, under an agreement between herself, the laborers, and the contractor, by which the latter agreed to pay for such board and lodging, retaining the amount from the wages due the men, alleged as against a demurrer facts which enabled the plaintiff to maintain an action against the contractors and sureties, unless the contractors had paid the laborers entitled to the wages, without knowledge of the sureties of the right of plaintiff to receive the wages, or some part thereof, and was not necessary to negative such payment by the contractors. U. S. v. Kimpland (C. C. 1899), 93 Fed. 403.

In an action on a bond for the performance of a contract which provided for the construction of two steamers within a fixed period, according to certain plans, and that on failure to do so the United States might complete the same, the declaration alleged the steamers were not completed, that the contractor abandoned the contract, that a new contract was thereupon made, and they were completed thereunder. Held, that a demurrer to the declaration, for the reason that the new contract was for the construction and completion of said steamers, whereas under the original contract it should have been for their completion only, would not lie, the words "construction" and "completion" having substantially the same meaning. U. S. v. Perth Amboy Shipbuilding &

Engineering Co. (C. C. 1905), 137 Fed. 685.

The declaration setting up the new contract "for the construction and completion" of said steamers did not imply other or different steamers from those originally contracted for. Id.

Where the contractor failed to complete the contract and abandoned the same, it was unnecessary to state in the declaration the exact date of the abandonment; it appearing that a new contract was awarded after abandonment. Id.

It is unnecessary, in an action by the United States for the use of a creditor of the principal to aver that there were no other persons having claims or demands against the defendants under said bond, or, if there were such creditors, that they had been paid. U. S. v. Perth Amboy Shipbuilding & Engineering Co. (C. C. 1905), 137 Fed. 689.

A complaint of a subcontractor held to allege a complete performance of the contract and final settlement thereof, that no action on the bond had been brought by the United States, and that plaintiff's action was brought more than six months, and less than one year, after such performance and settlement, entitling plaintiff to sue. U. S. v. Stannard (D. C. 1913), 207 Fed. 198.

In action on Government contractor's bond, technical objection that intervener's statement of claim did not show failure of Government to sue held sufficiently met by presumption that original plaintiff made all necessary allegations. Fidelity & Deposit Co. v. U. S. (C. C. A. 1916), 229 Fed. 127.

In an action on a Federal contractor's bond, brought in the name of the United States to the use of subcontractors, held that the statement of claim need not deny that the United States had instituted an action. U. S. v. Emery (D. C. 1915), 225 Fed. 287.

Defenses.—Where, in an action on a bond against his paid surety, defendant's affidavit of defense urged an extension of time to the principal in discharge of its liability on the bond, and that, pending such extension, receivers were appointed for the contractor, but did not allege that the contractor became insolvent during such extension, or that the receivers were appointed because of the contractor's insolvency, or facts showing that the extension operated injuriously to the surety in any other manner, it was insufficient. United States Fidelity & Guaranty Co. v. U. S. (1910), 178 Fed. 692, 102 C. C. A. 192, affirming judgment U. S. v. United States Fidelity & Guaranty Co. (C. C. 1909), 172 Fed. 268.

In action on bond of contractor with United States, the objection that notice to other creditors has not been published may be raised by appearing specially and moving to set aside the service of the summons and complaint, as well as by answer. Merchants' Nat. Bank, of New Haven, Conn., v. U. S. (1914), 214 Fed. 200, 130 C. C. A. 548.

Loss to surety of contractor held not sufficiently shown in plea, where recourse is had solely to hypothetical inferences, contingencies, or possibilities of damage. U. S. v. Lynch (D. C. 1912), 192 Fed. 364.

In an action on a bond a demurrer to surety's answer alleging that the goods sued for were furnished on a day stated and that time for payment thereof by the contractor was extended without the consent of and to the detriment of the surety, was properly sustained. U. S. v. Henningsen (1905), 82 P. 171, 40 Wash. 87.

Evidence, admissibility, and sufficiency.—A plaintiff can not recover on a bond given by a contractor for Government work under this statute, on an allegation that such contractor is indebted to him for work and materials supplied in the prosecution of the work, where the only evidence in support of such allegation is that plaintiff hired certain barges to a third person, to whom they were charged. U. S. v. Simon (1899), 98 Fed. 73, 38 C. C. A. 650.

The United States entered into a contract, by which the other party was to furnish and place in position, for the purposes of the construction of a breakwater, 88,000 tons more or less of riprap stone. The proposals on which the contract was let required bids to state the location of the quarry from which it was proposed to obtain the stone, and to be accompanied by a sample, and the contractor's bid stated that the quarry was located "at Spuyten Duyvil, New York." The contractor had previously purchased from the United States, and agreed to remove, a large quantity of stone which the Government had deposited on leased premises at Spuyten Duyvil; but, before the riprap contract was completed, he was dispossessed and prevented from removing any more of such stone by reason of the failure of the Government to renew its lease, and thereupon he abandoned the contract. Held, in an action against him and the surety on his bond for breach of the contract, that it could not be shown by the surety, as a defense, that it was understood by the parties that the stone to be used was that so purchased by the contractor, and that performance was prevented by the act or default of the Government, which precluded its recovery, since the effect of such evidence would be to add a term to the written contract which did not specify such stone. U. S. v. Fidelity & Deposit Co. of

Maryland (1907), 152 Fed. 506, 81 C. C. A. 586.

Where, after termination of a contract for contractor's failure to commence work within the time fixed as extended, the Government entered into another contract with another to complete the work at a higher cost, and such contracts were substantially similar, the second contract was competent evidence of damages for default of the original contractor and his surety. U. S. v. Stone, Sand & Gravel Co. (1910), 177 Fed. 321, 100 C. C. A. 651.

Whether coal constituted "material," depending on the provisions of the specifications expressly made a part of the contract, as well as on the bond and contract proper, and it being impossible to determine the question without the specifications, the contract and bond without the specifications were inadmissible for determination of that question. U. S. v. United States Fidelity & Guaranty Co. (1909), 71 A. 1106, 82 Vt. 94.

Where the surety pleaded that the goods sued for did not go into the construction of the work, evidence that extension of credit was given to the contractor without the surety's knowledge was inadmissible. U. S. v. Henningsen (1905), 82 P. 171, 40 Wash. 87.

Burden of proof.—Judgment by default against principal in an action on a bond against principal and sureties is, at most, only prima facie evidence against the sureties who put in issue their liability, and incidentally that of the principal. U. S. v. Rundle (1901), 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505.

In an action on a bond for coal furnished contractor in connection with construction of buildings, after expiration of time fixed for the completion of the work, the burden is on plaintiff to show that an extension of time was granted. U. S. v. United States Fidelity & Guaranty Co. (1909), 71 A. 1106, 82 Vt. 94.

Questions for jury.—Where, in an action on a Federal contractor's bond, there was evidence to support a finding that the suit was not instituted within a year after final settlement, as required by this act, such finding was conclusive on writ of error. U. S. v. Title Guaranty & Surety Co. (1914), 218 Fed. 67, 134 C. C. A. 19.

There being no written extension of time, and parol evidence on question of an extension other than in writing being conflicting, it was for the jury. U. S. v. United States Fidelity & Guaranty Co. (1909), 71 A. 1106, 82 Vt. 94.

Costs, docket and counsel fees.—Each successful claimant in an action on a bond may be allowed the docket fee authorized by R. S. 824. Title Guaranty & Trust Co. v. Crane Co. (1910), 31 Sup. Ct. 140, 219 U. S. 24, 55 L. Ed. 72, affirming judgment. Same v. Puget Sound Engine Works (1908), 163 Fed. 168, 89 C. C. A. 618.

A surety who when sued pays into court the amount of the penal obligation of the bond, and is thereupon discharged from further liability, is not entitled to allowance of counsel fees from the fund, insufficient to pay creditors of the principal against it. U. S. v. Heaton (1904), 128 Fed. 414, 63 C. C. A. 156, modifying decree (C. C. 1903), 124 Fed. 699.

Priority.—A surety's equity in sums due from the Government held superior to an assignment by contractor. Henningsen v. United States Fidelity & Guaranty Co. (1908), 28 Sup. Ct. 389, 208 U. S. 404, 52 L. Ed. 547, affirming decree (1906), 143 Fed. 810, 74 C. C. A. 484.

The fact that the United States first commenced an action on the bond does not give it a right to priority, and, the fund having been paid into court, the right of the United States therein under the statute may properly be determined by the court as against other creditors brought in without objection, although the action is one at law. U. S. v. Heaton (1904), 128 Fed. 414, 63 C. C. A. 156.

In the distribution of the proceeds recovered on a bond conditioned as required by this section as originally enacted, the United States is not entitled to priority over laborers or materialmen who are also secured by the bond. U. S. v. American Surety Co. (1905), 138 Fed. 78, 67 C. C. A. 552, affirming judgment (C. C. 1903), 126 Fed. 811.

Where there are claims against a contractor and his sureties in favor of the United States, and of individuals supplying labor or materials, aggregating a sum in excess of the penalty of the bond, the equitable rule of pro rata distribution will be applied, and no priority will be given to the United States, or to any individual creditor by reason of his having first commenced suit. American Surety Co. of New York v. Lawrenceville Cement Co. (C. C. 1899), 96 Fed. 25.

A surety company was surety on the bond of a United States contractor, and several actions at law having been brought against it on the bond by the United States and others furnishing labor or material to the contractor, the claims aggregating more than the penalty of the bond, it filed a bill in equity praying that such claims be marshaled and adjusted, and the amount for which it was liable be distributed; that further proceedings in the actions at law be enjoined. The injunction was granted against all claimants ex-

cept the United States, and all other claims were approved and allowed in the equity suit. The United States refused to submit its demand to the equity court, but proceeded in the action at law until it obtained a verdict, after which the surety, by a motion, set up a dividend paid by it to the other creditors under orders of the court of equity. Pending such motion the other creditors moved in the equity suit for a final distribution. Held, that all creditors, including the United States, were entitled to share in the fund pro rata, and that, to secure such end, an order would be entered requiring payment to be made by complainant surety on that basis to all creditors whose claims were before the court; complainant on making such payments to be discharged from further liability to such creditors, and with leave granted it in the action at law by the United States to set up such payments by a supplemental motion as a matter affecting the amount of the judgment to be entered on the verdict. U. S. v. American Surety Co. (C. C. 1903), 126 Fed. 811, judgment affirmed (1905), 135 Fed. 78, 67 C. C. A. 552.

777. Transfer of a contract.—No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States. *R. S. 3737.*

Notes of Decisions.

Purpose and scope of act.—The section does not refer to a lease of land to be used for public purposes. Freedman's Sav. & Trust Co. v. Shepherd (1888), 8 Sup. Ct. 1250, 1255, 127 U. S. 494, 32 L. Ed. 163.

This section is for the protection of the United States only, and does not affect the rights of the parties to such a transfer. Hegness v. Chilberg (1915), 224 Fed. 28, 139 C. C. A. 492.

The purpose of the section was to secure to the Government the personal attention and services of the contractor. Francis v. U. S. (1875), 11 Ct. Cl. 638.

One of the purposes of the section was to secure integrity in bidding for contracts, by preventing a bidder or contractor from making several bids, one by himself and others by his friends and employees, to be afterwards consummated by assignments of the contract by them to the real bidder, for whom they all acted. Another was to prevent those who bid for and obtain contracts for mere speculation, and who have neither the intention nor the ability to perform them, from selling the contracts at a profit to bona fide bidders or contractors. (1888) 19 Op. Atty. Gen. 187.

Effect of section in general.—This section avoids the liability of the United States on a contract after the transfer of any interest therein to another person by the party with whom the contract was made. St. Paul & D. R. Co. v. U. S. (1885), 5 Sup. Ct. 366, 368, 112 U. S. 733, 28 L. Ed. 861; (1851) 5 Op. Atty. Gen. 502; (1863) 10 Op. Atty. Gen. 523; Turnbull v. Farnsworth (1890), 1 Wash. T. 444.

In view of this section, it was held that an assignment by a public contractor of a claim against the United States for money accruing on a building contract was void, both as against the United States, the contractor's surety, the laborers, and materialmen. Henningsen v. United States Fidelity & Guaranty Co. (1906), 143 Fed. 810, 813, 74 C. C. A. 484.

The section is imperative and absolute, and bars any action by the assignor as well as the assignee. Wanless v. U. S. (1870), 6 Ct. Cl. 123.

If the assignee of a public contract can be held to the liabilities of the contractor, he must nevertheless be put in default by proper notice. Hersch v. U. S. (1879), 15 Ct. Cl. 385.

An attempted assignment which the parties do not set up or claim under can not, after full performance, be set up by the Government to prevent a recovery for the service performed. Dougherty v. U. S. (1883), 18 Ct. Cl. 496.

On a contract between the United States and A. G. Sloo, which contract is now performed by the coassignees of said Sloo, held, that the United States may pay for the mail service under said contract and assignment to any two of the coassignees. (1856) 7 Op. Atty. Gen. 676.

There is no authority given by the section, nor to be inferred from it, that any officer of the United States can, in advance, either approve or recognize any proposed assignment thus forbidden. (1888) 19 Op. Atty. Gen. 186.

The parties to an assignment may suffer damage, but can derive no benefit from an assignment of a Government contract. Id.

A shipbuilding company having contracts with the Federal Government for the building of several vessels, by depositing the contracts in a bank with power of attorney authorizing it to collect payments by the Government on the contract, on the faith of which the bank made loans to the company, effectuated a valid equitable assignment of the contracts. S. H. Hawes & Co. v. Wm. R. Trigg Co. (1909), 65 S. E. 538, 110 Va. 165.

Consent to assignment.—Contractors with the Government may transfer with the assent of Government, and when such transfers are made and assented to the assignees take the place of the original party. (1823) 5 Op. Atty. Gen. 747; (1861) 10 Op. Atty. Gen. 4.

A manufacturing company, after having entered into a contract with the Navy Department to deliver a large quantity of steel castings to be used in the construction of an armored cruiser, proposed to transfer the contract to another manufacturing company, which contemplated fulfilling the covenants of the former company with the Government, and asked the approval of such transfer by the Secretary of the Navy. Advised that, in view of the prohibition in the section the proposed transfer can not lawfully be approved and recognized by the Navy Department. (1888) 19 Op. Atty. Gen. 186.

Election by Government.—This section is intended for the protection of the Government, which may treat a contract as annulled thereunder by an assignment, or recognize the assignment. Dulaney v. Scudder (1899), 94 Fed. 6, 10, 36 C. C. A. 52; Federal Manufacturing & Printing Co. v. U. S. (1906), 41 Ct. Cl. 318; (1821) 5 Op. Atty. Gen. 738; (1877) 15 Op. Atty. Gen. 236; (1879) 16 Op. Atty. Gen. 278.

A stipulation in a contract in conformity with the statute is for the sole benefit of the Government. Tinker & Scott v. United States Fidelity & Guaranty Co. (C. C. 1909), 169 Fed. 211, 212.

Contract still binding on assignor.—A contract entered into by the Chief of Ordnance with the South Boston Iron Co. in Oct., 1880, and subsequently transferred by that company to the South Boston Iron Works, may still be treated by the Government as obligatory upon the former company, notwithstanding such transfer. (1884) 18 Op. Atty. Gen. 88.

As between the South Boston Iron Works and the United States no privity exists by reason of the transfer, and in the absence of any agreement between that company and the United States importing an undertaking by the former to perform the contract referred to, such contract can not be enforced against it by the latter. Id.

Under the provisions of the section a transfer operated to annul the contract so far as the United States is concerned; but these provisions were not made to enable a contractor to avoid his agreement with the Government and relieve himself from his obligations by a mere transfer. Id.

Form of assignment.—Where, after the members of a firm had obtained a contract for the performance of public work for the United States, two of the members of the firm assigned their interest therein to the third, who agreed to assume all the debts of the firm and to prosecute the work at his own risk and for his own benefit, such assignment, while valid as between the parties, could not affect the rights of the United States, and operated only as an assumption by the assignee of the debts of the firm in consideration of the receipt of the benefits to be derived from the execution of the agreement. Hardaway & Prowell v. National Surety Co. (1907), 150 Fed. 465, 80 C. C. A. 283; decree affirmed, Hardaway v. National Surety Co. (1909), 29 Sup. Ct. 202, 211 U. S. 552, 53 L. Ed. 321.

An agreement between a Government contractor and one of the sureties on his bond, by which the surety agrees to furnish the money necessary for carrying out the contract, and the contractor agrees to divide the profits with him, does not amount to a transfer of the contract. Bowe v. U. S. (C. C. 1890) 42 Fed. 761; Anderson et al. v. Blair, Ala. 1918, 80 So. 31.

A contract by a claimant, employing an attorney to prosecute a claim against the United States in the Court of Claims on a contingent fee of 50 per cent. of the amount recovered, and stipulating that the fee shall be a lien on any draft issued by the Government in payment of the claim, is not an assignment of a claim against the United States within the section. Roberts v. Consaul (1905) 24 App. D. C. 551.

No technical, formal, or written transfer of a Government contract by the contractor is necessary to bring the case within the prohibition. It is sufficient to annul the contract that the facts disclose a substantial transfer of it or of an interest therein by whatever means attempted, or however much disguised; as where the contractor made a power of attorney authorizing another to receive and collect the vouchers, and to receive and receipt for payments, and the nominal agent performed and subsequently procured an assignment of the nominal contractor's claim, with authority to bring suit in his name, it was held that the contract was thereby annulled, and that

no suit could be maintained on it. Francis v. U. S. (1875), 11 Ct. Cl. 638.

A transfer of the legal title of real property by virtue of the decree of a court of equity, carrying with it the right to rents accrued, is not an assignment of a claim against the Government within the prohibition of the section. Mills v. U. S. (1884), 19 Ct. Cl. 79.

The fact that a Government contractor contracted with another to do certain work on articles which he had agreed to furnish the Government did not constitute an assignment of the contract. White v. McNulty (1898), 49 N. Y. S. 903, 26 App. Div. 173; judgment affirmed (1900), 58 N. E. 1094, 164 N. Y. 582.

Assignment of money due.—In view of the section, it was held that a person having a contract with the United States can not transfer or assign any part of the money coming to him thereunder so as to affect any one but himself, and the acceptance by a disbursing agent of the United States of an order on such fund has no validity against third persons. Greenville Sav. Bank v. Lawrence (1896), 76 Fed. 545, 546, 22 C. C. A. 646.

Where suit is brought on a contract, and the petition alleges that a third person became the owner of one-third interest in the contract before performance, and seeks to recover to his use, but the transfer is not produced on the trial, it will be held that the assignment related to the contract itself, and not to moneys due under it, and hence that it was void. Chouteau v. U. S. (1873), 9 Ct. Cl. 155.

There is a distinction between the assignment of a covenant contract and an assignment of a claim for money due under a contract. The former is void, and passes no title, legal or equitable; the latter passes title to the money due, as though it were the sale of a chattel. Id.

O. having given a power of attorney to S., coupled with an interest in the performance of the contract, by which power S. was to sign and receipt for all moneys due under the contract, held that this was a transfer of the contract within the section, yet that, although the Government may avail itself of such transfer to annul the contract under the provisions of that section, it is not compelled to do so. (1877) 15 Op. Atty. Gen. 236.

S., having a contract with the Engineer Department for dredging in the Occoquan River, by the terms of which the compensation named therein was to be paid to him from time to time, gave to I. a power of attorney (declared in the instrument to be irrevocable) "to demand, receive, and receipt for, to the proper disbursing officer of the United States, all moneys, warrants, drafts, vouchers, and checks that may become due and payable to me (S.) from the United States for work," etc. Held, that the instrument does not amount to a transfer of an interest in the contract so as to authorize the annulment thereof under the section. (1879) 16 Op. Atty. Gen. 261.

Formation of partnership as assignment.—This section does not invalidate a partnership formed between a party to whom the Government has given a contract and other persons whose means are required to carry it out, and written promises to such moneyed partners by the other to pay back out of the contract money his portion of the fund advanced does not bring the case within such section. Hobbs v. McClean (1886), 6 Sup. Ct. 870, 873, 117 U. S. 567, 29 L. Ed. 940. See also, Burck v. Taylor (1894), 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578.

The statute does not apply to a preliminary arrangement for the honest purpose of uniting capital to obtain means to fulfill such a contract; there being no intent to influence bidding or evade the duties and responsibilities as a public contractor. Field v. U. S. (1880), 16 Ct. Cl. 434.

S., having a contract with the Engineer Department to perform certain dredging, entered into an arrangement with G., by which it was stipulated that S. should furnish two-thirds and G. one-third of the money, material, or labor necessary for the execution of the contract; that in case of loss by reason of such execution the loss should be borne in the proportion of two-thirds thereof by S. and one-third by G., and that the net proceeds should be divided between them in the same proportion. Held, that such agreement is an assignment of an interest in the contract, and falls within the provision of the section. (1879) 16 Op. Atty. Gen. 278.

The formation of a partnership by persons holding a contract with the Government for the erection of public buildings does not necessarily effect an annulment of the contract. North Pac. Lumber Co. v. Spore (1904), 75 P. 890, 44 Or. 462.

Formation of corporation as assignment.—A corporation formed to carry out a Government contract held not an assignee of the contract, but a mere agent of the contractor. U. S. v. Axman (C. C. 1906), 152 Fed. 816, 821.

If, subsequently to a contract, a corporation is organized, the stock of which is owned chiefly by the contractors, and the work is done under their supervision, it is not a transfer which will cause the annul-

ment of the contract. Hollerbach v. U. S. (1912), 47 Ct. Cl. 236.

Subletting parts of work.—A contractor has a right to perform by ordinary business methods, provided he does not assign the contract and does retain his personal responsibility. He may make subcontracts and perform through the agency of others. Manning v. Ellicott (1896), 9 App. D. C. 71. Stuart, Hall & Bangs v. U. S. (1892), 27 Ct. Cl. 385.

A contractor with the United States for the construction of a public improvement does not, by contracting with a third party to furnish material for such work, make an assignment or a transfer of his contract. U. S. v. Farley (1899), 91 Fed. 474.

An agreement by a sculptor that, in the event of an award to him by a congressional commission of a contract for a certain statue for which he had submitted designs, he would enter into a contract with a contractor for stone work for the erection by the latter of a granite pedestal for such statue, and that, to the amount of such pedestal, the contractor should be made a party to the contract between the commission and the sculptor, is not void under the section. Manning v. Ellicott (1896), 9 App. D. C. 71.

Assignee's recovery on quantum meruit. — A suit can not be maintained for damages for the breach by the United States of a transferred contract. But where there has been a delivery of goods under the contract, duly accepted by the United States, an action may be maintained by the contractor for the use of the assignee in quantum meruit. Wheeler v. U. S. (1869), 5 Ct. Cl. 504.

Where the claimant sues on an implied contract arising from the impressment of his wagon train, the defendants can not set up that he was a subcontractor and the contract void, under the statute forbidding the transfer of public contracts. Mason v. U. S. (1878), 14 Ct. Cl. 59.

Where a party brings his action in his own name and upon the implied contract arising from the taking of his own property for public use, it is no defense that he had been acting as assignee of a contract for the sale of similar goods, and that the transfer of such contracts renders them void under the statute. Hersch v. U. S. (1879), 15 Ct. Cl. 385.

Government liability to assignee of patent.—The Government is liable to the assignee of a patent for royalties, notwithstanding the provisions of this section. Federal Mfg. & Printing Co. v. U. S. (1907), 42 Ct. Cl. 479.

Assignee as plaintiff.—Where a quartermaster and the assignee of a contract both treat the contract as a nullity, the assignee actually furnishing the goods, and the quartermaster dealing with him, giving him vouchers in his own name and certifying that he purchased the goods from him, an action on the vouchers is properly brought in the name of the party in interest. Heathfield v. U. S. (1872), 8 Ct. Cl. 213.

An action by the transferee of a Government contract ought not to fail merely because the assignor does not appear as nominal plaintiff suing for the use and benefit of the transferee. Federal Manufacturing & Printing Co. v. U. S. (1906), 41 Ct. Cl. 318.

778. Name of contractor on supplies.—Every person who shall furnish supplies of any kind to the Army or Navy shall be required to mark and distinguish the same with the name of the contractor furnishing such supplies, in such manner as the Secretary of War and the Secretary of the Navy may, respectively, direct; and no supplies of any kind shall be received, unless so marked and distinguished. *R. S. 3731.*

779. American material and labor preferred.- That in all contracts for material for any public improvement, the Secretary of War shall give preference to American material; and all labor thereon shall be performed within the jurisdiction of the United States. *Sec. 2 act of Mar. 3, 1875 (18 Stat. 455), making appropriations for the support of the Army.*

That all material purchased under the provisions of this Act shall be of American manufacture, except in cases when, in the judgment of the Secretary of War, it is to the manifest interest of the United States to make purchases abroad, which material shall be admitted free of duty. *Sec. 2, act of Mar. 3, 1921 (41 Stat. 1352), making appropriations for fortifications, armament, etc.*

780. Manufacture in arsenals. That no part of the moneys appropriated in each or any section of this Act shall be used or expended for the purchase or

acquirement of any article or articles that at the time of the proposed acquirement can be manufactured or produced in each or any of the Government arsenals of the United States for a sum less than it can be purchased or procured otherwise. *Sec. 5, act of Mar. 3, 1921 (41 Stat. 1352), making appropriations for fortifications, etc.*

That no part of the moneys appropriated in each or any section of this Act shall be used or expended for the purchase or acquirement of any article or articles that at the time of the proposed acquirement can be manufactured or produced in each or any of the Government arsenals of the United States for a sum less than it can be purchased or procured otherwise. *Act of June 5, 1920 (41 Stat. 975), making appropriations for the support of the Army.*

* * * He shall cause to be manufactured or produced at the Government arsenals or Government-owned factories of the United States all such supplies or articles needed by the War Department as said arsenals or Government-owned factories are capable of manufacturing or producing upon an economical basis. And all appropriations for manufacture of matériel pertaining to approved projects, which are placed with arsenals or Government-owned factories or other ordnance establishments shall remain available for such purpose until the close of the next ensuing fiscal year. *Sec. 5a, added to the act of June 3, 1916, by sec. 5, act of June 4, 1920 (41 Stat. 765).*

Similar provisions appear in previous appropriation acts.

See 788, 789, post.

Manufacture of cotton fabrics to supply the requirements of the War and Navy Departments and other needs of the Government was authorized to be carried on in the penitentiary at Atlanta, Ga., by act of July 10, 1918 (40 Stat. 896).

781. Economical operation of arsenals.—That expenditures for carrying out the provisions of this Act shall not be made in such manner as to prevent the operation of the Government arsenals at their most economical rate of production, except when a special exigency requires the operation of a portion of an arsenal's equipment at a different rate: * * * *Sec. 4, Mar. 3, 1921 (41 Stat. 1352), making appropriations for fortifications, etc.*

782. Eight hours a day's work.—That the service and employment of all laborers and mechanics who are now, or may hereafter, be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are now, or may hereafter be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this act shall apply or be construed to

apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States. *Sec. 1, act of Aug. 1, 1892 (27 Stat. 340), as amended by act of Mar. 3, 1913 (37 Stat. 726).*

That the provisions of this Act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon a public work of the United States or of the District of Columbia, or persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, for which contracts have been entered into prior to the passing of this Act or may be entered into under the provisions of appropriation Acts approved prior to the passage of this Act. *Sec. 3, act of Aug. 1, 1892 (27 Stat. 340), as amended by act of Mar. 3, 1913 (37 Stat. 727).*

This section and the section next following were the eight-hour law of Aug. 1, 1892, entitled "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia."

The previous eight-hour law, act June 25, 1868 (15 Stat. 77), was incorporated into R. S. sec. 3738, providing that eight hours should constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the Government of the United States. That section was superseded by this act.

A permanent appropriation to pay such sum as might be required in the settlement of accounts for services of laborers, etc., employed by or on behalf of the Government, to settle and pay for the same without reduction on account of reduction of hours of labor by said act June 25, 1868, was made by R. S. sec. 3689. That provision is omitted as obsolete.

The provisions of this act were not to apply to alien laborers employed in the construction of the Isthmian Canal within the Canal Zone, by a provision of act Feb. 27, 1906, sec. 1 (34 Stat. 33); and they were not to apply to unskilled alien laborers and to the foremen and superintendents of such laborers, so employed, by a provision of act June 30, 1906, sec. 4 (34 Stat. 669). Both these provisions are omitted as temporary merely.

All public contracts were required to provide for an eight-hour day for laborers and mechanics, doing the work contracted for, post, 784–786. Nothing in said act was to be construed to repeal or modify this act, by a provision of, post, 786.

The hours of business and of labor in the executive departments were prescribed by R. S. sec. 162, and act Mar. 3, 1893, sec. 5, amended by act Mar. 15, 1898, sec. 7, ante, 81, 82.

Notes of Decisions

Validity of act. The act is not repugnant to the Federal Constitution. Ellis v. U. S. (1907), 27 Sup. Ct. 600, 206 U. S. 246, 51 L. Ed. 1047, 11 Ann. Cas. 589.

Congress may fix the hours of labor upon all the works of the United States, wherever conducted, and make the law binding upon the officers of the United States and, through the agency of contracts, upon all contractors with the United States. (1905) 25 Op. Atty. Gen. 442.

Operation and effect of act in general.—The eight-hour law of Aug. 1, 1892, is of general application, and the limitation as to public works in that act applies only to such persons as are in the employ of contractors and subcontractors. (1892), 20 Op. Atty. Gen. 459. The scope of the act is not limited by the territorial jurisdiction of Congress, but is coextensive with the subject matter to which it was directed, to wit, the conduct of officers and agents of the United States in respect to the hours of labor of mechanics and laborers upon all public works of the United States. (1905) 25 Op. Atty. Gen. 441. The law contemplates eight hours of effective labor. (1906), 26 Op. Atty. Gen. 64.

Construction and operation of former act.—The act of 1868 was in the nature of

a direction by the Government to its officers and agents, and it was not a contract between the Government and its laborers that eight hours should constitute a day's work. It neither prevented the Government from making agreements with them by which their labor might have been more or less than eight hours a day, nor did it prescribe the amount of compensation for that or any other number of hours' labor. U. S. v. Martin (1876), 94 U. S. 400, 402, 24 L. Ed. 128. See, also, Martin v. U. S. (1874), 10 Ct. Cl. 276; (1878) 16 Op. Atty. Gen. 58; (1882) 17 Op. Atty. Gen. 341; (1886) 18 Op. Atty. Gen. 389; (1890) 19 Op. Atty. Gen. 685.

Act June 25, 1868 (R. S. sec. 3738), is a legislative declaration that for the persons described therein eight hours a day is a reasonable day's labor; and where the public interests can be subserved, this should be a guide to officers, both civil and military, in contracting for the public service. (1886) 18 Op. Atty. Gen. 389.

The circular of the Navy Department of Mar. 21, 1878, announcing that "the department will contract for the labor of mechanics, foremen, leading-men, and laborers on the basis of eight hours a day," but that all workmen "electing to labor ten hours a day will receive a proportionate increase of their wages," was in accordance with the former law. (1878) 16 Op. Atty. Gen. 58.

Time of day for performance of labor.—The blasting, cleaning of tracks, repair of machinery, and all other similar matters incident to reclamation work, essential to prompt and continuous service in the regular day, may legally be done before and after regular hours. The law does not prescribe in what hours of the day the labor shall be done. (1906) 26 Op. Atty. Gen. 64.

Persons employed as lock tenders, lock helpers, lockmen, and in similar employments at the locks of the various canals owned and operated by the Government may be called upon to perform service at any hour of the day, and such requirement is legal and proper so long as the total service rendered does not exceed eight hours per day. (1908) 26 Op. Atty. Gen. 605.

Effect as to amount of wages.—The eight-hour law is a mere direction by the Government to its agents, not a contract with its servants, and gives the latter no right to extra compensation for working more than eight hours a day. Timmonds v. U. S. (1895), 84 Fed. 933, 28 C. C. A. 570, following U. S. v. Martin (1876), 94 U. S. 400, 24 L. Ed. 128. And one employed as a laborer in the service of the United States, at a given monthly salary, who, without objection, works at such employment more than eight hours each day, and who, without protest, accepts the agreed monthly pay, has no right of action against the Government for additional compensation for such extra hours of labor, in the absence of an express contract therefor. Coleman v. U. S. (D. C. 1897), 81 Fed. 824; Martin v. Same (1874), 10 Ct. Cl. 276; Averill v. Same (1878), 14 Ct. Cl. 200; (1886) 18 Op. Atty. Gen. 389.

Neither the eight-hour labor law of Aug. 1, 1892, nor par. 812 of Army Regulations of 1901 (now par. 731 of Army Regulations of 1913), that eight hours shall constitute a day's work for laborers and mechanics employed by or on behalf of the United States, except in cases of emergency, work a different result in this respect. U. S. v. Moses (1903), 126 Fed. 58, 60 C. C. A. 600 70 L. R. A. 261, reversing judgment Moses v. U. S. (D. C. 1902), 116 Fed. 520, and writ of certiorari denied (1904), 25 Sup. Ct. 789, 195 U. S. 632, 49 L. Ed. 353.

There is nothing in the act of June 25, 1868, requiring workmen in the navy yards to be paid the same price for eight hours' labor which private establishments pay for 10 or 12, unless the amount of services rendered or the quality of work make the fewer hours in the navy yards equivalent in value to the longer time hired in private establishments, or for some other reason make it consistent with the public interest. (1869) 13 Op. Atty. Gen. 29.

Act June 25, 1868, left the subject of compensation to be regulated upon principles in force at the time of its passage. The President, by proclamation dated May 19, 1869, directed that thereafter no reduction should be made in the wages of Government employees on account of the reduction in the hours of labor. Held, that persons serving the Government as laborers, workmen, and mechanics are not entitled to receive, for the period intervening between the date of the act and the date of the proclamation, the wages of a day of 10 hours for working eight hours; the Government being under no obligation to pay more for the past because it has agreed to pay more for the future. (1871) 13 Op. Atty. Gen. 424.

The eight-hour law does not establish an inflexible rule for the payment of wages. It was passed in deference to a sentiment of philanthropy, and its intent is not to increase wages, but to elevate the condition of laboring men by diminishing their hours of labor. Averill v. U. S. (1878), 14 Ct. Cl. 200.

It prescribes the length of time which shall constitute a day's work for employees of the Government; but it does not establish any rule by which the compensation for a day's work shall be determined—this

being left to be fixed in the ordinary or customary manner where the law does not otherwise provide. (1882) 17 Op. Atty. Gen. 341; (1886) 18 Op. Atty. Gen. 389.

It does not contemplate a reduction of wages simply because of the reduction thereby made in the length of the day's work; but, on the other hand, it does not require that the same wages shall be paid therefor as are received by those who in similar private employments work a greater length of time per day. (1882) 17 Op. Atty. Gen. 341.

It simply requires that the same worth of labor shall be compensated in the public employment at the same rate of wages that it receives in private employment. (1863) 12 Op. Atty. Gen. 530.

Departments and employments subject to act. The law is not applicable to work contracted for by the United States to be performed in Alaska. Moses v. U. S. (D. C. 1902), 116 Fed. 526; judgment reversed, U. S. v. Moses (1903), 126 Fed. 58, 60 C. C. A. 600, 70 L. R. A. 281; writ of certiorari denied, Moses v. U. S. (1904), 25 Sup. Ct. 789, 195 U. S. 632, 49 L. Ed. 353.

Where a contractor is to furnish the "labor" necessary for dressing and boxing the defendants' stone, and is to receive the cost thereof, with 15 per cent added, they having the right to appoint agents to supervise the work and keep an account of its cost, no privity exists between the defendants and the contractor's laborers; and where the Government is defendant, they are not in any sense Government laborers, nor entitled to the benefits of the statute. Driscoll v. U. S. (1877), 13 Ct. Cl. 15.

The eight hour law controls the Government printing office. Harrison v. U. S. (1891), 26 Ct. Cl. 250.

It was not intended to extend to any others than the immediate employees of the Government. (1872) 14 Op. Atty. Gen. 37.

It applies to the employment of laborers and mechanics in the construction of the Panama Canal. (1905) 25 Op. Atty. Gen. 441. But it does not apply to laborers and mechanics in the employment of the Panama Railroad and Steamship Line, such persons being employed by the corporation and not by the United States. (1905) 25 Op. Atty. Gen. 465.

The Panama Canal Commission has authority to enter into an agreement with the International Contracting Co., of Maine, whereby the latter agrees to supply male Chinamen for work upon the Panama Canal, and to feed, clothe, and transport them back to China at the expiration of their respective contracts of employment, notwithstanding said agreement contains a provision that 10 hours shall constitute a day's labor. (1906) 26 Op. Atty. Gen. 1.

Materials for naval vessels under construction in private hands, such as armor, guns, and other articles obtained under special contracts, are not within the statute. (1906) 26 Op. Atty. Gen. 30.

The act does not apply to contractors furnishing the Quartermaster's Department with supplies. (1906) 26 Op. Atty. Gen. 36.

Presumably watchmen and messengers, if they are engaged in the work ordinarily assigned to such employees, are not subject to the provisions. (1908) 26 Op. Atty. Gen. 604.

Persons employed by the Indian Service on the Menominee Indian Reservation, Wis., under the act of Mar. 28, 1908 (35 Stat. 51), for the cutting of timber thereon and its conversion into logs and other lumber, are not employees of the United States Government, and are not subject to the restrictions imposed by the act. (1909) 27 Op. Atty. Gen. 130.

The provision of the naval appropriation act of June 24, 1910 (36 Stat. 628), which makes the section applicable to the construction of naval vessels, should be construed to apply simply to work done on the vessel itself at the place where it is built, and not to the manufacture elsewhere of machinery or other material which is to enter into the construction of the vessel. (1910) 28 Op. Atty. Gen. 358.

The section does not apply to the construction of torpedo boats and torpedo boat destroyers provided for in the act of June 24, 1910 (36 Stat. 626). (1910) 28 Op. Atty. Gen. 406.

Public works.—Dredging a channel in Boston Harbor is not a public work of the United States, within the meaning of act Aug. 1, 1892. Ellis v. U. S. (1907), 27 Sup. Ct. 600, 602, 206 U. S. 246, 51 L. Ed. 1047, 11 Ann. Cas. 589.

A lock and dam across a navigable stream, built under a contract with the United States authorized by act of Congress, although the contractor received in payment the privilege of using the surplus water for generating electric power, held "a public work of the United States," within the act. Chattanooga & Tennessee River Power Co. v. U. S. (1913), 209 Fed. 28, 126 C. C. A. 170.

The "eight-hour law" does not apply to the case of a man who, entirely at his own risk and cost, although under Government inspection, builds barges which United States engineers agreed to purchase on completion for Government use if found to conform to certain prescribed specifications. U. S. v. Ollinger (D. C. 1893), 55 Fed. 959.

This act makes it unlawful for any contractor on any public works of the United States whose duty it is to employ, direct, or control the services of laborers or mechanics to require or permit them to work more than eight hours in any calendar day and the laborers or mechanics referred to by the act are laborers and mechanics employed on such public works of the United States. U. S. v. Ollinger (D. C. 1893), 55 Fed. 959, 961.

Seamen on a Government vessel are employed upon "public works of the United States" when engaged in removing obstructions to navigation in rivers and harbors, and to exact from them more than eight hours' labor per day at this work, or in the actual care and repair of appliances necessary to carry it on, will subject the offender to indictment. U. S. v. Jefferson (D. C. 1894), 60 Fed. 736.

A timber dry dock is one of the "public works" of the United States. (1892) 20 Op. Atty. Gen. 445.

The section does not apply to a contractor for furnishing materials such as post office lock boxes, to be used in a Government building. (1892), 20 Op. Atty. Gen. 454. Nor to vessels under construction for the Navy by contract with builders at private establishments. (1906) 26 Op. Atty. Gen. 30.

Suggested that the words "public works" can not be restricted to the conception of fixed things, such as land and structures thereon. The expression is used in river and harbor acts which provide for repairs to breakwaters and for improving rivers, including, probably, dredging and deepening of channels. It is also suggested that there is a difference between "public work" and "public works," the former being the broader term and including the progress or activity, and the latter the product or completed thing. (1906) 26 Op. Atty. Gen. 30.

Irrigation works for the reclamation of arid and semiarid lands are "public works of the United States." (1906) 26 Op. Atty. Gen. 64.

The employment of laborers and mechanics in making repairs to Government vessels is employment upon a public work of the United States, and is therefore subject to the restriction. (1912) 29 Op. Atty. Gen. 305.

Laborers and mechanics.—Masters, mates, engineers, firemen, cranemen, deck hands, and scowmen employed on tugs, dredges, and scows used in dredging a harbor channel are not laborers or mechanics within the meaning of act Aug. 1, 1892. Ellis v. U. S. (1907), 27 Sup. Ct. 600, 602, 206 U. S. 246, 51 L. Ed. 1047, 11 Ann. Cas. 589.

Defendant was a contractor engaged in constructing for the United States jetties near Cape May Harbor, extending from the shore into the open sea. The jetties were built up with stone, thrown overboard from barges, which were towed across Delaware Bay, anchored, and as needed towed to the jetties and warped along while being discharged. As crews of such barges defendant employed engineers, boatmen, and hookmen, selected for their seafaring experience, who operated the barges and also discharged their cargoes. The work done and the time required to do it depended on tide, wind, and weather, which ordinarily required variable hours of service on the part of the men. Held, that such men were seamen, with the rights of such, including the right to a lien on the vessel for their wages, and could not be classed as laborers or mechanics, within the meaning of the section. Breakwater Co. v. U. S. (1910), 183 Fed. 112, 105 C. C. A. 404.

The section applies to jetty work at the mouth of a river, which is being conducted directly by the Government, and those employed upon that work who come fairly within the meaning of the words "laborers and mechanics" should be restricted to eight hours of effective labor in any one calendar day, irrespective of enforced idleness on other days, except in case of a sudden emergency requiring prompt action. (1907) 26 Op. Atty. Gen. 278.

All persons who are employed and paid by the day are included within the act, even though they do not fall within the strict language of "laborers, workmen, and mechanics." (1886) 18 Op. Atty. Gen. 389.

The words "laborers" and "mechanics" are used in their ordinary sense, and the determination of that question is, therefore, a matter of administration only, involving the ascertainment of a question of fact. (1892) 20 Op. Atty. Gen. 487. See, also (1892), 20 Op. Atty. Gen. 459.

The terms do not include employees at the Fort Leavenworth Military Prison, some of them designated "foremen of mechanics." (1894) 21 Op. Atty. Gen. 32. Nor to the office force of the Isthmian Canal Commission stationed on the Isthmus of Panama, or to any of the employees of the Government who are not within the ordinary meaning of the words. (1905) 25 Op. Atty. Gen. 441.

The words apply to all persons who may fairly come within the description of laborers and mechanics, whether they are paid by the year, by the month, or by the day. (1905) 25 Op. Atty. Gen. 465. And hence blacksmiths and their helpers, firemen, and pumpmen are within the law. (1906) 26 Op. Atty. Gen. 64.

A hostler, "whose duty is to feed, drive, and care for horses and to clean carriages,

harness, and stables," is a domestic servant, not a laborer. (1908) 26 Op. Atty. Gen. 623. And one whose duty is to perform manual labor in the removal of furniture and office fixtures, cutting grass, washing floors and windows, and general office cleaning, is not a laborer, but a domestic servant. Id.

A watchman "whose duty is to watch the entrance of one of the public buildings occupied by the War Department, executing instructions with regard to admitting persons into the building and permitting public property to be taken out of the building, reporting to his chief any violation of law, disturbance of the peace, etc., that may be brought to his attention, or to guard the building and property therein during the night," is not a laborer or mechanic within the meaning of the eight-hour law. (1908) 26 Op. Atty. Gen. 623.

The statute does not include watchmen. Collins v. U. S. (1889), 24 Ct. Cl. 340. A watchman employed at Corregidor Island, Philippine Islands, whose duties are "to supervise all arrivals and to see that no one lands on the island without authority, to investigate such matters as the absence from work of native employees, and to make report of those matters," is not a laborer or mechanic, as such duties pertain more to those of a clerk or superintendent of laborers than to those of a laborer or mechanic. (1908) 26 Op. Atty. Gen. 622.

The section includes such laborers employed at customs ports as are actually engaged in manual labor, and as to them the act of Mar. 15, 1898, 82, ante, has not repealed the section. (1912) 29 Op. Atty. Gen. 481.

Extra work.—Article 62, par. 812, of the Army Regulations. Compare sec. 731, Army Regulations, 1913, providing that "eight hours constitute a day's work for all mechanics and laborers employed by or on behalf of the United States except in cases of emergency," is an implied condition of every contract for labor made by an Army officer on behalf of the Government, wherever such labor is to be performed; and where the employee is required by the officer in charge, and who represents the Government, to work more than eight hours a day, when there is no emergency, the United States is legally bound, the same as an individual employer would be, to pay for the extra work upon quantum meruit. Moses v. U. S. (D. C. 1902), 116 Fed. 526; judgment reversed, U. S. v. Moses (1903), 126 Fed. 58, 60 C. C. A. 600, 70 L. R. A. 281; writ of certiorari denied, Moses v. U. S. (1904), 25 Sup. Ct. 789, 195 U. S. 632, 49 L. Ed. 353.

Under this section and secs. 724, 725, 765, 770, ante, and Army Regulations, par. 825, providing that all contracts for extras in the construction of Government buildings shall be in writing and made under the direction of the chief officer of the War Department, and that no expenditure of over $500 shall be made without the approval of the Secretary of War, no recovery can be had by a contractor for extra work for items which were never the subject of any agreement, nor authorized by the officer in charge as extras, nor submitted by him to the War Department. Churchyard v. U. S. (C. C. 1900), 100 Fed. 920.

Extraordinary emergency.—The building of a public levee on a river can not be said to present at all times an extraordinary emergency. U. S. v. Garbish (1911), 32 Sup. Ct. 77, 222 U. S. 257, 56 L. Ed. 190, reversing judgment (C. C. 1910) 180 Fed. 502.

A contractor who intentionally permits laborers to work more than eight hours a day, under the mistaken assumption that an extraordinary emergency exists, intentionally violates the act. Ellis v. U. S. (1907), 27 Sup. Ct. 600, 601, 206 U. S. 246, 51 L. Ed. 1047, 11 Ann. Cas. 587.

A delay, not entirely unexpected, in obtaining the timber required for the construction of a pier at the Boston Navy Yard, does not create an "extraordinary emergency." Id.

An "extraordinary emergency" in connection with the building of a dam across the Ohio River can not be construed as a continuing emergency, which would suspend the law during the entire life of the contract, nor an emergency growing out of the scarcity of labor, nor can it be made to include, not only the time of the happening of a flood, but also the time required to repair the injuries resulting therefrom; but it is such an unforseen, sudden, or unexpected emergency as requires immediate action or remedy, and when the emergency passes the privilege ceases. U. S. v. Sheridan-Kirk Contract Co. (D. C. 1906), 149 Fed. 809.

The term "emergency" includes any event or occasional combination of circumstances which calls for immediate action or remedy, pressing necessity or exigency. U. S. v. Southern Pac. Co. (1913), 209 Fed. 502, 126 C. C. A. 384. Thus unexpected absence of one of six train dispatchers in a division office of an interstate railroad, due to illness, making it necessary to retain the others on duty for a longer period than 9 hours in each 24-hour period, is an emergency, relieving the carrier from liability under Hours of Service Law, sec. 2. Id.

There is no conflict between the declaration in sec. 4 of the reclamation act of June 17, 1902 (30 Stat. 389), that eight

hours shall constitute a day's work upon the public works therein specified, and the saving clause of this section, allowing more than eight hours' work in one calendar day "in case of extraordinary emergency." (1906) 26 Op. Atty. Gen. 64.

The exception of cases of extraordinary emergency was designed to excuse overtime work which must be rendered to avert some sudden unusual emergency, unexpectedly arising and calling for prompt action. (1907) 26 Op. Atty. Gen. 278.

The eight-hour law includes skilled as well as unskilled workmen; and the employment of persons for a longer period than eight hours in any one day "when a dam is being raised or lowered," and the service is one "requiring skill and training" which "can not safely be intrusted to inexperienced men," is not an employment in case of an "extraordinary emergency," and is a violation of that statute. (1908) 26 Op. Atty. Gen. 605.

Duty of officers.—It is the duty of the engineers of the Reclamation Service to see that the eight-hour law is observed by the contractors and to report violations of that law. (1906) 26 Op. Atty. Gen. 64.

Responsibility for violation.—The offense is not the working overtime by the laborer or mechanic, but is on the part of the contractor in requiring and permitting such overtime work to be done. U. S. *v.* Sheridan-Kirk Contract Co. (D. C. 1906), 149 Fed. 809.

The Attorney General declines to give an opinion as to whether the so-called eight-hour law is applicable to a certain contract for public work, for the reason that the contractor, and not the Secretary of the Treasury, is responsible for a violation of the law. (1892), 20 Op. Atty. Gen. 500.

Effect on bids.—In awarding contracts for supplies for the Government under 733, 751, ante, no account can be taken of the fact that the contractor's employ- work over eight hours a day. (1890) 19 Op. Atty. Gen. 685.

Contract.—A bid which was formally accepted four days prior to the act, but which left the determination of minor details and the formal execution of the contract to a later date, was not a contract within this section. (1892) 20 Op. Atty. Gen. 445.

783. Penalty for violating the eight-hour law.—That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof. *Sec. 2. act of Aug. 1, 1892 (27 Stat. 340), as amended by the act of Mar. 3, 1913 (37 Stat. 726).*

Notes of Decisions.

Elements of offense.—To render one amenable to the law, he must be an officer or agent of the United States, or a contractor or subcontractor whose duty it is to employ, direct, or control laborers or mechanics upon some of the public works of the United States, and he must have intentionally required or permitted such laborers or mechanics to work more than eight hours in any calendar day. U. S. *v.* Ollinger (D. C. 1893), 55 Fed. 959.

Intent.—Under this section the intention is an essential ingredient of the offense, and must be charged in an indictment or information. U. S. *v.* San Francisco Bridge Co. (D. C. 1898), 88 Fed. 891.

Reliance on repudiated construction of act.—Where a defendant has been notified by Government engineers that he can no longer rely on the construction of the eight-hour law given by that department during the years immediately following the passage of the law, he is not entitled to introduce such construction as a defense. U. S. *v.* Sheridan-Kirk Contract Co. (D. C. 1906), 149 Fed. 809.

Information.—An allegation in an information that defendant, as a contractor on public works, "required" laborers to work more than eight hours in a calendar day, necessarily implies that the act was done intentionally, and is a sufficient allegation

of the intent to support the information after verdict. U. S. v. San Francisco Bridge Co. (D. C. 1898), 88 Fed. 891.

The section makes it a separate offense in case of each laborer or mechanic so required to work more than eight hours, and a criminal information against a contractor for violation of such provision must set out the names of, or otherwise identify, the persons so alleged to have been unlawfully employed, that the accused may meet the charge intelligently, and be able to plead a conviction or acquittal in bar of any subsequent prosecution. U. S. v. Breakwater Co. (D. C. 1909), 174 Fed. 78.

Burden to show emergency.—The rule which places the burden of proof upon the party who, under the circumstances of the case, is best able to make the proof, requires that, in a prosecution for violation of the law, the burden of showing the alleged offense was justified by an extraordinary emergency shall be upon the one interposing such a defense, who from the necessities of the case is possessed of special knowledge with reference thereto. U. S. v. Sheridan-Kirk Contract Co. (D. C. 1906), 149 Fed. 809.

Jurisdiction.—In a prosecution of Government contractors for "unlawfully, intentionally, and knowingly requiring or permitting a laborer or mechanic, employed on public work," to wit, a dam, to work more than eight hours in a single calendar day, the offense is not the working overtime, but is on the part of the contractor in requiring and permitting such overtime work to be done; and hence, where the work is directed, required, or permitted from the Ohio side of the river, the Federal court for the Southern District of Ohio has jurisdiction over the offense, notwithstanding some or all of the work may have been performed south of the line which divides the States of Ohio and Kentucky. U. S. v. Sheridan-Kirk Contract Co. (D. C. 1906), 149 Fed. 809.

784. Eight-hour provision in contracts.—That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; * * * *Sec. 1, act of June 19, 1912 (37 Stat. 137).*

This was the first section of an act entitled "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon a public work of the United States and of the District of Columbia, and of all persons employed in constructing, maintaining, or improving a river or harbor of the United States and of the District of Columbia."

Sec 2 of the act is set forth post 786.

Notes of Decisions.

Application of section.—The restriction of the act applies to contracts for the purchase of supplies by the Government where the work incident to the manufacture thereof has ordinarily been performed by the Government up to the time of the making of the contract therefor, and not merely occasionally or to a limited extent, and it is immaterial whether the contractor furnishes both materials and labor or labor only. (1912) 29 Op. Atty. Gen. 505.

The eight-hour workday restriction of the act applies only to work contemplated by the contract. The words "work contemplated by the contract" include the work directly and proximately in view in the contract as specifically appropriated to and destined for the Government use. (1912) 29 Op. Atty. Gen. 534.

The eight-hour workday restriction of the act of June 19, 1912 (37 Stat. 137), known as the eight-hour law, applies to the employment of labor on the work contemplated by the contract, and it is immaterial by whom the labor is employed, whether by a contractor, subcontractor, or sub-subcontractor. 30 Op. Atty. Gen. 31.

The word "supplies" and the phrase "such materials or articles as may usually be bought in open market" are practically synonymous, and cover things which are had in store or stock. Whether a particular article or material falls within this exception to the eight-hour provision is generally a matter of administration. Id.

Smokeless powder is manufactured ordinarily by the Government, and hence con-

tracts for the purchase thereof are subject to the eight-hour restriction. Id.

Contracts for the purchase of projectiles are not excepted from the operation of the eight-hour restriction, but only the work done in assembling the parts, treating the forging or casting, and machining the projectiles would be "work contemplated by the contract" unless the casting and other parts were manufactured solely and exclusively for the purpose of making the projectiles. Id.

Time of taking effect.—The act became effective Jan. 1, 1913, and hence only contracts thereafter made are required to contain the eight-hour restriction and the penalty stipulation provided. (1912) 29 Op. Atty. Gen. 505.

Insertion of provision.—Contracts excepted from the operation of the eight-hour law need not contain the eight-hour stipulation.

When contracts are made by letters of proposal and acceptance, the latter should not contain the eight-hour stipulation. 30 Op. Atty. Gen. 81.

Insertion of provision in case of doubt.—Where the administrative officer in charge is in doubt as to whether a dredging contract involves the employment of laborers or mechanics, the wisest course is to insert in the contract the eight-hour restriction required by the act of June 19, 1912, leaving the status of any particular person as to whom the question is raised to be determined by the actual facts of his employment. (1912) 29 Op. Atty. Gen. 583.

Legality of compensating overtime one day by undertime another.—A schedule by which employees work 8½ or 8¾ hours on 5 days in the week and 4 or 5 hours on Saturday, making a total of 48 hours in each week, is prohibited by the 8-hour workday restriction in said act of 1911. (1912) 29 Op. Atty. Gen. 371.

785. Penalty withheld for violation of the eight-hour law.— * * * and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any officer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this Act directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the Commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or subcontractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court. *Sec. 1, act of June 19, 1912* (*37 Stat. 137*).

That this Act shall become effective and be in force on and after January first, nineteen hundred and thirteen. *Sec. 3, act of June 19, 1912* (*37 Stat. 138*).

Notes of Decisions

Report of violations.—Under the operation of the eight-hour law it will not be necessary to report the cases of any persons working more than eight hours a day upon any vessel engaged in dredging under a Government contract, irrespective of whether such persons are connected with the vessel as a part of its crew in its operation and management or are only employed thereon in the particular work of dredging and handling material. (1912) 29 Op. Atty. Gen. 583.

786. Exceptions from the eight-hour law.—That nothing in this Act shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided*, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this Act. The President, by Executive order, may waive the provisions and stipulations in this Act as to any specific contract or contracts during time of war or a time when war is imminent, and until January first, nineteen hundred and fifteen, as to any contract or contracts entered into in connection with the construction of the Isthmian Canal. No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the violation to have been excusable. Nothing in this Act shall be construed to repeal or modify the Act entitled "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," being chapter three hundred and fifty-two of the laws of the Fifty-second Congress, approved August first, eighteen hundred and ninety-two, as modified by the Acts of Congress approved February twenty-seventh, nineteen hundred and six, and June thirtieth, nineteen hundred and six, or apply to contracts which have been or may be etered into under the provisions of appropriation Acts approved prior to the passage of this Act. *Sec. 2, act of June 19, 1912* (*37 Stat. 138*).

Notes of Decisions.

The word "supplies" and the phrase "such materials or articles as may usually be bought in the open market" are practically synonymous and cover things which are had in store or stock. Whether a particular article or material falls within this exception to the eight-hour provision is generally a matter of administration. 29 Op. Atty. Gen. 534; 30 Op. Atty. Gen. 49.

Any article or material which can fairly be said to be included, in its ordinary condition, within the class of supplies or articles which may usually be bought in open market, is excepted from the operation of the act, no matter if it may differ in particulars from other members of the class by reason of the requirements of the specifications under which it is contracted for. For instance, paper, in its ordinary state, evidently belongs to the class of "supplies" and it is not withdrawn therefrom because manufactured according to the standard of quality fixed upon by the Joint Committee on Printing. 29 Op.

Atty. Gen. 639. Building materials furnished by contractors or subcontractors are excepted. 30 Op. Atty. Gen. 183.

Looking at the act of June 19, 1912, it will be seen that sec. 1 lays down the rule which is to govern all contracts hereafter entered into by the United States, or on its behalf, and prescribes the penalty for a violation of its requirements and the mode of redress when the penalty is unjustly exacted, while sec. 2 states the exceptions to the rule and the qualifications and limitations thereof. The main exceptions are found in the first sentence of sec. 2. But to these exceptions there is attached a proviso, the effect of which is to limit and narrow the exceptions. This proviso might be so construed as to nullify, in whole or in part, portion of the act to which it is attached. The purpose of the proviso, however, is merely to qualify or limit the part of the enactment to which it is attached and not to nullify or destroy it. The Attorney General therefore ruled that to carry out the intent of the proviso, the words, "which have been, are now, or may hereafter be performed by the Government," can not be taken literally, but must be construed as referring to work which, up to the time of the making of the contract therefor has ordinarily been performed by the Government, and not merely occasionally or to a limited extent, so that to let the same upon contract would indicate an intention to evade the eight-hour restriction of the act of Aug. 2, 1892. To illustrate: In view of your statement that "the War Department has from time to time engaged in the manufacture of clothing, tentage, and various equipments for the Army on its own account, using materials purchased for the purpose, but as a general rule the Government awards contracts for the manufacture of clothing, furnishing material therefor," I should say that, under the circumstances stated, the eight-hour restriction need not be incorporated in contracts for such clothing. 29 Op. Atty. Gen. 511.

But as to smokeless powder, in view of the fact that the Government manufactures about 30 per cent of the amount in use, it could not be considered that the Government occasionally or to a limited extent had performed such work; so contracts for the purchase of this class of powder must fall under the eight-hour law. 29 Op. Atty. Gen. 546.

787. Suspension of the eight-hour law.—That in case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States: *Provided further*, That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half for all hours work in excess of eight hours. *Act of Mar. 4, 1917 (39 Stat. 1192), making appropriations for the naval service.*

788. Price proportioned to cost of manufacture by the Government.—That except as expressly otherwise authorized herein, no part of the sums appropriated by this Act shall be expended in the purchase from private manufacturers of any material at a price in excess of 25 per centum more than the cost of manufacturing such material by the Government, or, where such material is not or has not been manufactured by the Government, at a price in excess of 25 per centum more than the estimated cost of manufacture by the Government. *Sec. 3, act of Mar. 3, 1921 (41 Stat. 1352), making appropriations for fortifications, etc.*

789. Contracts with Government-owned establishments.—That all orders or contracts for the manufacture of material pertaining to approved projects heretofore or hereafter placed with Government-owned establishments shall be considered as obligations in the same manner as provided for similar orders placed with commercial manufacturers, and the appropriations shall remain available for the payment of the obligations so created as in the case of contracts or orders with commercial manufacturers. *Act of June 15, 1920 (41 Stat. 975), making appropriations for the support of the Army.*

790. Adjustment of war contracts of 1917-18.—That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into,

in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: *Provided*, That in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: *Provided further*, That this Act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen: *And provided further*, That the Secretary of War shall report to Congress at the beginning of its next session following June thirtieth, nineteen hundred and nineteen, a detailed statement showing the nature, terms, and conditions of every such agreement and the payment or adjustment thereof: *And provided further*, That no settlement of any claim arising under any such agreement shall bar the United States Government through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed, from the right of review of such settlement, nor the right of recovery of any money paid by the Government to any party under any settlement entered into, or payment made under the provisions of this Act, if the Government has been defrauded, and the right of recovery in all such cases shall exist against the executors, administrators, heirs, successors, and assigns, of any party or parties: *And provided further*, That nothing in this Act shall be construed to relieve any officer or agent of the United States from criminal prosecution under the provisions of any statute of the United States for any fraud or criminal conduct: *And provided further*, That this Act shall in no way relieve or excuse any officer or his agent from such criminal prosecution because of any irregularity or illegality in the manner of the execution of such agreement: *And provided further*, That in all proceedings hereunder witnesses may be compelled to attend, appear, and testify, and produce books, papers and letters, or other documents; and the claim that any such testimony or evidence may tend to criminate the person giving the same shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person in the trial of any criminal proceeding. *Sec. 1, act of Mar. 2, 1919* (*40 Stat. 1272*).

To secure relief as provided above, unexpended portion of appropriations for the fiscal year [illegible] are to remain available until June 30, 1921, as listed in the act of June 5, 1920 (41 Stat. 1026, 1027).

[illegible] effect of the act of Mar. 2, 1919 (40 Stat. 1272), authorizing the adjustment of informally executed war contracts, is to give the Secretary of War original jurisdiction in the settlement of claims arising thereunder and to suspend temporarily further action by the accounting officers. Claims under informally executed war contracts which have been submitted to the auditor and settled prior to the passage of said act may not be transmitted to the Secretary of War for his further action, but it will be the duty of the

claimants to file their claims with the Secretary of War. Where payments under informally executed war contracts have been made and allowed in the accounts of disbursing officers they must be considered as closed so far as action by the statute must be made through the Secretary of War, and the prior payments will be for his consideration. If claims under informally executed war contracts coming within the provisions of said act should be filed with the auditor, that officer may transmit them to the War Department for consideration under said act and advise the claimants to that effect. The auditor is not authorized to withdraw settled accounts and transmit them as claims to the War Department. 25 Comp. Dec. 774.

791. Jurisdiction over claims under war contracts of 1917–1918.—That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company, or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said Section. *Sec. 2, act of Mar. 2, 1919 (40 Stat. 1273).*

792. Adjustment of agreements with foreign governments and persons.—That the Secretary of War, through such agency as he may designate or establish is empowered, upon such terms as he or it may determine to be in the interest of the United States, to make equitable and fair adjustments and agreements, upon the termination or in settlement or readjustment of agreements or arrangements entered into with any foreign government or governments or nationals thereof, prior to November twelfth, nineteen hundred and eighteen, for the furnishing to the American Expeditionary Forces or otherwise for War purposes of supplies, materials, facilities, services or the use of property, or for the furnishing of any thereof by the United States to any foreign government or governments, whether or not such agreements or arrangements have been entered into in accordance with applicable statutory provisions; and the other provisions of this Act shall not be applicable to such adjustments. *Sec. 3, act of Mar. 2, 1919 (40 Stat. 1273).*

793. Payment to a sub-contractor.—That whenever, under the provisions of this Act, the Secretary of War shall make an award to any prime contractor with respect to any portion of his contract which he shall have sublet to any other person, firm, or corporation who has in good faith made expenditures, incurred obligations, rendered service, or furnished material, equipment, or supplies to such prime contractor, with the knowledge and approval of any agent of the Secretary of War duly authorized thereunto, before payment of said award the Secretary of War shall require such prime contractor to present satisfactory evidence of having paid said subcontractor or of the consent of said subcontractor to look for his compensation to said prime contractor only; and in the case of the failure of said prime contractor to present such evidence or such consent, the Secretary of War shall pay directly to said subcontractor the amount found to be due under said award; and in case of the insolvency of any prime contractor the subcontractor of said prime contractor shall have a lien upon the funds arising from said award prior and superior to the lien of any general creditor of said prime contractor. *Sec. 4, act of Mar. 2, 1919 (40 Stat. 1273).*

794. Adjustment of contracts for manganese, chrome, pyrites and tungsten.—That the Secretary of the Interior be, and he hereby is, authorized to adjust, liquidate, and pay such net losses as have been suffered by any person, firm, or corporation, by reason of producing or preparing to produce, either manganese,

chrome, pyrites, or tungsten in compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to supply the urgent needs of the Nation in the prosecution of the war; said minerals being enumerated in the Act of Congress approved October fifth, nineteen hundred and eighteen, entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply."

The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable; that the decision of said Secretary shall be conclusive and final, subject to the limitation hereinafter provided; that all payments and expenses incurred by said Secretary, including personal services, traveling and subsistence expenses, supplies, postage, printing, and all other expenses incident to the proper prosecution of this work, both in the District of Columbia and elsewhere, as the Secretary of the Interior may deem essential and proper, shall be paid from the funds appropriated by the said Act of October fifth, nineteen hundred and eighteen, and that said funds and appropriations shall continue to be available for said purpose until such time as the said Secretary shall have fully exercised the authority herein granted and performed and completed the duties hereby provided and imposed: *Provided, however*, That the payments and disbursements made under the provisions of this section for and in connection with the payments and settlements of the claims herein described, and the said expenses of administration shall in no event exceed the sum of $8,500,000: *And provided further*, That said Secretary shall consider, approve, and dispose of only such claims as shall be made hereunder and filed with the Department of the Interior within three months from and after the approval of this Act: *And provided further*, That no claims shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of commercial importance: *And provided further*, That no claims shall be paid unless it shall appear to the satisfaction of said Secretary that moneys were invested or obligations were incurred subsequent to April sixth, nineteen hundred and seventeen, and prior to November twelfth, nineteen hundred and eighteen, in a legitimate attempt to produce either manganese, chrome, pyrites, or tungsten for the needs of the Nation for the prosecution of the war, and that no profits of any kind shall be included in the allowance of any of said claims, and that no investment for merely speculative purposes shall be recognized in any manner by said Secretary: *And provided further*, That the settlement of any claim arising under the provision of this section shall not bar the United States Government, through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed, from the right of review of such settlement, nor the right to recover any money paid by the Government to any party under and by virtue of the provisions of this section, if the Government has been defrauded, and the right of recovery in all such cases shall extend to the executors, administrators, heirs, and assigns of any party.

That a report of all operations under this section, including receipts and disbursements, shall be made to Congress on or before the first Monday in December of each year.

That nothing in this section shall be construed to confer jurisdiction upon any court to entertain a suit against the United States: *Provided further*, That in determining the net losses of any claimant the Secretary of the Interior shall, among other things, take into consideration and charge to the claimant, the then market value of any ores or minerals on hand belonging to the claimant, and also the salvage or usable value of any machinery or other appliances which may be claimed was purchased to equip said mine for the purpose of complying with the request or demand of the agencies of the Government above mentioned in the manner aforesaid. *Sec. 5, act of Mar. 2, 1919 (40 Stat. 1274–5).*

For act of Oct. 5, 1918, above, see post, 2970–2972.

795. Inventories of public property.—The Secretary of State, the Secretary of the Treasury, the Secretary of the Interior, the Secretary of War, the Secretary of the Navy, the Postmaster-General, the Attorney-General, and Commissioner of Agriculture shall keep, in proper books, a complete inventory of all the property belonging to the United States in the buildings, rooms, offices, and grounds occupied by them, respectively, and under their charge, adding thereto, from time to time, an account of such property as may be procured subsequently to the taking of such inventory, as well as an account of the sale or other disposition of any of such property. *R. S. 197.*

Section one hundred and ninety-seven is amended by inserting at the end of the section the words "except supplies of stationery and fuel in the public offices and books, pamphlets, and papers in the Library of Congress." *Act of Feb. 27, 1877 (19 Stat. 241), amending R. S. 197.*

796. Sale of unsuitable property.—The President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged, or unsuitable for the public service. Such inspection or survey shall be made by officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him. *R. S. 1241.*

Notes of Decisions.

Manner of sale in general.—Under this section (act Mar. 3, 1825), the President only has power to cause ordnance, arms, ammunition, etc., unfit for public service, upon proper inspection and survey, to be sold, under regulations prescribed by the Secretary of War, which regulations as promulgated required the property to be offered first at public auction. Accordingly it was held that the head of the ordnance bureau had no authority to break up old cannon, which had been condemned as unfit for service, and sell them as old iron in exchange for gun skiddings. (1833) 2 Op. Atty. Gen. 580.

Public sales.—Inspection, condemnation, and public sale are necessary to a valid sale of unsuitable military stores. Cooper *v.* U. S. (1863) 1 Ct. Cl. 85.

The War Department can properly make no sale of arms, except at auction, and on due public notice. (1859) 9 Op. Atty. Gen. 391.

Sale subject to food and drugs act.—A sale, under this section, of drugs and medicines purchased for the use of the Army and afterwards condemned as being unfit for use, is as much subject to the provisions of food and drugs act June 30, 1906 as a sale by a private person would be under similar circumstances, and would render the officers making the sale liable under that act, unless the drugs and medicines so sold are labeled in accordance with its provisions. Where a drug so sold is sold under a name recognized by the United States Pharmacopœia, a mere general statement of the character of the drug, showing only the fact of its deterioration, is insufficient; and in order that it may not be deemed adulterated, its actual standard of strength, quality, or purity should be stated on the label of each bottle, box, or other container in which the goods are intended to reach the consumer. Where, however, a drug so sold is not sold under a name recognized in the United States Pharmacopœia, a general statement on the label that its quality has deteriorated, and that it has

been condemned for sale under this section, would be a sufficient compliance with the food and drugs act, and would show that it was not sold under any professed standard, and would not be deemed either adulterated or misbranded under sections 7 and 8 of the food and drugs act. But a sale of such condemned drugs and medicines could in no respect affect the original makers or vendors from whom they were purchased before the passage of the food and drugs act, unaccompanied by any guaranty under that act, and at a time previous to their deterioration. (1908) 26 Op. Atty. Gen. 547.

797. Sale of war supplies during the war with Germany.—That during the existing emergency the President be, and he hereby is, authorized, in his discretion, and upon such terms as he shall deem expedient, through the head of any executive department, to sell any supplies, materials, equipment or other property heretofore or hereafter purchased, acquired, or manufactured by the United States in connection with, or incidental to, the prosecution of the war, to any person, partnership, association, or corporation, or to any foreign State or Government engaged in war against any Government with which the United States is at war; and any moneys received by the United States as the proceeds of any such sale shall be covered into the Treasury of the United States and a full report of the same shall be forthwith submitted to Congress. *Act of May 10, 1918 (40 Stat. 548).*

That the President be, and he hereby is, authorized, through the head of any executive department, to sell, upon such terms as the head of such department shall deem expedient, to any person, partnership, association, corporation, or any other department of the Government, or to any foreign State or Government, engaged in war against any Government with which the United States is at war, any war supplies, material and equipment, and any by-products thereof, and any building, plant or factory, acquired since April sixth, nineteen hundred and seventeen, including the lands upon which the plant or factory may be situated, for the production of such war supplies, materials, and equipment which, during the present emergency, may have or may hereafter be purchased, acquired, or manufactured by the United States: * * * *Provided further*, That a detailed report shall be made to Congress on the first day of each regular session of the sales of any war supplies, matériel, lands, factories, or buildings, and equipment made under the authority contained in this or any other Act, except sales made to any foreign State or Government engaged in war against any Government with which the United States is at war, showing the character of the articles sold, to whom sold, the price received therefor, and the purpose for which sold: * * * *Act of July 9, 1918 (40 Stat. 850), making appropriations for the support of the Army.*

798. Sale of surplus war supplies after the armistice with Germany. – * * * *Provided further*, That in addition to the delivery of the property heretofore authorized to be delivered to the Public Health Service, the Department of Agriculture and the Post Office Department of the Government, the Secretary of War be, and he is hereby, authorized to sell any surplus supplies including motor trucks and automobiles now owned by and in the possession of the Government for the use of the War Department to any State or municipal subdivision thereof, or to any corporation or individual upon such terms as may be deemed best. *Act of July 11, 1919 (41 Stat. 105), making appropriations for the support of the Army: Contingencies of the Army.*

That the commissioners and other responsible officials, in expending appropriations contained in this Act, so far as possible, shall purchase material, supplies, including food supplies and equipment, when needed and funds are avail-

able, from the various services of the Government of the United States possessing material, supplies, and equipment no longer required because of the cessation of war activities. It shall be the duty of the commissioners and other officials, before purchasing any of the articles described herein, to ascertain from the Government of the United States whether it has articles of the character described that are serviceable. And articles purchased from the Government, if the same have not been used, shall be paid for at a reasonble price, not to exceed actual cost, and if the same have been used, at a reasonable price based upon length of usage. The various services of the Government of the United States are authorized to sell such articles to the municipal government under the conditions specified and the proceeds of such sales shall be covered into the Treasury as a miscellaneous receipt: *Provided*, That this section shall not be construed to amend, alter, or repeal the Executive order of December 3, 1918, concerning the transfer of office material, supplies, and equipment in the District of Columbia falling into disuse because of the cessation of war activities. *Sec. 6, act of Feb. 22, 1921 (41 Stat. 1144), making appropriations for the District of Columbia.*

Similar provisions appear in previous appropriation acts.

The Executive order of Dec. 3, 1918, provided for the transfer of surplus office material, supplies, and equipment in the hands of departments or other Government establishments in the District of Columbia to the Secretary of the Treasury, to be handled through the General Supply Committee, for the benefit of the municipal government and the governmental service in the District of Columbia. Regulations, dated Dec. 10, 1918, were promulgated thereunder by the Secretary of the Treasury.

799. Sale to another department.—That the heads of the several executive departments and other responsible officials, in expending appropriations contained in this Act, so far as possible shall purchase material, supplies, and equipment, when needed and funds are available, from other services of the Government possessing material, supplies, and equipment no longer required because of the cessation of war activities. It shall be the duty of the heads of the several executive departments and other officials, before purchasing any of the articles described herein, to ascertain from the other services of the Government whether they have articles of the character described that are serviceable. And articles purchased by one service from another, if the same have not been used, shall be paid for at a reasonable price not to exceed actual cost, and if the same have been used, at a reasonable price based upon length of usage. The various services of the Government are authorized to sell such articles under the conditions specified, and the proceeds of such sales shall be covered into the Treasury as a miscellaneous receipt: *Provided*, That this section shall not be construed to amend, alter, or repeal the Executive order of December 3, 1918, concerning the transfer of office material, supplies, and equipment in the District of Columbia falling into disuse because of the cessation of war activities: * * * *Sec. 3, Act of July 19, 1919 (41 Stat. 232), making appropriations for sundry civil expenses.*

* * * *Provided further*, That the said Executive order shall continue in effect until June 30, 1922, without modification, except that proceeds from the transfer of appropriations thereunder shall be covered into the Treasury as miscellaneous receipts: *Provided further*, That the heads of the executive departments and independent establishments and the Commissioners of the District of Columbia shall cooperate with the Secretary of the Treasury in connection with the storage and delivery of material, supplies, and equipment transferred under the foregoing order: * * * *Act of Mar. 3, 1921 (41 Stat.*

1265), making appropriations for legislative, executive, and judicial expenses: Treasury Department.

See note to 798, ante.

Similar provision appears in previous appropriation acts.

Sec. 6, act of June 5, 1920 (41 Stat. 873), directs that the officials of the District of Columbia shall so far as possible purchase material and supplies from the various services of the Government of the United States.

800. Sales to the Post Office Department.—That the Postmaster General and other responsible officials, in expending appropriations contained in this Act, so far as possible shall purchase material, supplies, and equipment, when needed and funds are available, from the various services of the Government of the United States possessing material, supplies, and equipment no longer required because of the cessation of war activities. It shall be the duty of the Postmaster General and other officials, before purchasing any of the articles described herein, to ascertain from the other services of the Government whether they have articles of the character described that are serviceable. And articles purchased from other services of the Government, if the same have not been used, shall be paid for at a reasonable price not to exceed actual cost, and if the same have been used, at a reasonable price based upon length of usage. The various services of the Government are authorized to sell such articles to the Postal Service under the conditions specified and the proceeds of such sales shall be covered into the Treasury as a miscellaneous receipt. *Sec. 4, act of Feb. 28, 1919 (40 Stat. 1200), making appropriations for the service of the Post Office Department.*

801. Sales of Army stores to military schools.—That, under such regulations as the Secretary of War may prescribe, educational institutions to which an officer of the Army is detailed as professor of military science and tactics may purchase from the War Department for cash, for the use of their military students, such stores, supplies, matériel of war, and military publications as are furnished to the Army; such sales to be at the price listed to the Army with the cost of transportation added: *Provided*, That all moneys received from the sale of stores, supplies, matériel of war, and military publications to educational institutions to which an officer of the Army is detailed as professor of military science and tactics shall respectively revert to that appropriation out of which they were originally expended and shall be applied to the purposes for which they are appropriated by law. *Act of July 17, 1914 (38 Stat. 512).*

Provision for the issuance of ordnance and ordnance supplies and stores upon the giving of bonds for the care and safe-keeping thereof was made by R. S. sec. 1225, as amended, post, 866, 868, 2366.

The Secretary of War was authorized under such rules and regulations as he may prescribe to issue arms, tentage, and equipment to schools and colleges having a course of military training, prescribed by him, by sec. 35, act of June 4, 1920 (41 Stat. 780), 866, post.

802. Sale of stores to the Panama Canal.—* * * The Governor of the Panama Canal, so far as the expenditure of appropriations contained in this Act may be under his direction, shall purchase needed materials, supplies, and equipment from available surplus stocks of the War Department; * * * *Act of Mar. 3, 1921 (41 Stat. 1352), making appropriations for fortifications, etc., Panama Canal fortifications.*

803. Surplus incidental to vocational training.—* * * *Provided further*, That farm products and the increase in live stock (including fowls) which accrue as incidental to vocational training in agriculture and animal husbandry,

may be sold under such regulations as the Secretary of War may prescribe and the proceeds of such sales shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts. *Act of June 5, 1920 (41 Stat. 966), making appropriations for the support of the Army: Vocational training.*

804. Statement of sales submitted to Congress.—A detailed statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind shall be included in the appendix to the book of estimates. *R. S. 3672.*

Section thirty-six hundred and seventy-two is amended by inserting, in the third line, after the word "kind," the words "except materials, stores, or supplies sold to officers and soldiers of the Army, or to exploring or surveying expeditions authorized by law." *Act of Feb. 27, 1877 (19 Stat. 249), amending R. S. 3672.*

Hereafter the statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind shall be submitted to Congress at the beginning of each regular session thereof as a separate communication and shall not hereafter be included in the annual Book of Estimates. *Sec. 6, act of June 25, 1910 (36 Stat. 773), making appropriations for sundry civil expenses.*

Statements of all money arising from proceeds of public property or other sources, and of payments from such funds, must be submitted to the Secretary of the Treasury. See 269, ante.

805. Trade in captured or abandoned property.—All persons in the military or naval service of the United States are prohibited from buying or selling, trading, or in any way dealing in captured or abandoned property, whereby they shall receive or expect any profit, benefit, or advantage to themselves, or any other person, directly or indirectly connected with them; and it shall be the duty of such person whenever such property comes into his possession or custody, or within his control, to give notice thereof to some agent, appointed by virtue of this Title, and to turn the same over to such agent without delay. Any officer of the United States, civil, military, or naval, or any sutler, soldier, or marine, or other person who shall violate any provision of this section, shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisonment in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same. *R. S. 5513.*

Notes of Decisions.

Captured and abandoned property.—Property is captured on land when seized or taken from hostile possession by the military forces under orders from a commander-officer. Lamar v. Browne (1875), 92 U. S. 187, 193, 23 L. Ed. 650.

Where property was seized and sold, and the proceeds paid into the United States Treasury, under the captured and abandoned property act, the question whether the property was in fact captured or abandoned is not open to litigation in the courts, but the only remedy of the person claiming to be the owner is by a proceeding for the proceeds in the Court of Claims. Chamberlain v. Stanton (C. C. 1875) Fed. Cas. No. 2,579.

Surrender of captured personal property to former owner.—Where property of a disloyal person was seized by the military forces of the Government during the Civil War, and no proceedings by way of forfeiture, condemnation, sales, etc., were had concerning it as would divest his title or any portion of it, and transfer it to third persons or to the United States, then a subsequent pardon restores to him his plenary title. The Secretary of War has authority to surrender certain personal effects in his official possession, formerly belonging to Jefferson Davis, to the latter's personal representatives. 30 Op. Atty. Gen. 246.

806. Delaying or defrauding captor, etc., of prize property.—Whoever shall willfully do, or aid or advise in the doing, of any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property, or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States or any captor or claimant of such property, shall be fined not more than ten thousand dollars, or imprisoned not more than five years, or both. *Sec. 38, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1096).*

807. Certificate of loss due to an accountable officer.—That instead of forwarding to the accounting officers of the Treasury Department returns of public property intrusted to the possession of officers or agents, the Quartermaster-General, the Commissary-General of Subsistence, the Surgeon-General, the Chief of Engineers, the Chief of Ordnance, the Chief Signal Officer, the Paymaster-General of the Navy, the Commissioner of Indian Affairs, or other like chief officers in any Department, by, through, or under whom stores, supplies, and other public property are received for distribution, or whose duty it is to receive or examine returns of such property, shall certify to the proper accounting officer of the Treasury Department, for debiting on the proper account, any charge against any officer or agent intrusted with public property, arising from any loss, accruing by his fault, to the Government as to the property so intrusted to him. *Sec. 1, act of Mar. 29, 1894 (28 Stat. 47).*

That said certificate shall set forth the condition of such officer's or agent's property returns, that it includes all charges made up to its date and not previously certified, that he has had a reasonable opportunity to be heard and has not been relieved of responsibility; the effect of such certificate, when received, shall be the same as if the facts therein set forth had been ascertained by the accounting officers of the Treasury Department in accounting. *Sec. 2, act of Mar. 29, 1894 (28 Stat. 47).*

That the heads of the several Departments are hereby empowered to make and enforce regulations to carry out the provisions of this act. *Sec. 4, act of Mar. 29, 1894 (28 Stat. 47).*

That all laws or parts of laws inconsistent with the provisions of this act are hereby repealed. *Sec. 5, act of Mar. 29, 1894 (28 Stat. 47).*

Notes of Decisions.

Effect of certificate under this act.—A certificate of the proper auditor, authenticated in accordance with R. S. sec. 886, ante, 364, showing a balance audited against an officer on a certificate made under this act makes a prima facie case in a suit by the Government against him for the value of property unaccounted for, both as to the property and its value, charged at its cost to the Government. U. S. v. Du Perow (D. C. 1913), 208 Fed. 995. (See U. S. v. Patrick, 73 Fed. Rep. 800.)

808. Accountable officer to have opportunity to relieve himself from liability.—That the manner of making property returns to or in any administrative bureau or department, or of ascertaining liability for property, under existing laws and regulations, shall not be affected by this Act, except as provided in section one; but in all cases arising as to such property so intrusted the officer or agent shall have an opportunity to relieve himself from liability. *Sec. 3, act of Mar. 29, 1894 (28 Stat. 47).*

Secs. 1303 and 1304, R. S., post, 1615, 1616, require that deficiency in or damage to any article of military supplies and repairs or damages to arms, etc., due to negligence

shall be charged against the delinquent, and that the cost or value thereof shall be deducted from his pay.

For regulations relative to damaged, lost, or destroyed military property, see paragraphs 682–692, Army Regulations of 1913.

809. Regulations by the Quartermaster General for accounting.—The Quartermaster-General, under the direction of the Secretary of War, shall prescribe and enforce a system of accountability for all quartermaster's supplies to the Army or to officers, seamen, and marines. *R. S. 1139.*

Section eleven hundred and thirty-nine is amended by adding at the end of the section the following: "And he shall account to the Secretary of War at least once in three months for all property and money that may pass through his hands, or the hands of his subordinate officers." *Act of Feb. 27, 1877 (19 Stat. 242), amending R. S. 1139.*

Provided further, That hereafter the accounting for Army supplies or property and the fixing of responsibility therefor shall be according to such regulations as may be prescribed by the Secretary of War. *Act of Aug. 29, 1916 (39 Stat. 635.*

Returns to the Quartermaster General, of clothing and camp equipage, by officers receiving such supplies, were required by R. S. 1220, post, 876.

810. Loss of vouchers or company books.—Section two hundred and twenty-five is amended by adding at the end of the section the following: "In settling the accounts of the commanding officer of a company for clothing and other military supplies, the affidavit of any such officer may be received to show the loss of vouchers or company books, or any matter or circumstance tending to prove that any apparent deficiency was occasioned by unavoidable accident or lost in actual service, without any fault on his part, or that the whole or any part of such clothing and supplies had been properly and legally used and appropriated; and such affidavit may be considered as evidence to establish the facts set forth, with or without other evidence, as may seem to the Secretary of War just and proper under the circumstances of the case. *Act of Feb. 27, 1877 (19 Stat. 241), amending R. S. 225.*

811. Embezzlement, stealing, etc.—Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. *Sec. 47, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1097).*

Notes of Decisions.

See sec. 812, post, and notes thereunder.

Military property.—For stealing, embezzlement, etc., as military offense, see A. W. 94, ch. 52, post.

Embezzlement.—Embezzlement within the statute is the fraudulent appropriation of property by a person to whom the same has been intrusted or into whose hands it has lawfully come. McKnight *v.* U. S. (1899), 97 Fed. 208, 215, 38 C. C. A. 115.

Indictment.—Where an indictment charges, under this section, the embezzlement of a certain sum of money, belonging to the United States, by defendant, a post office employee, if the words charging defendant with being such an employee are material, it must be averred that the money embezzled came into his hands by virtue of such employment, since otherwise the allegation of employment is meaningless, and may be misleading. Moore *v.* U. S. (1895), 16 Sup. Ct. 294, 295, 160 U. S. 268, 40 L. Ed. 422.

Where in such indictment the words charging defendant's employment are treated as surplusage, the property embezzled must be identified with particularity, a mere averment that it was a certain amount not being sufficient. Id.

In an indictment founded on this section which alleges that the accused was

an assistant in a post office of the United States, and that a certain sum of money belonging to the United States came into his hands in his capacity as such assistant, which he thereafter embezzled, a general description of the money as consisting of so many dollars and cents is sufficient. McBride v. U. S. (1900), 101 Fed. 821, 42 C. C. A. 38.

An indictment under this section, which charges defendant with stealing money "belonging to" the United States, sufficiently avers the ownership of the property stolen. Dimmick v. U. S. (1905), 135 Fed. 257, 70 C. C. A. 141.

In an indictment under act Mar. 3, 1825, sec. 16, punishing any one who shall "fraudulently embezzle," etc., the word "feloniously" will not supply the place of "fraudulently." U. S. v. Forrest (C. C. 1826), Fed. Cas. No. 15,131.

An indictment under this section charging defendant with the embezzlement of money of the United States is bad where it does not allege that he was a clerk or employee of the Government, or that the money came lawfully into his possession by virtue of some employment. U. S. v. Allen (D. C. 1906), 150 Fed. 152.

Evidence.—Where defendant charged with larceny of money from a mint while employed therein as clerk, to account for his presence there at unusual hours, testified that he went to check up the pay rolls, it was competent for the Government to show the length of time required to perform such work. Dimmick v. U. S. (1905), 135 Fed. 257, 70 C. C. A. 141.

While evidence to show motive is not essential to conviction in a criminal prosecution, where the guilt of defendant is clearly established it is admissible; and in a prosecution for larceny of money, where the evidence was largely circumstantial, it was not error to admit evidence to show that defendant was in debt at the time as tending to some extent to show a motive for the crime. Id.

It is not necessary to a conviction for larceny of money that the money, or any part of it, should be shown to have been in defendant's possession. Id.

Circumstantial evidence considered, and held sufficient to sustain a conviction for larceny. Id.

812. Embezzlement of military stores, etc.—Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in the preceding section. *Sec. 36, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1096).*

The "preceding section" above referred to is found herein partly in 437, ante, and partly in 816, post.

This section has been held unenforceable, in several instances, because of the indefinite nature of the penal clause. See, for example, the first case cited in the note below. In view of these decisions, the Attorney General directed, by Circular No. 308, of 1912, that no more prosecutions be brought under this section.

Notes of Decisions.

Section void.—This section is void for uncertainty. The "preceding section," to which reference is made for the penalty, prescribes two penalties of very different degrees of severity, and it is impossible to determine the legislative intent as to punishment therefrom. Holmes v. U. S. (C. C. A. 1920), 267 Fed. 529; writ of certiorari denied (1920), 65 L. Ed. 45; 41 Sup. Ct. 13.

Indictment.—The property embezzled must be identified with particularity, a mere averment that it was a certain amount being insufficient. Moore v. U. S. (1895), 160 U. S. 268.

A count in an indictment charging that defendant did willfully, unlawfully, and feloniously knowingly apply to his own use "certain property of the United States" furnished for the military service, without describing the property, held insufficient to state an offense under this section. Edwards v. U. S. (C. C. A. 1920), 266 Fed. 848.

In an indictment under this section, for unlawfully selling property of the United States furnished for use of the Army, it is not necessary to state how the property came into possession of the defendants. Horowitz v. U. S. (C. C. A. 1919), 263 Fed. 48.

Intent.—A defendant who signed an application blank for enlistment, stating that he had never applied for enlistment before, and thereby secured subsistence and transportation, which he used for the purpose for which it was issued, to take him to the re-

cruiting depot, where he was rejected because of a previous dishonorable discharge from the Army, is not guilty of an offense under this section. U. S. *v.* Buchanan (D. C. 1917), 238 Fed. 877.

A charge against a defendant of applying military property to his own use, under this section, is equivalent to a charge of receiving stolen property, and defendant has the right to explain his possession, and in doing so to testify as to what was said to him by the person from whom he received the property. Grier *v.* U. S. (C. C. A. 1919), 262 Fed. 407.

Evidence.—Where, on a trial for larceny from the United States of two kegs and several cans of paint taken from a fort, it appears that one of the kegs produced in court is so lettered as to indicate Government ownership and bears the number 402, and an officer of the Quartermaster's Department stationed at the fort testifies to having received from an Army depot an invoice bearing that number of two kegs and several cans of paint and he identifies the lettered keg produced by the fact that the number on it corresponds with the number on the invoice, the testimony of the officer that the lettered keg belongs to the United States is competent, especially where it appears that he is specially qualified to testify as to the significance of the marking. Jackson *v.* U. S. (1909), 34 App. D. C. 1.

Title.—Under a contract between the United States and one of the defendants, for the manufacture of leather jerkins, which required the United States to furnish the linings, title thereto did not pass, so that the contractor and a confederate who conspired to obtain linings from the United States in excess of needs and sell the same, were guilty of a violation of this section and sec. 37, Criminal Code. Borman *v.* U. S. (C. C. A. 1919), 262 Fed. 26.

Clothing issued to inmates of Soldiers' Home.—Inmates of the National Military Home at Dayton, Ohio, are not in the military service of the United States, and clothing issued to them is not used in such service. So held on demurrer to an indictment, under this section, charging the defendant with applying to his own use an overcoat which had been issued to an inmate of such home. U. S. *v.* Murphy (C. C. 1881), 9 Fed. 26.

Military offense.—For the corresponding military offense, see A. W. 94, post, ch. 52.

813. Robbery, larceny, etc., of public property.—Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both. *Sec. 46, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1097).*

Notes of Decisions.

Stealing stamps.—Postage stamps remaining in the possession of the United States unissued are personal property belonging to the United States and may be the subject of larceny under this section. Jolly *v.* U. S. (1898), 18 Sup. Ct. 624, 625, 170 U. S. 402, 42 L. Ed. 1085.

The offense is complete where accused feloniously took and carried away stamps, the property of the United States without reference to whether he broke and entered or attempted to break and enter any post office with intent to commit this offense. Anderson *v.* Moyer (D. C. 1912), 193 Fed. 499.

Blank checks.—Six blank checks, with stubs attached, each of the value of 1 cent, the personal property of the United States, constituted "property," the subject of larceny, under this section. Keller *v.* U. S. (1909), 168 Fed. 697, 94 C. C. A. 368.

Goods delivered to workman for special purpose.—A workman is guilty of larceny where goods delivered to him for a special purpose are taken away by him with intent to steal them. U. S. *v.* Strong (C. C. 1821), Fed. Cas. No. 16,411; Same *v.* Clew (C. C. 1827), Id. 14,819.

Jurisdiction of State court.—Under R. S. sec. 711, giving Federal courts exclusive jurisdiction of all crimes and offenses cognizable under the authority of the United States, and sec. 5456 (embodied herein), declaring that every person who robs another of any kind or description of personal property belonging to the United States shall be punished, etc., an indictment charging the felonious entry of the private office of A., from which defendant feloniously stole certain moneys, postage stamps, and other valuable papers and checks, was not within the jurisdiction of the State court, if the property stolen was in fact the property of the United States. Ex parte Roach (D. C. 1908), 166 Fed. 344.

Indictment.—This section covers two distinct offenses, to wit, the robbing another of personal property belonging to the

United States, and the felonious taking and carrying away the same, so that an indictment for the latter offense need not charge a forcible taking. Jolly v. U. S. (1898), 18 Sup. Ct. 624, 625, 170 U. S. 402, 42 L. Ed. 1085.

814. Receiving stolen public property.—Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender. *Sec. 48, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1098).*

Notes of Decisions.

Unconstitutionality of part of statute.—So much of act Mar. 3, 1875 (18 Stat. 479, sec. 2), as provides that the judgment of conviction against the principal in the crime of embezzlement or larceny of property of the United States shall be evidence in the prosecution against a receiver thereof that the property was embezzled or stolen is in violation of Const. Amend. 6, declaring that an accused shall be confronted with the witnesses against him. Kirby v. U. S. (1899) 19 Sup. Ct. 574, 577, 174 U. S. 47, 43 L. Ed. 890.

Character of property as stolen.—Stolen postage stamps sent by the thief to defendant were delivered up to a postmaster on written order of the thief, but were subsequently allowed to go forward, and to be delivered to defendant. Held, that they lost their character as stolen property. U. S. v. De Bare (D. C. 1875), Fed. Cas. No. 14,935.

Felony.—Whether receiving property of the United States with the intent to convert the same, knowing it to have been stolen, is a felony, is a question of law, depending upon the punishment permitted by the United States statutes, of which a State court will take judicial notice. In re Kirby (1897), 73 N. W. 95, 10 S. D. 338.

Indictment.—An indictment under this section charging that the property was owned by the United States when it was stolen, and that defendant feloniously received such property knowing it to have been feloniously stolen, sufficiently alleges the United States' ownership when it was received by defendant, and need not aver the name of the person from whom the defendant received it or that such name was unknown to the grand jurors. Kirby v. U. S. (1899), 19 Sup. Ct. 574, 579, 174 U. S. 47, 43 L. Ed. 890.

815. Sale, barter, etc., of clothing, arms, etc., furnished to soldiers.—The clothes, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accouterments, so furnished, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized to receive the same. The possession of any such clothes, arms, military outfits, or accouterments by any person not a soldier or officer of the United States shall be presumptive evidence of such a sale, barter, exchange, pledge, loan, or gift. *R. S. 3748.*

Similar provisions were made by R. S. 1242, post, 817.

Notes of Decisions.

See also notes under 816, post.

Construction.—This section is not a criminal statute. It is a prohibitive statute merely. U. S. v. Smith (C. C. 1907), 156 Fed. 859.

Title to clothing issued.—The Government retains title to military equipments supplied to a soldier in the discharge of his military duties, the goods being regarded as public property whether re-

maining in a public depot or in the possession of the individual soldier, and this notwithstanding the soldier is allowed to retain such articles of clothing as he has then in use on the expiration of his terms of service. Lobosco *v.* U. S. (1911), 183 Fed. 742, 106 C. C. A. 476.

The title to clothing issued to soldiers remains in the United States, and such clothing, when issued, is public property under R. S. sec. 5438, making it a criminal offense for any person to knowingly purchase or receive in pledge from a soldier any public property. U. S. *v.* Hart (D. C. 1906), 146 Fed. 202, 203.

Clothing issued to a soldier becomes his individual property and ceases to belong to the United States, and a person receiving it in pledge from a soldier is punishable solely by seizure of the articles under this section, and is not criminally liable under R. S. sec. 5438. U. S. *v.* Michael (D. C. 1907), 153 Fed. 609, 612.

Presumption.—Evidence that the pistol was found in defendant's possession was sufficient to sustain a verdict of guilty under this section and R. S. 1242, post 817, which make such possession by one not an officer or soldier of the United States prima facie evidence that the property was obtained in violation of the statute. Bolland *v.* U. S. (C. C. A. 1916), 238 Fed. 529.

816. Purchase or receipt in pledge of property issued to a soldier.— * * * And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than $500 or imprisoned not more than two years, or both. *Sec. 35, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1095), as amended by the act of Oct. 23, 1918 (40 Stat. 1016).*

This part of sec. 35 (36 Stat. 1095), before it was amended, was as follows: "Whoever shall knowingly purchase or receive in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier, sailor, officer, or person, under a clothing allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be fined not more than five hundred dollars, and imprisoned not more than two years."

Notes of Decisions.

Constitutionality.—This section, which authorizes the imposition of a maximum fine of $500 and imprisonment for not more than two years upon a civilian for knowingly purchasing or receiving in pledge any public property from a soldier, is not unconstitutional. Ontal *v.* U. S. (1911), 188 Fed. 310, 110 C. C. A. 288.

Indictment.—It is not necessary, in charging illegal purchases from the Quartermaster Department during certain months, that purchases on different dates be set forth in separate counts; an indictment including more than one offense in the same count is good. Eisenberg *v.* U. S. (C. C. A. 1919), 261 Fed. 598.

An indictment for knowingly purchasing, "during the months of April and May, 1918," from soldiers in the Quartermaster Department, having no right to sell the same, "approximately 21 sacks of oats," the exact quantity being unknown, the property of the United States, furnished for the use of the Army, held sufficiently specific as to date and description of property. Id.

Purchasing or receiving in pledge from soldiers or sailors.—The circumstance that in reenacting R. S. sec. 5438, in this section of the criminal code Congress added the words "whether furnished to the soldier, sailor, officer or person under a clothing allowance or otherwise" is a mere matter of precaution in view of conflicting decisions on the subject as to the status of articles issued to soldiers or sailors under their clothing allowance. Lobosco *v.* U. S. (1911), 183 Fed. 742, 106 C. C. A. 476.

Under secs. 815, ante, and 817, post, prohibiting the purchase, sale, pledge, loan, or gift by a soldier of any of his clothing, arms, military outfit and accouterments, the Government in supplying the soldier must part with equipments suitable and necessary for the discharge of his military duties retains title to the same; it being regarded as public property, whether remaining in a public depot or in the possession of the individual soldier, and this notwithstanding the soldier is allowed to retain such articles of clothing as he has worn in use on the expiration of his term of service. Id.

Secs. 815, ante and 817, post, prohibit the gift, sale, or exchange or purchase of any clothing, arms, military outfit, and accouterments of a soldier or sailor, and R. S. sec. 5438 (embodied herein), declares that every person who knowingly purchases or receives in pledge for any obligation or indebtedness of any soldier, officer, sailor or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, from a person not having the lawful right to pledge or sell same, shall be imprisoned, etc. Held, that the offense denounced is committed if the person purchases clothing or equipment knowingly from a soldier or sailor employee, in military service; the Government not being required to show, in addition, that defendant had knowledge that the soldier or sailor selling the articles in question did not have the lawful right to do so. Id.

Under this section, making it an offense for any person to knowingly purchase or receive in pledge from a soldier any arms, equipment, ammunition, clothing, stores, or other public property, it is not material that the clothing purchased by accused from certain marines was not a part of their equipment, but was furnished to them under their clothing allowance. Id.

Clothing furnished to a soldier by the United States under a clothing allowance does not become his private property which he has a right to dispose of while in the service, but is "public property" within this section, which makes it a criminal offense to knowingly purchase or receive in pledge from any soldier "any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier * * * under a clothing allowance or otherwise, such soldier * * * not having the lawful right to pledge or sell the same." Ontai v. U. S. (1911), 189 Fed. 310, 110 C. C. A. 280.

In that provision of R. S. sec. 5438 (embodied herein), which makes it a criminal offense if any one "knowingly" purchases or receives in pledge from any soldier clothes or other public property, such soldier not having the lawful right to pledge or sell the same, the word "knowingly" applies only to the question whether a person purchasing or receiving such property in pledge knew, or should have known from facts which put him on inquiry, that the person offering the same was a soldier. U. S. v. Kopik (C. C. 1907), 155 Fed. 919.

It is not a defense to a prosecution, under such statute, for receiving property in pledge from a soldier still in the service, that such property consisted of clothing which he had paid for out of his clothes allowance, or which had been charged against it. Id.

R. S. sec. 5438 (embodied herein), applies to persons who knowingly purchase or receive in pledge any of the kinds of property described therein from a soldier, officer, or sailor in the service of the United States. The elements of the crime are guilty knowledge and the actual purchasing of and receiving in pledge the kind of property named and receiving it from a person in the military service of the United States. All those things are necessary to be proven in order to make it a criminal case. The guilty knowledge that is the necessary element of the crime is not knowledge that the act is unlawful, but knowledge must be knowledge of the facts, knowledge that the property offered for sale is the military stores or property of the United States. U. S. v. Smith (C. C. 1907), 156 Fed. 859, 861.

In a prosecution under R. S. sec. 5438 (embodied herein), for knowingly purchasing in pledge from a soldier, arms, clothing or other public property, the jury may consider the possession of such property by defendant as prima facie evidence that it was sold or pledged to him, but not as prima facie evidence that it was taken by him with guilty knowledge. Id.

The seventeenth article of war (now the eighty-fourth article) provides that any soldier who sells, or through neglect loses or spoils, his horse, arms, clothing, or accouterments shall be punished as a court-martial shall adjudge. Sec. 815, ante, declares that clothes, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away, and that no person not a soldier or duly authorized officer of the United States who has possession of any such clothes, etc., shall have any

right, title, or interest therein, but the same may be seized and taken wherever found. Held, that clothing issued to soldiers while in the military service remained the property of the United States, within R. S. sec. 5438 (embodied herein), providing that every person who knowingly purchases or receives in pledge from any soldier any clothes, equipment, or other public property, which the person selling or pledging the same has no right to sell, shall be imprisoned, etc. U. S. v. Hart (D. C. 1906), 146 Fed. 202.

The title to clothing issued to soldiers remains in the United States, and such clothing when issued is public property under R. S. sec. 5438 (embodied herein), making it a criminal offense for any person to knowingly purchase or receive in pledge from a soldier any public property. Id.

The receiving in pledge, by a civilian from a soldier, of clothing issued to the latter during the term of his enlistment, does not constitute a penal offense, within R. S. sec. 5438 (embodied herein). U. S. v. Michael (D. C. 1907), 153 Fed. 609.

Clothing issued to a soldier becomes his individual property and ceases to belong to the United States, and a person receiving it in pledge from a soldier is not criminally liable under R. S. sec. 5438 (embodied herein); the sole punishment for the act being the seizure of the articles of which he is pledgee under this section. Id.

An indictment for purchasing of a soldier "his arms" can only be sustained by showing that the soldier was in lawful possession of the arms, or had a special bailment of them. U. S. v. Brown (C. C. 1816), Fed. Cas. No. 14669.

The confession of a defendant that he received a pistol in pledge from a soldier was sufficiently corroborated to justify the submission of the case to the jury by evidence showing that the pistol was issued to a soldier, and that it was found in possession of the defendant, whose place of business was very near the reservation on which such soldier was stationed. Bolland v. U. S. (C. C. A. 1916), 238 Fed. 529.

Punishment.—The imposition by this section of a maximum fine of $500 and imprisonment for not more than two years upon a civilian for knowingly purchasing or receiving in pledge any public property from a soldier, is not unconstitutional as providing for an excessive fine or a cruel and unusual punishment. Ontai v. U. S. (1911), 188 Fed. 310, 110 C. C. A. 288.

To warrant a conviction under R. S. sec. 5438 (embodied herein), for knowingly purchasing or receiving in pledge from a soldier in the military service of the United States arms, clothing, or other public property, such soldier not having the lawful right to sell or pledge the same, it must be proven beyond a reasonable doubt that defendant actually purchased or received in pledge from a soldier the property described in the indictment with knowledge that the seller or pledgor was at the time a soldier in the service of the United States, and that the property was military property such as the Government issues, but it is not necessary to prove that the soldier had no lawful right to sell or pledge such property because the same is expressly prohibited by secs. 815, ante, and 817, post, and the jury may in a proper case give effect to the provisions of such sections making possession of such property by a civilian presumptive evidence that the same was sold, bartered, or pledged in violation of such prohibition. U. S. v. Smith (C. C. 1907), 156 Fed. 859.

In a criminal prosecution for purchasing any of the United States supplies from a soldier, the burden is not on the United States to show that the soldier had no right to sell the property, as this section explicitly provides that he shall not sell such property. Id.

Since in a prosecution for knowingly purchasing clothing from certain marines in the Government service, in alleged violation of this section, prohibiting any person from knowingly making such purchases, etc., the Government was required to prove guilty knowledge, evidence of the commission of other similar offenses by accused than those charged in the indictment was admissible. Lobosco v. U. S. (1911), 183 Fed. 742, 106 C. C. A. 476.

Articles of war.—The amendment of Oct. 23, 1918, to the above section, while relating to the same subject matter as A. W. 94, post, ch. 52, and applying both to civilians and persons in the military or naval service, does not amend or repeal such article, nor deprive courts-martial of jurisdiction in respect to persons in the military and naval service. U. S. v. Barry (D. C. 1919), 260 Fed. 291.

817. Arms and accouterments in the possession of persons not soldiers.—The clothing, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and the possession of any such property by any person not a soldier or officer of the United States shall be prima-facie evidence of such

sale, barter, exchange, pledge, loan, or gift. Such property may be seized and taken from any person, not a soldier or officer of the United States, by any officer, civil or military, of the United States, and shall, thereupon, be delivered to any quartermaster or other officer authorized to receive the same. *R. S. 1242.*

Notes of Decisions.

Operation and effect in general.—This section is not a criminal statute. It simply prohibits the disposition of the military stores of the United States, except as they are issued to soldiers. U. S. *v.* Smith (C. C. 1907), 156 Fed. 859.

Under this section, construed in connection with secs. 437, and 815 ante, the Government, in supplying a soldier with an equipment, retains title to the same, it being regarded as public property, whether remaining in the public depot or in the possession of the individual soldier, and this notwithstanding the soldier is allowed to retain such articles of clothing as he has then in use on the expiration of his term of service. Lobosco *v.* U. S. (1911), 183 Fed. 742, 106 C. C. A. 476. See, also, Ontai *v.* Same (1911), 188 Fed. 310, 110 C. C. A. 288; U. S. *v.* Hart (D. C.), 146 Fed. 202; Same *v.* Michael (D. C. 1907), 153 Fed. 609.

CHAPTER 21.

SPECIFIC APPROPRIATIONS AND STORES.

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818. Contingent expenses of the military establishment.—The Secretary of War shall lay before Congress, at the commencement of each regular session, a statement of all contracts for supplies or services which have been made by him or under his direction during the year preceding, and also a statement of the expenditures of the moneys appropriated for the contingent expenses of the military establishment. *R. S. 229.*

That so much of section two hundred and twenty-nine Revised Statutes of the United States as requires the Secretary of War to lay before Congress at the commencement of each regular session a statement of all contracts for supplies or services which have been made by him or under his direction during the year preceding, * * * be, and the same are hereby, repealed. *Act of Mar. 2, 1895 (28 Stat. 787), amending R. S. 229.*

819. Proceeds from the operation of public utilities.—That, in case of actual or threatened hostilities, any proceeds received from the operation of a public utility, in connection with engineer operations in the field overseas, shall be available for the purpose of such utility until the close of the fiscal year following that in which the proceeds are received, and a detailed report of such proceeds and application thereof shall be rendered to Congress on forms conforming as far as practicable to those used by American Companies in reports to the Interstate Commerce Commission: * * * *Chap. XX, act of July 9, 1918 (40 Stat. 893), making appropriations for the support of the Army.*

820. Proceeds from sales of Engineer material.— * * * *Provided*, That the provision of the Act of March twenty-third, nineteen hundred and ten, making moneys arising from the disposition of serviceable quartermaster material available for the purposes of the appropriation throughout the fiscal year following

that in which the disposition was affected, is hereby extended to apply to material supplied to the Army by the Engineer Department. *Chap. XX, act of July 9, 1918 (40 Stat. 893), making appropriations for the support of the Army.*

For the provision of the act of Mar. 23, 1910, mentioned above, see post, 903.

821. Insufficient balance of an Engineer fund.—Hereafter whenever pressing obligations are required to be paid by a disbursing officer of the Engineer Department and there is an insufficient balance to his official credit under the proper appropriation or appropriations for the purpose, he is authorized to make payment from the total available balance to his official credit, provided sufficient funds under the proper appropriation or appropriations have been allotted by the Chief of Engineers for the expenditure. When such disbursements are made the accounts of the disbursing officer shall show the charging of the proper appropriations, the balances under which will be adjusted by the disbursing officer on receipt of funds or by the accounting officers of the Treasury. *Act of Mar. 3, 1911 (36 Stat. 1056), making appropriations for the support of the Army: Engineer Department.*

822. Settlement of accounts of the Engineer Department.—Hereafter in the settlement of transactions between appropriations under the Engineer Department, or between the Engineer Department and another office or bureau of the War Department, or of any other executive department of the Government, payment therefor shall be made by the proper disbursing officer of the Corps of Engineers or of the office, bureau, or department concerned. *Act of Apr. 27, 1914 (38 Stat. 369), making appropriations for the support of the Army.*

823. Expenditures for fortifications, etc.—It shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for fortifications and other works of defense, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe; and such contracts shall be made with the lowest responsible bidders, accompanied by such securities as the Secretary of War shall require, conditioned for the faithful prosecution and completion of the work according to such contract. *Act of June 25, 1906 (34 Stat. 463), making appropriations for fortifications, etc.*

Notes of Decisions.

Liability of assignee of contract for fortifications and his sureties.—See U. S. v. Tillotson (C. C. 1823) Fed. Cas. No. 16524; (1820) 1 Op. Atty. Gen. 402.

824. Engineer funds used for temporary constructions.—* * * *Provided further*, That so much of this appropriation as is necessary to provide facilities for Engineer training of troops may be expended for military construction work of a temporary character at camps and cantonments and in training areas, for training purposes only. *Act of June 5, 1920 (41 Stat. 970), making appropriations for the support of the Army: Engineer operations in the field.*

825. Disbursements by a constructing engineer.—It shall be the duty of the engineer superintending the construction of a fortification, or engaged about the execution of any other public work, to disburse the moneys applicable to the same; but no compensation shall be allowed him for such disbursement. *R. S. 1153.*

As to the relation between constructing engineers and post commanders see pars. 1503-1505, A. R., 1913, and G. O. No. 2, War Department, 1914.

Notes of Decisions.

Repeal.—This section was not repealed expressly or by implication by act Mar. 3, 1875, sec. 4, (18 Stat. 415). (1889) 19 Op. Atty. Gen. 425.

Disbursement of moneys.—This section does not seem to prevent an officer of the Engineer Corps, other than the engineer superintending the construction, etc., from being directed and authorized to disburse the moneys for the work under construction. The "superintendence" of a work means its oversight, direction, care, or inspection, and does not imply the power of contracting for the work or paying the hands. (1863) 9 Op. Atty. Gen. 463.

Compensation for disbursement.—The lieutenant colonel of the Corps of Engineers, in charge of the construction of the State, War, and Navy Building, who was directed by the Secretary of War, acting under act Mar. 3, 1875 (18 Stat. 415), to disburse the appropriations made from time to time for that building, is not entitled to compensation at the rate of three-eighths of 1 per cent upon the amount of money disbursed by him, said claim being controlled by the provisions of this section. (1889) 19 Op. Atty. Gen. 425.

826. Engineer supplies.—The Chief of Engineers is authorized, with the approval of the Secretary of War, to regulate and determine the number, quality, form, and dimensions of the necessary vehicles, pontoons, tools, implements, arms, and other supplies for the use of the battalions of engineer soldiers. *R. S. 1152.*

Whenever the Secretary of War invites proposals for any works or for any material or labor for any works separate proposals and separate contracts for each work, and for each class of material or labor for each work, are required by R. S., sec. 3717, ante, 747.

The Secretary of War was required to give preference to American material in all contracts for material for any public improvement, by sec. 2, act of Mar. 3, 1875, ante, 779.

Notes of Decisions.

Powers of Chief of Engineers.—The Chief of Engineers of the Army is not and never has been vested with authority to grant licenses for the erection of wharves along the river front of the city of Washington, D. C. (1886) 18 Op. Atty. Gen. 441.

827. Appropriations for support of the Signal Corps.—That on and after July first, eighteen hundred and ninety-one, the appropriations for the support of the Signal Corps of the Army shall be made with those of other staff corps of the Army, * * *. *Sec. 9, act of Oct. 1, 1890 (26 Stat. 654).*

Provisions for the sale of surplus maps and publications of the Signal Office, the money received therefrom to be applied to the expenses of the Signal Service, were made by R. S. sec. 227.

828. Proceeds from sales of Signal Corps supplies.—Hereafter all moneys arising from the disposition of serviceable Signal Corps supplies and equipment, authorized by law and regulations, shall constitute one fund on the books of the Treasury Department and be available during the fiscal year in which their disposition was effected and the year following, for the replacement of Signal Corps supplies and equipment. *Act of Apr. 27, 1914 (38 Stat. 353), making appropriations for the support of the Army.*

The Chief Signal-Officer may cause to be sold any surplus maps or publications of the Signal-Office, the money received therefor to be applied toward defraying the expenses of the signal-service; and an account of the same shall be rendered in each annual report of the Chief of the Signal-Service. R. S. 227.

The above section, while never specifically repealed, has come to be regarded as of little importance, since, under the act of Oct. 1, 1890 (26 Stat. 653), the Weather Bureau has taken over civilian duties formerly performed by the Signal Corps.

829. Settlement of accounts of the Signal Corps.— * * * *Provided further*, That hereafter in the settlement of transactions between appropriations under the Signal Corps, or between the Signal Corps and another office or bureau of the War Department, or of any other executive department of the Government, payment therefor shall be made by the proper disbursing officer of the Signal Corps, or of the office, bureau, or department concerned. *Act of Aug. 29, 1916 (39 Stat. 622), making appropriations for the support of the Army.*

830. Disbursement of Signal Corps funds.—*Provided further*, That all appropriations made for the support of the Signal Service or Corps shall be disbursed under the direction of the Secretary of War, by the regularly bonded officer who is now and may be hereafter detailed by the Secretary of War for duty as disbursing officer of the Signal Service. *Act of Aug. 30, 1890 (26 Stat. 399), making appropriations for sundry civil expenses.*

A further proviso following that set forth here, that all accounts of such disbursements should be audited and adjusted by the Third Auditor and Second Comptroller of the Treasury, was superseded by the provisions changing the duties of the officers and the system of accounting in the Treasury of the Dockery Act of July 31, 1894, ante, 267, 260, 312, 331.

This section may be regarded as superseding previous provisions that appropriations for the Signal Service, under the War Department, should be expended under the direction of the Secretary of War, act Aug. 7, 1882, sec. 1 (22 Stat. 319); and that no money should be paid out of appropriations for the Army, for the Signal Service, other than the pay of officers, detailed for service therein, except sums specifically appropriated therefor, act Mar. 3, 1885 (23 Stat. 357).

831. Returns of Signal Service property.—That, from and after the passage of this act, every officer of the Signal Corps, every noncommissioned officer or private of the Signal Corps, and all other officers, agents, or persons who now have in possession, or may hereafter receive or may be intrusted with any stores or supplies, shall, quarterly or more often, if so directed, and in such manner and on such forms as may be prescribed by the Chief Signal Officer, make true and correct returns to the Chief Signal Officer of all Signal Service property and all other supplies and stores of every kind received by or intrusted to them and each of them, or which may, in any manner, come into their and each of their possession or charge. * * * *Act of Oct. 12, 1888 (25 Stat. 552).*

Provided, That the Act of Congress approved October twelfth, eighteen hundred and eighty-eight, entitled "An Act to make enlisted men of the Signal Corps responsible for public property," be amended so as to read that property returns of the Signal Corps shall be rendered semiannually or more often. *Act of Apr. 27, 1914 (38 Stat. 353), amending act of Oct. 12, 1888 (25 Stat. 552).*

832. Telegraph and telephone.—Telegraph and telephone systems: Purchase, equipment, operation, and repair of military, telegraph, telephone, radio, cable, and signaling systems; * * * telephone apparatus, including rental and payment for commercial, exchange, message, trunk line, long distance, and leased line telephone service at or connecting any post, camp, cantonment, depot, arsenal, headquarters, hospital, aviation station, or other office or station of the Army, excepting local telephone service for the various bureaus of the War Department in the District of Columbia, and toll messages pertaining to the office of the Secretary of War; electric time service; the rental of commercial telegraph lines and equipment and their operation at or connecting any post, camp, cantonment, depot, arsenal, headquarters, hospital, aviation station, or other office or station of the Army, but not including payment for individual telegraph messages trans-

mitted over commercial lines; * * * *Act of June 5, 1920 (41 Stat. 952), making appropriations for the support of the Army: Signal Service.*

Similar provision appears in previous appropriation acts.

833. Commercial telephone service at Coast Artillery posts.—For providing commercial telephone service for official purposes at Coast Artillery posts, $10,000. *Act of July 11, 1919 (41 Stat. 108), making appropriations for the support of the Army: Signal Service.*

Similar provision appears in previous appropriation acts.

834. Forwarding charges on telegrams.—*Provided*, That hereafter the Signal Corps, in its operation of military telegraph lines, cables, or radio stations, is authorized in the discretion of the Secretary of War, to collect forwarding charges due connecting commercial telegraph or radio companies for the transmission of Government radiograms or telegrams over their lines, and to this end, under such regulations as may be prescribed by the Secretary of War, it can present vouchers to disbursing officers for payment or file claims with auditors of the Treasury Department for the amount of such forwarding charges. *Act of May 12, 1917 (40 Stat. 43), making appropriations for the support of the Army: Signal Service.*

835. Washington-Alaska military cable and telegraph system.—For the purpose of connecting headquarters, Department of Alaska, at Saint Michael, by military telegraph and cable lines with other military stations in Alaska, four hundred and fifty thousand five hundred and fifty dollars: *Provided*, That commercial business may be done over these military lines under such conditions as may be deemed, by the Secretary of War, equitable and in the public interests, all receipts from such commercial business shall be accounted for and paid into the Treasury of the United States, and that the sum hereby appropriated shall be immediately available: * * * *Act of May 26, 1920 (41 Stat. 906).*

Provision for extensions and betterments has been made annually in acts for the support of the Army. (See 41 Stat. 952).

836. Willful injury to telegraph systems, etc.—Whoever shall willfully or maliciously injure or destroy any of the works, property, or material of any telegraph, telephone, or cable line, or system, operated or controlled by the United States, whether constructed or in process of construction, or shall willfully or maliciously interfere in any way with the working or use of any such line, or system, or shall willfully or maliciously obstruct, hinder, or delay the transmission of any communication over any such line, or system, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both. *Sec. 60, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1099).*

837. Patents on aircraft.—To enable the Secretary of War and the Secretary of the Navy to secure by purchase, condemnation, donation, or otherwise, such basic patent or patents as they may consider necessary to the manufacture and development of aircraft in the United States and its dependencies, for governmental and civil purposes, under such regulations as the Secretary of War and the Secretary of the Navy may prescribe, $1,000,000.

Provided, That such arrangements may be made in relation to the purchase of any basic patent connected with the manufacture and development of aircraft in the United States as in the judgment of the Secretary of War and the Secretary of the Navy will be of the greatest advantage to the Government and to the development of the industry.

Provided further, That in the event there shall be pending in court litigation involving the validity of said patent or patents, bond, with good and approved security in an amount sufficient to indemnify the United States, shall be required, payable to the United States, conditioned to repay to the United States the amount paid for said patent or patents in the event said patent or patents are finally adjudged invalid. *Act of Mar. 4, 1917 (39 Stat. 1169–1170), making appropriations for the naval service.*

The act of Aug. 29, 1916 (39 Stat. 622), provided for the development of a suitable type of aviation motor. The act of July 24, 1917 (40 Stat. 246), provided for the development of suitable types of aviation engines, airplanes, etc.

The act of July 11, 1919 (41 Stat. 108), and of June 5, 1920 (41 Stat. 953), provided for experimental investigation, purchase and development of aircraft, helium gas rights, engines, patents, etc., as well as for the supply of the Army with airships, war balloons and other aerial machines.

The act of June 5, 1920 (41 Stat. 953), provided for experimental investigation and purchase and development of new types of aircraft, accessories thereto, and aviation engines, including patents and other rights thereto, and plans, drawings, and specifications thereof.

838. Special clothing and equipment for aviation.— * * * for the purchase, manufacture, and issue of special clothing, wearing apparel, and similar equipment for aviation purposes; * * * *Act of June 5, 1920 (41 Stat. 953), making appropriations for the support of the Army: Air Service.*

Similar provisions appear in previous appropriation acts.

839. Special apparatus for medical research.— * * * purchase of special apparatus and appliances, repairs, and replacements of same used in connection with special scientific medical research in the Air Service; * * * *Act of June 5, 1920 (41 Stat. 953), making appropriations for the support of the Army: Air Service.*

Similar provisions appear in previous appropriation acts.

840. Sale of airplane materials.—The President, during the present emergency, is authorized, through the head of any department of the Government, to sell any war materials used in the construction of airplanes which may have been or may hereafter be acquired by the United States for the purpose of the Army or Navy, or for the prosecution of war, to any person, firm, or corporation, or to any foreign state or government engaged with the United States Government in the prosecution of war against a common enemy or its allies, in such manner and upon such terms, at not less than cost, as he in his discretion may deem best: *Provided*, That any moneys received by the United States hereunder shall become available as part of the appropriation by which said property was purchased by the United States. *Act of Oct. 6, 1917 (40 Stat. 356).*

* * * for all necessary expenses connected with the sale or disposal of surplus or obsolete aeronautical equipment, and the rental of buildings, and other facilities for the handling or storage of such equipment; * * * *Act of June 5, 1920 (41 Stat. 953), making appropriations for the support of the Army: Air Service.*

841. Sale of supplies and equipment for aeroplane mail service.— * * * The Postmaster General in expending this appropriation shall purchase, as far as practicable, such available and suitable equipment and supplies for the aeroplane mail service as may be owned by or under construction for the War Department or the Navy Department when no longer required because of the cessation of war activities, and it shall be his duty to first ascertain if

such articles of the character described may be secured from the War Department or the Navy Department before purchasing such equipment or supplies elsewhere. If such equipment or supplies, other than emergency supplies, are purchased elsewhere than from the War Department or the Navy Department, the Postmaster General shall report such action to Congress, together with the reasons for such purchases. All articles purchased from either of said departments shall be paid for at a reasonable price considering wear and tear and general condition. Said departments are authorized to sell such equipment and supplies to the Post Office Department under the conditions specified, and the proceeds of such sales shall be covered into the Treasury as miscellaneous receipts: *Provided further*, That the Secretary of War and the Secretary of the Navy are hereby authorized and directed to deliver immediately to the Postmaster General, as he may request, and as hereinbefore provided, such aeroplane machines, supplies, equipment, and parts as may be serviceable and available for the aeroplane mail service, the same to be out of any equipment that the War Department or the Navy Department has on hand or under construction, the War Department and the Navy Department appropriations to be credited with the equipment turned over to the Post Office Department: • • • *Act of Feb. 28, 1919 (40 Stat. 1194), making appropriations for the service of the Post Office Department: Inland transportation by railroad routes and aeroplanes.*

842. Transfer of aeroplanes and automobiles to the Post Office Department.—That the Secretary of War may, in his discretion, deliver and turn over to the Postmaster General from time to time, and without charge therefor, for use in the Postal Service, such aeroplanes and automobiles or parts thereof as may prove to be, or as shall become, unsuitable for the purposes of the War Department but suitable for the use of the Postal Service; • • • *Sec. 8, act of July 2, 1918 (40 Stat. 753), making appropriations for the service of the Post Office Department.*

843. Indemnity for damage resulting from the operation of aircraft.—• • • *Provided*, That claims not exceeding $250 in amount for damages to persons and private property resulting from the operation of aircraft at home and abroad, may be settled out of the funds appropriated hereunder, when each claim is substantiated by a survey report of a board of officers appointed by the commanding officer of the nearest aviation post, and approved by the Director of Air Service: *Provided further*, That claims so settled and paid from the sum hereby appropriated shall not exceed in the aggregate the sum of $150,000: • • • *Act of June 5, 1920 (41 Stat. 953-954), making appropriations for the support of the Army: Air Service.*

Similar provisions appear in previous appropriation acts.

844. Settlement of accounts between the Medical Department and other bureaus.— • • • *Provided further*, That hereafter in the settlement of accounts between the appropriations of the Medical Department and those of any other branch of the Army service, or any bureau or office of the War Department, or any other executive department or establishment of the Government, payment thereof may be made by the proper disbursing officer of the Medical Department or of the branch of the Army Service, office, bureau, department, or establishment concerned. *Act of Mar. 4, 1915 (38 Stat. 1080).*

845. Medical and hospital supplies.—For the manufacture and purchase of medical and hospital supplies, including disinfectants, for military posts, camps, hospitals, hospital ships and transports, for laundry work for enlisted men and

Army nurses while patients in a hospital, * * * for the purchase of veterinary supplies * * * for expenses of medical supply depots * * * for supplies for use in teaching the art of cooking to the enlisted force of the Medical Department; * * * for advertising, printing, binding, laundry, and all other necessary miscellaneous expenses of the Medical Department. *Act of June 5, 1920 (41 Stat. 967–968), making appropriations for the support of the Army.*

Similar provisions appear in previous appropriation acts.

846. Transfer of hospitals and equipment to the Public Health Service.—The Secretary of War is hereby authorized and directed to transfer without charge to the Secretary of the Treasury for the use of the Public Health Service such hospital furniture and equipment, including hospital and medical supplies, motor trucks, and other motor-driven vehicles, in good condition, not required by the War Department, as may be required by the Public Health Service for its hospitals, and the President is authorized to direct the transfer to the Treasury Department of the use of such lands or parts of lands, buildings, fixtures, appliances, furnishings, or furniture under the control of any other department of the Government not required for the purposes of such department and suitable for the uses of the Public Health Service. *Sec. 3, act of Mar. 3, 1919 (40 Stat. 1303).*

The Secretary of War is authorized and directed to transfer without charge to the Secretary of the Treasury for the use of the Public Health Service such mechanical, construction, and miscellaneous material, hospital furniture and equipment, hospital and medical supplies, motor trucks and other motor-driven vehicles, not required by the War Department, as may be required by the Public Health Service for its hospitals; * * * *Act of Mar. 4, 1921 (41 Stat. 1365).*

The act of July 19, 1919 (41 Stat. 205), making appropriations for sundry civil expenses, provides that the War Department is authorized to transfer to St. Elizabeths Hospital the X-ray and dental outfits at present loaned to that hospital by the medical branch of the War Department.

The loan to the Governor of Kansas of emergency hospital equipment for use in an epidemic of influenza was authorized by Joint Res. 30, Feb. 18, 1920 (41 Stat. 436).

847. Proceeds of sales of medical and hospital supplies.—* * * *Provided,* That hereafter all moneys arising from dispositions of serviceable medical and hospital supplies authorized by law and regulation shall constitute one fund on the books of the Treasury Department, which shall be available to replace medical and hospital supplies throughout the fiscal year in which the dispositions were effected and throughout the following fiscal year. *Act of June 12, 1906 (34 Stat. 256), making appropriations for the support of the Army: Medical Department.*

848. Sale of medical supplies to the Soldiers' Home.—That hereafter, upon proper application therefor, the Medical Department of the Army is authorized to sell medical and hospital supplies at its contract prices to the Soldiers' Home in the District of Columbia. *Act of June 4, 1897 (30 Stat. 54), making appropriations for sundry civil expenses: Soldiers' Home.*

849. Sales of medical supplies to civilian employees.—* * * *Provided further,* That hereafter civilian employees of the Army stationed at military posts may, under regulations to be made by the Secretary of War, purchase necessary medical supplies when prescribed by a medical officer of the Army. *Act of*

Mar. 2, 1905 (33 Stat. 839), making appropriations for the support of the Army: Medical Department.

A previous provision permitting such purchases "at cost, with ten per centum added," made by act Mar. 3, 1883 (22 Stat. 459), may be regarded as superseded by this act. This provision was repeated in the same language in the similar appropriation act for the fiscal year 1906, act Mar. 2, 1905 (33 Stat. 839).

850. Sale of medical supplies to the American National Red Cross.—* * * *Provided*, That hereafter, with the approval of the Secretary of War and at rates of charge of not less than the contract prices paid therefor plus twenty-five per centum to cover the cost of purchase, inspection, and so forth, the Medical Department of the Army may sell for cash to the American National Red Cross such medical supplies and equipments as can be spared without detriment to the military service * * * *Act of Mar. 4, 1915 (38 Stat. 1089), making appropriations for the support of the Army: Medical Department.*

Chapter IV, act of July 11, 1919 (41 Stat. 130), authorized the Secretary of War to place at the disposal of the American Red Cross medical and hospital supplies and supplementary and dietary foodstuffs no longer essential to the American Expeditionary Forces.

851. Issue of supplies to the American Red Cross for instruction.—That the Secretary of War and the Secretary of the Navy be, and are hereby, authorized to issue, each at his discretion and under proper regulations to be prescribed by him, out of equipment for medical and other establishments on hand, belonging to the Government and which can be temporarily spared, such articles as may appear to be required for instruction and practice by organizations formed by the American National Red Cross, for the purpose of rendering aid to the Army and Navy in war. *Sec. 1, Joint Res. 15, May 8, 1914 (38 Stat. 771).*

That the regulations prescribed by the Secretary of War or by the Secretary of the Navy, in pursuance of the authority granted by section one, shall provide for the immediate return of the articles of equipment loaned the American National Red Cross when called for by the authority which issued them; and the said Secretaries shall require a bond in each case, in double the value of the property, for the care and safe-keeping thereof and for the return of the same when required. *Sec. 2, Joint Res. 15, May 8, 1914 (38 Stat. 771).*

This section was extended so as to permit the issue of the equipment mentioned herein to the American National Red Cross for the instruction of persons who may volunteer to receive training by that association from May 1 to June 1, 1916, by Joint Res. 19, May 18, 1916 (39 Stat. 164).

852. Dental supplies to be sold.—That the Secretary of War is hereby authorized and directed to sell at public or private sale, under such rules and regulations as he may prescribe, all dental outfits in excess of the needs of the Government, preferentially to persons who served in the Army, Navy, Marine Corps, Coast Guard, or the American Red Cross of the United States during the recent war and who are at the time of such sale licensed to practice dentistry; but not more than one set of dental supplies shall be sold at private sale to any one person. *Joint Res. 38, Apr. 17, 1920 (41 Stat. 554–555).*

853. Ordnance appropriations available for two years.—Hereafter the appropriations "Ordnance-stores ammunition," "Small-arms target practice," and "Ordnance stores and supplies" shall be available for two years to procure the stores authorized by them. *Act of Mar. 2, 1907 (34 Stat. 1175), making appropriations for the support of the Army.*

The above appropriations appear regularly in the acts for the support of the Army.

854. Apportionment of expenses of the Ordnance Department.—The Chief of Ordnance, in conducting manufacturing or similar operations, is authorized to charge any indirect or general expense for labor or material therefor against any of the appropriations authorizing these operations in such manner as is most economical and efficient, provided that the methods adopted shall show that each of such appropriations bears its ratable share of the total amount of these expenses. *Act of Mar. 2, 1907 (34 Stat. 1062), making appropriations for fortifications, etc.* See 1223½ post at p. 1182 p. 5

855. Disbursements when an Ordnance appropriation is insufficient.—Hereafter whenever pressing obligations are required to be paid by a disbursing officer of the Ordnance Department and there is an insufficient balance to his official credit under the proper appropriation or appropriations for the purpose, he is authorized to make payment from the total available balance to his official credit, provided sufficient funds under the proper appropriation or appropriations have been allotted by the Chief of Ordnance for the expenditure. When such disbursements are made the accounts of the disbursing officer shall show the charging of the proper appropriations, the balances under which will be adjusted by the disbursing officer on receipt of funds, or by the accounting officers of the Treasury. *Act of Mar. 3, 1909 (35 Stat. 750), making appropriation for the support of the Army.*

856. Charges for manufacture at arsenals.—That all orders or contracts for manufacture of material pertaining to approved projects, which are placed with arsenals or other ordnance establishments and which are chargeable to armament of fortifications appropriations, shall be considered as obligations in all respects in the same manner as provided for similar orders placed with commercial manufacturers. *Sec. 6, act of May 21, 1920 (41 Stat. 613).*

857. Replacing materials under Ordnance appropriations.—The Chief of Ordnance, in conducting manufacturing or similar operations under any particular appropriation heretofore or hereafter made, is authorized to use material procured under any appropriation and to replace the same in kind or otherwise: *Provided*, That in doing so the methods shall be such that each appropriation will be charged with the full value of the material used in carrying out its object. *Act of Mar. 4, 1911 (36 Stat. 1344), making appropriations for fortifications, etc.*

858. Procurement of stores by the Ordnance Department for other departments.—Whenever the Ordnance Department, under existing regulations, procures stores for other Executive Departments or bureaus, including the Philippine government, its appropriations shall be applicable to defray the necessary expenses in connection with the procurement, subject to reimbursement from time to time, or on completion of the work, from the department or bureau for which the stores were procured. *Act of June 12, 1906 (34 Stat. 258), making appropriations for the support of the Army.*

See also act of Aug. 24, 1912 (37 Stat. 589), 880, post.

859. Procurement of ordnance and materials from the Navy.—Such naval ordnance and ordnance material as the Secretary of War and the Secretary of the Navy may determine necessary is authorized to be transferred from the Navy Department to the War Department: *Provided*, That if such ordnance and ordnance material is obsolete for naval purposes the transfer shall be made without reimbursement and payment to the Navy for other ordnance and ordnance material transferred hereunder shall be made only after estimates shall

have been submitted to Congress and a specific appropriation for such payment shall have been made. *Act of July 8, 1918 (40 Stat. 817), making appropriations for fortifications, etc.*

860. American manufacture of ordnance.— * * * *Provided*, That all material purchased under the appropriations in this Act for the Ordnance Department of the United States Army shall be of American manufacture, except in cases when, in the judgment of the Secretary of War, it is to the manifest interest of the United States to make such purchases abroad, which material shall be admitted free of duty. *Act of June 5, 1920 (41 Stat. 971), making appropriations for the support of the Army: Ordnance Service.*

861. Cartridge cloth of foreign manufacture.— * * * And when, in the opinion of the Secretary of War, it is necessary to purchase material abroad for the manufacture of sacks for artillery cartridges, it shall be admitted free of duty. *Act of Mar. 15, 1898 (30 Stat. 326), making appropriations for the support of the Army: Ordnance Department.*

862. Tests of cannon.—That hereafter all rifled cannon of any particular material, caliber, or kind, made at the cost of the United States shall be publicly subjected to the proper test including such rapid firing as a like gun would be likely to be subjected to in actual battle for the determination of the endurance of the same to the satisfaction of the President of the United States or such persons as he may select; and he is hereby authorized to select not to exceed five persons, who shall be skilled in such matters; and if such gun shall not prove satisfactory, they shall not be put to use in the Government service. *Sec. 2, act of July 5, 1884 (23 Stat. 159), making appropriations for fortifications, etc.*

That so much of the Fortification Appropriation Act approved July 5, 1884, as pertains to the appointment of a board for the purpose of testing rifled cannon is hereby rescinded. *Sec. 7, act of Mar. 3, 1921 (41 Stat. 1352), making appropriations for fortifications, etc.*

Provisions for tests by the Board of Ordnance and Fortification were made by act Sept. 22, 1888, sec. 6, ante, 642.

863. Ordnance depots.—The Chief of Ordnance, under the direction of the Secretary of War, may establish depots of ordnance and ordnance stores in such parts of the United States and in such numbers, as may be deemed necessary. *R. S. 1165.*

864. Supply of ordnance and ordnance stores.—The Chief of Ordnance, or the senior officer of that corps for any district, shall execute all orders of the Secretary of War, and, in time of war, the orders of any general or field officer commanding an army, garrison, or detachment, for the supply of all ordnance and ordnance stores for garrison, field, or siege service. *R. S. 1166.*

That the Secretary of War is authorized to proceed with the installation of guns and howitzers in such order of priority as he may deem expedient, at places for which appropriations have been, or hereafter may be, made for emplacements for such guns and howitzers. *Sec. 6, act of Mar. 3, 1921 (41 Stat. 1352), making appropriations for fortifications, etc.*

865. Ordnance issued to Executive Departments.—That upon the request of the head of any Department, the Secretary of War be, and he hereby is, authorized and directed to issue arms and ammunition whenever they may be required for the protection of the public money and property, and they may be delivered to any officer of the department designated by the head of such department, to be accounted for to the Secretary of War, and to be returned when the necessity

for their use has expired. Arms and ammunition heretofore furnished to any department by the War Department, for which the War Department has not been reimbursed, may be receipted for under the provisions of this act. *Act of Mar. 3, 1879 (20 Stat. 412).*

Section 2 of the act of May 18, 1898 (30 Stat. 419), authorized the Secretary of War and general officers commanding troops in Cuba to make certain issues of arms, ammunition, equipments, etc., to the Cuban people during the existence of the War with Spain.

866. Ordnance stores issued to colleges and schools.— * * * The Secretary of War is authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government, and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice by the students of any college or university under the provisions of this section, and the Secretary shall require a bond in each case, in double the value of the property, for the care and safe-keeping thereof, and for the return of same when required: *Provided*, That nothing in this act shall be so construed as to prevent the detail of officers of the Engineer Corps of the Navy as professors in scientific schools or colleges as now provided by act of Congress approved February twenty-sixth, eighteen hundred and seventy-nine, entitled "An act to promote a knowledge of steam-engineering and iron-shipbuilding among the students of scientific schools or colleges in the United States;" and the Secretary of War is hereby authorized to issue ordnance and ordnance stores belonging to the Government on the terms and conditions hereinbefore provided to any college or university at which a retired officer of the Army may be assigned as provided by section twelve hundred and sixty of the Revised Statutes. *R. S. 1225, as amended by sec. 1, act of Sept. 26, 1888 (25 Stat. 491-492).*

That the Secretary of War is authorized to issue at his discretion, and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government, and which can be spared for that purpose, upon the approval of the governors of the respective States, such number of the same as may be required for military instruction and practice by such school, and the Secretary shall require a bond in each case, for double the value of the property, for the care and safe-keeping thereof and for the return of the same when required. *Sec. 3, act of Feb. 26, 1901 (31 Stat. 811).*

The Secretary of War is hereby authorized, under such regulations as he may prescribe, to issue such arms, tentage, and equipment as he shall deem necessary for proper military training to schools and colleges, other than those provided for in section 40 of this Act, having a course of military training prescribed by the Secretary of War and having not less than one hundred physically fit male students above the age of fourteen years; * * * *Sec. 55c, added to the act of June 3, 1916, by sec. 35, act of June 4, 1920 (41 Stat. 780).*

For the procurement and supply as provided in section 56 of the Act of Congress approved June 3, 1916, of such tentage and equipment, including the transporting of same, as the Secretary of War shall deem necessary for proper military training to schools and colleges other than those provided for in section 47 of the Act above referred to, $100. *Act of June 5, 1920 (41 Stat. 967), making appropriations for the support of the Army: Quartermaster supplies for schools and colleges.*

For arms and ordnance equipment, including overhauling and repairing of personal equipments, machine-gun outfits, and horse equipments for issue to schools and colleges in pursuance of the provisions of section 56 of the Act

entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, $100. *Act of June 5, 1920 (41 Stat. 974), making appropriations for the support of the Army: Ordnance supplies for schools and colleges.*

Section 56, act of June 3, 1916 (39 Stat. 197), has been stricken out by sec. 35, act of June 4, 1920, above cited, and apparently replaced by sec. 55c of the latter act above set out.

Sections 45, 46, and 47 of the act of June 3, 1916, above mentioned, applied only to institutions at which one or more units of the Reserve Officers' Training Corps are maintained. They were superseded by sec. 33, act of June 4, 1920 (41 Stat. 777).

By section 1, act of Apr. 17, 1918 (40 Stat. 531), section 56 was "suspended for and during the period of the present war, but for such period only."

Current appropriations covering provisions of section 56, act of June 3, 1916, are to be found in the acts of July 11, 1919 (41 Stat. 128) and June 5, 1920 (41 Stat. 948–977).

867. **Issue of ordnance and other supplies for Reserve Officers' Training Corps.**—The Secretary of War, under such regulations as he may prescribe, is hereby authorized to issue to institutions at which one or more units of the Reserve Officers' Training Corps are maintained such public animals, transportation, arms, ammunition, supplies, tentage, equipment, and uniforms belonging to the United States as he may deem necessary, and to forage at the expense of the United States public animals so issued, to pay commutation in lieu of uniforms at a rate to be fixed annually by the Secretary of War, and to authorize such expenditures from proper Army appropriations as he may deem necessary for the efficient maintenance of the Reserve Officers' Training Corps. He shall require from each institution to which property of the United States is issued a bond in the value of the property issued for the care and safe-keeping thereof, except for uniforms, expendable articles, and supplies expended in operation, maintenance, and instruction, and for its return when required. *Sec. 47, act of June 3, 1916 (39 Stat. 192), as amended by sec. 34, act of June 4, 1920 (41 Stat. 777–778).*

For arms and ordnance equipment, including overhauling and repairing of personal equipments, machine-gun outfits, and horse equipments for use in connection with the Reserve Officers' Training Corps, established by the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, $100. *Act of June 5, 1920 (41 Stat. 974), making appropriations for the support of the Army: Ordnance stores for Reserve Officers' Training Corps.*

868. **Ordnance issued to schools in the Territories.**—That the Secretary of War is authorized to issue at his discretion, and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government, and which can be spared for that purpose, upon the approval of the governors of the respective States and Territories, such number of the same as may be required for military instruction and practice by such school, and the Secretary shall require a bond in each case, for double the value of the property, for the care and safe-keeping thereof and for the return of the same when required. *Sec. 3, act of Apr. 21, 1904 (33 Stat. 226).*

Previous provisions identical with this section, except the words "and Territories," following the words "the respective States," were made by act Feb. 26, 1901, sec. 3 (31 Stat. 810).

869. **Issue of ordnance and ordnance stores to Washington High School.**—That the Secretary of War is authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government and which can be spared for that purpose,

such as may appear to be required for military instruction and practice by the students of the High School of Washington, District of Columbia, and the Secretary shall require a bond in each case, in double the value of the property, for the care and safe keeping thereof and for the return of the same when required. *Joint Res. 9, Feb. 5, 1891 (26 Stat. 1113).*

870. Ammunition, targets, etc., issued for civilian target practice.—For manufacture and purchase of * * * and ammunition, targets, target materials, and other accessories which may be issued for small-arms target practice and instruction at the educational institutions and State soldiers' and sailors' orphans' homes to which issues of small-arms are lawfully made, under such regulations as the Secretary of War may prescribe, $500,000. *Act of June 5, 1920 (41 Stat. 971), making appopriations for the support of the Army: Ordnance Department.*

Practically similar provision appears in previous appropriation acts.

The act of July 11, 1919 (41 Stat. 127), making appropriations for the support of the Army, provides "for arms, ammunition, targets, and other accessories for target practice for issue in connection with the encouragement of rifle practice in pursuance of the provisions of law, $100,000."

871. Issue of targets, target materials, etc., to rifle clubs and schools.—The Secretary of War is hereby authorized to issue, under such rules and regulations as he may prescribe, for use in target practice, targets, target materials, and other necessary accessories, to rifle clubs organized under the rules of the National Board for the Promotion of Rifle Practice and to schools having a uniformed corps of cadets and carrying on military training, in sufficient number for the proper conduct of target practice. *Act of Aug. 29, 1916 (39 Stat. 643).*

872. Issue of rifles, cartridges, etc., to rifle clubs and schools.— * * * *Provided further,* That the Secretary of War is hereby authorized to issue, without expense to the United States, for use in target practice, United States magazine rifles and appendages therefor not of the existing service model and not necessary for the maintenance of a proper reserve supply, together with forty rounds of ball cartridges suitable to said arm, for each range at which target practice is had, not to exceed a total of one hundred and twenty rounds per year per man participating in target practice, to rifle clubs organized under the rules of the National Board for the Promotion of Rifle Practice and to schools having a uniformed corps of cadets and carrying on military training, in sufficient number for the conduct of proper target practice.

Issues of public property under this provision shall be made in compliance with regulations prescribed by the Secretary of War insuring the designed use of the property issued, providing against loss to the United States through lack of proper care, and for the return of the property when required, and embodying such other requirements as he may consider necessary adequately to safeguard the interests of the United States. *Act of Apr. 27, 1914 (38 Stat. 370).*

873. Issues of rifles and ammunition for use at rifle ranges.— * * * Where rifle ranges shall have been so established and instructors assigned to duty thereat, the Secretary of War shall be authorized to provide for the issue of a reasonable number of standard military rifles and such quantities of ammunition as may be available for use in conducting such rifle practice. *Sec. 113, act of June 3, 1916 (39 Stat. 211).*

874. Issues of artillery ammunition of old model to schools.—Hereafter ammunition of older model than current may be issued for the instruction in target

practice of students at the institutions to which the issue of artillery is authorized to the value of not more than five thousand dollars of original cost in any one year. *Act of Mar. 3, 1909 (35 Stat. 730).*

875. Returns to the Chief of Ordnance.—Section eleven hundred and sixty-seven is amended by inserting at the end thereof the following words: "Every officer of the Ordnance Department, every ordnance-store keeper, every post ordnance sergeant, each keeper of magazines, arsenals, and armories, every assistant and deputy of such, and all other officers, agents, or persons who shall have received or may be entrusted with any stores or supplies, shall quarterly, or oftener if so directed, and in such manner and on such forms as may be directed or prescribed by the Chief of Ordnance, make true and correct returns to the Chief of Ordnance of all ordnance-arms, ordnance-stores, and all other supplies and property of every kind received by or entrusted to them and each of them, or which may in any manner come into their and each of their possession or charge. * * * *Act of Feb. 27, 1877 (19 Stat. 242), amending R. S. 1167.*

That returns of ordnance property now required to be made quarterly to the Chief of Ordnance shall hereafter be made semiannually. *Act of Feb. 25, 1903 (32 Stat. 885), making appropriations for legislative, executive and judicial expenses.*

Officers accountable for public property are required to obtain certificates of nonindebtedness, etc., on discharge by 1617, post.

Notes of Decisions.

Returns of ordnance stores.—One complete annual return of ordnance and ordnance stores, with quarterly reports noting all intermediate changes since last return, if sanctioned by the Chief of Ordnance and approved by the Secretary of War, is sufficient under the provisions of this section. (1873) 14 Op. Atty. Gen. 289.

876. Reports of damages to ordnance.—Every officer commanding a regiment, corps, garrison, or detachment shall make, once every two months, or oftener if so directed, a report to the Chief of Ordnance stating all damages to arms, equipments, and implements belonging to his command, noting those occasioned by negligence or abuse, and naming the officer or soldier by whose negligence or abuse the said damages were occasioned. *R. S. 1220.*

This section, as enacted in the Revised Statutes, contained only the provision set forth here. It was amended by adding at the end of the section a provision for alteration of clothing issued by sec. 1, act of Feb. 27, 1877 (19 Stat. 243), post, 927.

877. Transfer of explosives, etc., to executive departments.—That the Secretary of War be, and he is hereby, authorized to turn over on request from other executive departments of the Government, in his discretion, from time to time, without charge therefor, such ammunition, explosives, and other ammunition components as may prove to be or shall become surplus or unsuitable for the purposes of the War Department and as shall be suitable for use in the proper activities of other executive departments. *Chap. IV, act of July 11, 1919 (41 Stat. 130), making appropriations for the support of the Army.*

878. Proceeds of sales of serviceable ordnance stores.—Hereafter all moneys arising from disposition authorized by law and regulation of serviceable ordnance and ordnance stores shall constitute one fund on the books of the Treasury Department, which shall be available to replace ordnance and ordnance stores throughout the fiscal year in which the disposition was effected

and throughout the following year. * * * *Act of Apr. 23, 1904 (33 Stat. 276), making appropriations for the support of the Army.*

Provisions for the sale, by the Secretary of War, of all obsolete and unserviceable ammunition, etc., then stored in the various arsenals, were made by act June 22, 1874 (18 Stat. 200), and a subsequent appropriation of an amount equal to the net proceeds of such sale to procure material adapted to the wants of the service, was made by act Mar. 3, 1875, sec. 1 (18 Stat. 388). These provisions are omitted, as temporary merely, and executed.

879. Sales of serviceable ordnance restricted.— * * * *Provided further*, That sales of guns and ammunition made under the authority contained in this or any other Act shall be limited to sales to other departments of the Government and to foreign States or Governments engaged in war against any Government with which the United States is at war, and to members of the National Rifle Association and of other recognized associations organized in the United States for the encouragement of small-arms target practice: * * *. *Act of July 8, 1918 (40 Stat. 850), making appropriations for the support of the Army.*

880. Sales of ordnance stores to another department.— * * * *Provided*, That hereafter when authorized transfers or sales of ordnance or ordnance stores are made to another bureau of the War Department, or to another executive department of the Government, payment therefor shall be made by the proper disbursing officer of the bureau, office, or department concerned. When the transaction is between two bureaus of the War Department, the price to be charged shall be the cost price of the stores, including the cost of inspection. When the transaction is between the Ordnance Department and another executive department of the Government, the price to be charged shall include the cost price of the stores and the costs of inspection and transportation. *Act of Aug. 24, 1912 (37 Stat. 589), making appropriations for the support of the Army.*

Act of Mar. 4, 1919 (40 Stat. 1347), provided as follows:

"The Secretary of War is authorized to direct the Ordnance Department to transfer, without charge, to the Quartermaster of the United States Military Academy at West Point, New York, one Holt, ten-ton artillery tractor, caterpillar type, such tractor to be used by the Quartermaster Corps for all kinds of tractor uses; that the Secretary of War is hereby directed to transfer, without charge, one ten-ton three-wheel road roller to the Quartermaster of the United States Military Academy: * * *."

881. Sales of ordnance stores to officers of the Navy and Marine Corps.— Articles of ordnance property may be sold by the Chief of Ordnance to officers of the Navy and Marine Corps, for their use in the public service, in the same manner as these articles are now sold to officers of the army. *Act of Mar. 3, 1909 (35 Stat. 751), making appropriations for the support of the Army.*

882. Sales to schools, etc., of articles for maintenance of ordnance issued.— Sales of articles of ordnance property are authorized to educational institutions and State soldiers' and sailors' orphans' homes for maintaining the ordnance and ordnance stores issued to them. *Act of May 11, 1908 (35 Stat. 125), making appropriations for the support of the Army.*

The issue of obsolete ordnance and ordnance stores to educational and other institutions was authorized by act June 30, 1906, post, 892.

883. Sale of rifles to militia and rifle clubs.—That the Secretary of War is hereby authorized to sell, at the prices at which they are listed for the Army, upon the request of the governors of the several States and Territories, such magazine rifles belonging to the United States as are not necessary for the

equipment of the Army and the organized militia, for the use of rifle clubs formed under regulations prepared by the national board for the promotion of rifle practice and approved by the Secretary of War. *Sec. 1, act of Mar. 3, 1905 (33 Stat. 986).*

884. Sale of ammunition and stores to rifle clubs.—That the Secretary of War is hereby authorized in his discretion to sell to the several States and Territories, as prescribed in section seventeen of the Act approved January twenty-first, nineteen hundred and three, for the use of said clubs, ammunition, ordnance stores, and equipments of the Government standard at the prices at which they are listed for the Army. The practice of the rifle clubs herein provided shall be carried on in conformity to regulations prescribed by the national board for the promotion of rifle practice, approved by the Secretary of War, and the results thereof shall be filed in the office of the Military Secretary of the Army. *Sec. 2, act of Mar. 3, 1905 (33 Stat. 987).*

The words "as prescribed in section seventeen of the act approved January twenty-first, nineteen hundred and three," of this section were superseded by sec. 86 of the national defense act of June 3, 1916, post, 2617, 2618, which superseded sec. 17 of the militia act of Jan. 21, 1903, mentioned in this section.

By an act dated Mar. 2, 1907 (34 Stat. 1158), the office of the Military Secretary of the Army, referred to in this paragraph, was changed to The Adjutant General's Office, see ante, 516.

Notes of Decisions.

Naval militia.—Those portions of the military organizations of the several States, Territories, and the District of Columbia that are intended for naval service are portions of the Organized Militia, and as such are entitled to participate in the contest for prizes and trophies provided for in act Mar. 2, 1907 (34 Stat. 1175). (1907) 26 Op. Atty. Gen. 303.

885. Sales of ordnance stores to civilian employees and the American National Red Cross.—Sales of ordnance stores are authorized to civilian employees of the Army and to The American National Red Cross under such regulations as may be prescribed by the Secretary of War. *Act of Mar. 3, 1909 (35 Stat. 750), making appropriations for the support of the Army.*

886. Sale of ordnance stores to Cuba.—The Secretary of War is hereby authorized to sell, at the prices fixed and published by the Chief of Ordnance, to the Government of Cuba such articles and quantities of ordnance and ordnance stores as may be desired by that Government for the equipment of its troops and as may be approved by the President of the United States. *Act of Aug. 29, 1916 (39 Stat. 643), making appropriations for the support of the Army.*

887. Sale of serviceable ordnance stores to designers.— * * * The Secretary of War is hereby authorized to sell to American designers such serviceable ordnance and ordnance stores as may be necessary in the development of designs which may be used in the military service: *Provided*, That such ordnance and ordnance stores can be spared for the purpose, and funds arising from such sales shall be available to replace like ordnance and ordnance stores. *Act of Apr. 23, 1904 (33 Stat. 276), making appropriations for the support of the Army.*

888. Sale of smooth-bore cannon.—That the Secretary of War and the Secretary of the Navy are hereby authorized to sell to projectors of methods of conversion, for experimental purposes only, any smooth-bore cannon on hand required by them, at prices which shall not be less than have been received from auction sales for such articles, and deliver the same at the cost of the Government, at the nearest convenient place for shipment or public transportation;

the cost of delivery to be deducted from the proceeds of sales, and the balance to be covered into the Treasury of the United States. *Sec. 3, act of July 5, 1884 (23 Stat. 159).*

889. Sales of useless ordnance for sentimental reasons.—Hereafter * * * individual pieces of United States armament which are not needed on account of historical value, and can be advantageously replaced, may be sold at a price not less than their cost price, when there exist for such sale sentimental reasons adequate in the judgment of the Secretary of War or Secretary of the Navy. *Act of Mar. 2, 1905 (33 Stat. 840), making appropriations for the support of the Army.*

890. Sale of obsolete small arms to patriotic organizations.—That the Chief of Ordnance is hereby authorized to sell without advertisement to patriotic organizations for military purposes surplus obsolete small arms and their equipments and ammunition at such prices as he may deem reasonable and just: *Provided,* That hereafter obsolete small arms and their equipment and ammunition shall not be disposed of to such organizations except as provided for in this Act. *Sec. 14, act of May 28, 1908 (35 Stat. 443).*

891. Sale of obsolete cannon, carriages and shot.—That the Chief of Ordnance is hereby authorized to sell without advertisement for public parks, public buildings, and soldiers' monuments purposes surplus obsolete brass or bronze cannon, carriages, and cannon balls at such prices as he may deem reasonable and just: *Provided,* That hereafter obsolete brass or bronze cannon and their accessories shall not be disposed of for such purposes except as provided for in this Act. *Sec. 47, act of Mar. 4, 1909 (35 Stat. 1075).*

892. Issue of obsolete ordnance stores to schools, etc.—That the Secretary of War is hereby authorized to issue, at his discretion and under proper regulations to be prescribed by him, without cost of transportation to the United States, such obsolete ordnance and ordnance stores as may be available to State and Territorial educational institutions and to State soldiers and sailors orphans' homes, for purposes of drill and instruction.

And the Secretary of War shall require from such institutions or homes a bond in each case in double the value of the property issued, for the care and safe-keeping thereof and for the return of the same to the United States when required: *Provided,* That the issues herein provided for shall be made only to institutions upon recommendation of the governors of States and Territories and shall not be made in any case to any educational institution to which issues of such stores are allowed to be made under provisions of existing law. *Act of June 30, 1906 (34 Stat. 817).*

Sales of articles of ordnance property for maintaining the ordnance, etc., ante, 882; and the issue of ammunition of old model for target practice of students at institutions to which the issue of artillery was authorized. ante, 874.

893. Obsolete ordnance issued to homes for soldiers.—That the Secretary of War * * * is authorized and directed, subject to such regulation as he may prescribe, to deliver to any of the "National Homes for Disabled Volunteer Soldiers" already established or hereafter established and to any of the State Homes for soldiers and sailors or either now or hereafter duly established and maintained under State authority, such obsolete serviceable cannon, bronze or iron, suitable for firing salutes, as may be on hand undisposed of, not exceeding two to any one Home. *Act of Feb. 8, 1889 (25 Stat. 657).*

* * * *Provided,* The Chief of Ordnance is authorized to issue such obsolete or condemned ordnance, gun carriages, and ordnance stores, as may be needed for ornamental purposes, to the Homes for Disabled Volunteer Soldiers,

the Homes to pay for transportation and such other expenses as are necessary. *Act of Mar. 3, 1899 (30 Stat. 1073).*

* * * *Provided*, That hereafter the Chief of Ordnance is authorized to issue such obsolete or condemned ordnance, gun carriages, and ordnance stores as may be needed for ornamental purposes to the Homes for Disabled Volunteer Soldiers, the Homes to pay for transportation out of any appropriation for current expenses. *Act of May 26, 1900 (31 Stat. 216), making appropriations for the support of the Army.*

894. Loans or gifts of condemned ordnance.—That the Secretary of War and the Secretary of the Navy are each hereby authorized, in their discretion, to loan or give to soldiers' monument associations, posts of the Grand Army of the Republic, and municipal corporations condemned ordnance, guns, and cannon balls which may not be needed in the service of either of said Departments. Such loan or gift shall be made subject to rules and regulations covering the same in each Department, and the Government shall be at no expense in connection with any such loan or gift. *Act of May 22, 1896 (29 Stat. 133).*

Provided, That no expense shall be incurred by the United States through the delivery of any of the foregoing condemned military equipment: *Provided further*, That each and every article of condemned military equipment covered by this act shall be subject at all times to the order of the Secretary of War. *Act of Sept. 8, 1916 (39 Stat. 843).*

Provisions for the delivery to certain named posts of the Grand Army of the Republic, cities, towns, villages, public schools, National Guard armories, and United Spanish War Veteran camps of condemned cannon and cannon balls are contained in act Sept. 8, 1916 (39 Stat. 843), with the proviso that no expense shall be incurred by the United States through such delivery, and that such cannon balls shall be subject at all times to the orders of the Secretary of War. A similar law was enacted Mar. 4, 1915 (38 Stat. 1212).

895. Loan of obsolete rifles to posts of the American Legion.—That the Secretary of War is hereby authorized, under rules, limitations, and regulations to be prescribed by him, to loan obsolete or condemned Army rifles, slings, and cartridge belts to posts or camps of organizations composed of honorably discharged soldiers, sailors, or marines, for use by them in connection with the funeral ceremonies of deceased soldiers, sailors, and marines, and for other post ceremonial purposes; and to sell such posts and camps blank ammunition in suitable amounts for said rifles at cost price, plus cost of packing and transportation: *Provided, however*, That not to exceed ten such rifles shall be issued to any one post or camp. *Act of Feb. 10, 1920 (41 Stat. 403), as amended by act of June 5, 1920 (41 Stat. 977).*

895½. Arms, matériel, etc., deposited in National Museum.—That the Secretary of War be, and he hereby is, authorized to furnish to the National Museum, for exhibition, upon request therefor by the administrative head thereof, such articles of arms, matériel, equipment, or clothing as have been issued from time to time to the United States Army, or which have been or may hereafter be produced for the United States Army, and which are objects of general interest or of foreign or curious research, provided that such articles are surplus or can be spared. *Sec. 1, act of Mar. 4, 1921 (41 Stat. 1438).*

That in all cases in which the Secretary of War has heretofore furnished to the National Museum any property of the kinds described in section 1 hereof, or has disposed of any colors, standards, or guidons of demobilized organizations of the United States Army in the manner provided by section 2 hereof, his acts

and doings in the premises are hereby ratified and confirmed. *Sec. 3, act of Mar. 4, 1921 (41 Stat. 1439).*

In regard to disposal of flags see 2779½, post.

896. General appropriations, Quartermaster Corps.—That all the money hereinbefore designated under the titles "Subsistence of the Army," "Regular supplies, Quartermaster Corps," "Incidental expenses, Quartermaster Corps," "Transportation of the Army and its supplies," "Water and sewers at military posts," "Clothing and camp and garrison equipage" shall be disbursed and accounted for as "General appropriations, Quartermaster Corps," and for that purpose shall constitute one fund. *Act of June 5, 1920 (41 Stat. 962), making appropriations for the support of the Army.*

Similar provision appears in previous appropriation acts.

897. Incidental expenses, Quartermaster Corps.—Postage; cost of telegrams on official business received and sent by officers of the Army, including members of the Officers' Reserve Corps, when ordered to active duty; * * * and incidental expenses of recruiting; * * * and such additional expenditures as are necessary and authorized by law in the movements and operation of the Army, and at military posts, and not expressly assigned to any other department, $10,000,000. *Act of June 5, 1920 (41 Stat. 958-959), making appropriations for the support of the Army: Quartermaster Corps, incidental expenses.*

Similar provisions appear in previous appropriation acts.

898. Insufficient balance of a Quartermaster fund.—Hereafter whenever pressing obligations are required to be paid by a disbursing officer of the Quartermaster's Department and there is an insufficient balance to his official credit under the proper appropriation or appropriations for the purpose, he is authorized to make payment from the total available balance to his official credit, provided sufficient funds under the proper appropriation or appropriations have been apportioned by the Quartermaster-General for the expenditure. When such disbursements are made the accounts of the disbursing officer shall show the charging of the proper appropriations, the balances under which will be adjusted by the disbursing officer on receipt of funds or by the accounting officers of the Treasury. *Act of Mar. 3, 1909 (35 Stat. 747), making appropriations for the support of the Army.*

899. Foreign exchange.—For payment of exchange by officers serving in foreign countries and when specially authorized by the Secretary of War, by officers disbursing funds pertaining to the Quartermaster Corps when serving in Alaska, and all foreign money received shall be charged to and paid out by disbursing officers of the Army at the legal valuation fixed by the Secretary of the Treasury, * * *. *Act of June 5, 1920 (41 Stat. 956), making appropriations for the support of the Army.*

Similar provision appears in previous appropriation acts.

900. Handling of supplies by the Quartermaster Corps.—The Secretary of War shall from time to time define and prescribe the kinds as well as the amount of supplies to be purchased by the Subsistence and Quartermaster Departments of the Army, and the duties and powers thereof respecting such purchases; and shall prescribe general regulations for the transportation of the articles of supply from the places of purchase to the several armies, garrisons, posts, and recruiting places, for the safe-keeping of such articles, and for the distribution of an adequate and timely supply of the same to the regimental quartermasters, and to such other officers as may by virtue of such regulations,

be intrusted with the same; and shall fix and make reasonable allowances for the store rent and storage necessary for the safe-keeping of all military stores and supplies. *R. S. 219.*

Contracts for supplies or services for the military service were required to be made by or under the direction of the chief officers of the War Department, and accounts were to be rendered for settlement to the accountant of the Department, by R. S. sec. 3714, ante, 724.

The Secretary of War was to prescribe regulations for bids for contracts under the War Department, by provisions of act Apr. 10, 1878, amended by act Mar. 3, 1883, ante, 745, 746.

The President was authorized to prescribe the kinds and quantities of the component articles of the ration, by act Feb. 2, 1901, sec. 40, post, 916.

901. Supplie transferred to the Marine Corps.— * * * *Provided*, That the Secretary of War is authorized and directed to transfer to the Secretary of the Navy for the use of the Marine Corps without payment therefor, such reserve stock of clothing, arms, and equipment, and other necessary military supplies, inventoried at the cost to the Army and not to exceed in the aggregate $7,000,000, as the same from time to time may be requisitioned. * * * *Sec. 4, act of Feb. 25, 1919 (40 Stat. 1174).*

902. Issue of quartermaster stores, etc., to schools for use in camps.—That the Secretary of War is authorized to issue, at his discretion and under such regulations as he may prescribe, such quartermaster supplies and stores belonging to the Government, and which can be spared for that purpose, as may appear to be required for the establishment and maintenance of military instruction camps by the students of any educational institution to which an officer of the Army is detailed as professor of military science and tactics, and the Secretary of War shall require a bond in each case in the value of the property for the care and safe-keeping thereof and for the return of the same when required. *Act of May 18, 1916 (39 Stat. 128).*

For the procurement and issue, under such regulations as may be prescribed by the Secretary of War, to institutions at which one or more units of the Reserve Officers' Training Corps are maintained, such public animals, uniforms, equipment, and means of transportation as he may deem necessary, and to forage at the expense of the United States public animals so issued; for transporting said animals and other authorized equipment from place of issue to the several institutions and training camps and return of same to place of issue when necessary. * * * *Act of June 5, 1920 (41 Stat. 966), making appropriations for the support of the Army; Quartermaster supplies, equipment, and so forth, Reserve Officers' Training Corps.*

903. Proceeds of sales of serviceable quartermaster supplies.—Hereafter all moneys arising from disposition of serviceable quartermaster's supplies or stores, authorized by law and regulations, shall remain available throughout the fiscal year following that in which the disposition was effected, for the purposes of that appropriation from which such supplies were authorized to be supplied at the time of the disposition. *Act of Mar. 23, 1910 (36 Stat. 257), making appropriations for the support of the Army.*

904. Sale of quartermaster property to officers of the Navy and Marine Corps.— * * * *Provided further*, That articles of serviceable quartermaster property may be sold by the Quartermaster General of the Army to officers of the Navy and Marine Corps, for their use in the public service, in the same manner as these articles are now sold to officers of the Army. *Act of Mar. 4, 1915 (38 Stat. 1079), making appropriation* [illegible]

See post, 912, and notes thereunder.

905. Sale of stores to patients of the Public Health Service.—That hereafter honorably discharged officers and enlisted men of the Army, Navy, or Marine Corps who are being cared for and are receiving medical treatment from the Public Health Service shall, while undergoing such care and treatment, be permitted to purchase subsistence stores and articles of other authorized supplies, except articles of the uniform, from the Army, Navy, and Marine Corps at the same price as charged the officers and enlisted men of the Army, Navy, and Marine Corps. *Act of June 5, 1920 (41 Stat. 976), making appropriations for the support of the Army.*

906. Subsistence funds kept in the personal possession of disbursing officers.—* * * *Provided further*, That hereafter officers intrusted with the disbursement of funds for the subsistence of the Army are hereby authorized to keep, at their own risk, in their personal possession for disbursement, such restricted amounts of subsistence funds for facilitating payments of small amounts to public creditors as shall from time to time be authorized by the Secretary of War; * * * *Act of Mar. 2, 1907 (34 Stat. 1166), making appropriations for the support of the Army.*

907. Purchase of subsistence supplies.—It shall be the duty of the officers of the Subsistence Department, under the direction of the Secretary of War, to purchase and issue to the Army such supplies as enter into the composition of the ration. *R. S. 1141.*

* * * *Provided*, That so much of the appropriation for subsistence of the Army as may be necessary may be applied to the purchase of subsistence stores for sale to officers for the use of themselves and their families, and to commanders of companies or other organizations, for the use of the enlisted men of their companies or organizations, and the proceeds of all sales of subsistence supplies shall hereafter be exempt from being covered into the Treasury and shall be immediately available for the purchase of fresh supplies. * * * *Act of Mar. 3, 1875 (18 Stat. 410).*

* * * For issue as rations to troops, including warrant officers of the Mine Planter Service, enlisted men of the Regular Army Reserve and retired enlisted men when ordered to active duty, members of Reserve Officers' Training Corps at camps, civil employees when entitled thereto, hospital matrons, nurses, applicants for enlistment while held under observation, general prisoners of war (including Indians held by the Army as prisoners, but for whose subsistence appropriation is not otherwise made), Indians employed with the Army as guides and scouts, and general prisoners at posts; for the subsistence of the masters, officers, crews, and employees of the vessels of the Army transport service; hot coffee for troops traveling when supplied with cooked or travel rations; meals for recruiting parties and applicants for enlistment while under observation; for sales to officers, including members of the Officers' Reserve Corps while on active duty, and enlisted men of the Army: * * * for other necessary expenses incident to the purchase, testing, care, preservation, issue, sale, and accounting for subsistence supplies for the Army, $32,000,000. *Act of June 5, 1920 (41 Stat. 957), making appropriations for the support of the Army: Quartermaster Corps.*

Notes of Decisions.

Contracts authorized.—The commissary general, under the direction of the President or Secretary of War, acting in that behalf for the President, may enter into contracts to slaughter and pack pork for the use of the army. Floyd *v.* U. S. (1866), 2 Ct. Cl. 429.

Reports.—Section 269, ante, requiring the heads of executive departments or other Government establishments to furnish the Secretary of the Treasury annually a statement of all money received by them during the previous fiscal year, arising from proceeds of public property, applies to sales, and purchases from the proceeds of sales, under this section. (1906) 26 Op. Atty. Gen. 38.

908. Delivery of subsistence supplies.—Contracts for subsistence supplies for the Army, made by the Commissary-General, on public notice, shall provide for a complete delivery of such articles, on inspection, at such places as shall be stipulated. *R. S. 3715.*

909. Sales of subsistence stores to officers and enlisted men.—The officers of the Subsistence Department shall procure and keep for sale to officers and enlisted men at cost prices, for cash or on credit, such articles as may, from time to time, be designated by the inspectors-general of the Army. An account of all sales on credit shall be kept, and the amounts due for the same shall be reported monthly to the Paymaster-General. *R. S. 1144.*

Provided further, That officers and enlisted men of the Signal Corps may purchase subsistence stores under the same regulations as prescribed for officers and enlisted men of the Army, as authorized by section eleven hundred and forty-four of the Revised Statutes, and paragraph fourteen hundred and two of the Army Regulations, eighteen hundred and eighty-nine. *Act of Aug. 30, 1890 (26 Stat. 400), making appropriations for sundry civil expenses.*

Amounts due from officers and men, for articles sold to them, are to be deducted from their pay, by R. S. 1209, 1300, 1301, post, 1612, 1613, 1614.

The sale of tobacco to enlisted men at cost prices, post, 1008.

Articles of serviceable quartermaster property may be sold by the Quartermaster General of the Army to officers of the Navy and Marine Corps, for their use in the public service, in the same manner as such articles are sold to officers of the Army, 912, post.

910. Sale of rations to officers in field.—Commissioned officers of the Army, serving in the field, may purchase rations for their own use, from any commissary of subsistence, on credit, at cost prices; and the amounts due for such purchases shall be reported monthly to the Paymaster-General. *R. S. 1145.*

911. Sales of subsistence stores at cost.— * * * *Provided*, That hereafter all sales of subsistence supplies to officers and enlisted men shall be made at cost price only; and the cost price of each article shall be understood, in all cases of such sales, to be the invoice price of the last lot of that article received by the officer making the sale prior to the first day of the month in which the sale is made. * * * *Act of July 5, 1884 (23 Stat. 108), making appropriations for the support of the Army.*

912. Sale of subsistence stores to officers and enlisted men of Navy and Marine Corps.— * * * *Provided further*, That hereafter the officers and enlisted men of the Navy and the Marine Corps shall be permitted to purchase subsistence supplies at the same price as is charged the officers and the enlisted men of the Army; and the officers and the enlisted men of the Army shall be permitted to purchase subsistence supplies from the Navy and Marine Corps at the same price as is charged the officers and the enlisted men of the Navy and Marine Corps. *Act of Aug. 29, 1916 (39 Stat. 630), making appropriations for the support of the Army.*

Similar provision appeared in prior appropriation acts, but without the word "hereafter."

913. Sales of subsistence stores to another bureau or department.—*Provided*, That hereafter when under the Army Regulations subsistence supplies are

furnished to another bureau of the War Department, or to another executive department of the Government or employees thereof, payment therefor shall be made in cash by the proper disbursing officer of the bureau, office, or department concerned, or by the employee to whom the sale is made. When the transaction is between two bureaus of the War Department the price to be charged shall be the contract or invoice price of the supplies. When the transaction is between the Subsistence Department and another executive department of the Government or employees thereof, the price to be charged shall include the contract or invoice price and ten per centum additional to cover wastage in transit, and the cost of transportation. *Act of Mar. 3, 1911 (36 Stat. 1047), making appropriations for the support of the Army.*

914. Proceeds of sales of subsistence stores.—*And provided further,* That hereafter all moneys arising from sales of subsistence supplies or stores, authorized by law and regulations, shall be covered into the Treasury to the credit of the proper appropriation and shall remain available throughout the fiscal year following that in which the sales were effected, for the purposes of that appropriation from which such supplies or stores were authorized to be supplied at the time of the sales. *Act of Apr. 27, 1914 (38 Stat. 361).*

915. Report of sales of subsistence stores.— * * * *Provided,* That hereafter the provisions of section five of the act of June thirtieth, nineteen hundred and six (Thirty-fourth Statutes, page seven hundred and sixty-three), shall not be construed to apply to the Subsistence Department. *Act of Aug. 24, 1912 (37 Stat. 579), making appropriations for the support of the Army.*

Section 5, act of June 30, 1906, mentioned in this provision, is set forth, ante, 269.

916. Ration to be prescribed by the President.—That the President be, and he is hereby, authorized to prescribe the kinds and quantities of the component articles of the army ration, and to direct the issue of substitutive equivalent articles in place of any such components whenever, in his opinion, economy and due regard to the health and comfort of the troops may so require. *Sec 40, act of Feb. 2, 1901 (31 Stat. 758).*

The components of the Army ration were prescribed, and authority was given to the President to make alterations therein required by a due regard to the health and comfort of the Army and economy, by R. S. 1146. An addition of vegetables was provided for by act June 16, 1890, sec. 5 (26 Stat. 157). These provisions were superseded by this section.

917. Cooking to be superintended by line officers.—The line officers of the Army shall superintend the cooking done for the enlisted men. *R. S. 1234.*

Officers of the Medical Department were required to unite with the officers of the line in superintending the cooking for the enlisted men, by R. S. 1174, ante, 567.

918. Issue of rations to enlisted men.—Sergeants and corporals of ordnance shall be entitled to receive one ration and a half daily. Other enlisted men shall be entitled to receive one ration daily. *R. S. 1293.*

* * * and hereafter no enlisted man shall be entitled to receive more than one ration daily. *Act of July 16, 1892 (27 Stat. 178), making appropriations for the support of the Army.*

Retired enlisted men were given a monthly allowance of $9.50 in lieu of rations and clothing by provisions of act Mar. 16, 1896, and act Mar. 2, 1907, post, 1818, 1705.

The emergency ration, when issued, is to be in addition to the regular ration, post, 923.

919. Additional ration for noncommissioned officers.—That all noncommissioned officers of the Army of grade of color sergeant and above as fixed by existing

Army Regulations and noncommissioned officers of the Marine Corps of corresponding grades shall be entitled to one ration or commutation therefor in addition to that to which they are now entitled. The commutation value shall be determined by the President on July 1 of each fiscal year, and for the current fiscal year the value shall be computed on the basis of 55 cents per ration: * * * *Sec. 5, act of May 18, 1920 (41 Stat. 602).*

That the provisions of sections * * * 5 * * * of this Act shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed: * * * *Sec. 13, act of May 18, 1920 (41 Stat. 604).*

920. Rations issued to seamen and marines.—The officers of the Subsistence Department shall, upon the requisition of the naval or marine officer commanding any detachment of seamen or marines under orders to act on shore, in co-operation with the land troops, and during the time such detachment is so acting or proceeding to act, furnish rations to the officers, seamen, and marines of the same. *R. S. 1143.*

921. Rations issued to hospital matrons and nurses.— * * * hospital matrons, and the nurses employed in post or regimental hospitals, shall be entitled to receive one ration daily. *R. S. 1295.*

922. Rations issued to Indians.—The president is authorized to cause such rations as he deems proper, and as can be spared from the Army provisions without injury to the service, to be issued, under such regulations as he shall think fit to establish, to Indians who may visit the military posts or agencies of the United States on the frontiers, or in their respective nations, and a special account of these issues shall be kept and rendered. *R. S. 2110.*

923. Emergency ration.— * * * *Provided*, That hereafter the emergency ration prescribed for use on emergent occasions shall, when issued, be furnished in addition to the regular ration under such regulations as may be prescribed by the Secretary of War; * * * *Act of Mar. 2, 1907 (34 Stat. 1165), making appropriations for the support of the Army.*

924. Procurement of clothing and camp and garrison equipage.—For cloth, woolens, materials, and for the purchase and manufacture of clothing for the Army, including retired enlisted men when ordered to active duty; for members of the Reserve Officers' Training Corps; for issue and for sale at cost price according to the Army regulations; for payment for clothing not drawn due to warrant officers of the Mine Planter Service and to enlisted men on discharge; for altering and fitting clothing and washing and cleaning when necessary; * * * issue of toilet kits to recruits upon their first enlistment, and issue of housewives to the Army; for expenses of packing and handling and similar necessaries; * * * *Act of June 5, 1920 (41 Stat. 961), making appropriations for the support of the Army: Clothing and camp and garrison equipage.*

Similar provisions appear in previous appropriation acts.

See ante, 815, for provisions relative to the sale, barter, exchange, pledge, loan or gift of clothing. See A. W. 84, chap. 52, post, as to punishment of soldier who sells or through neglect loses or spoils his clothing, etc.

925. Clothing of the Army prescribed by the President.—The President may prescribe the uniform of the Army and quantity and kind of clothing which shall be issued annually to the troops of the United States. *R. S. 1296.*

Retired enlisted men were given a monthly allowance of $9.50 in lieu of rations and clothing by provisions of act Mar. 16, 1896, and act Mar. 2, 1907, post, 1818, 1705.

See chapters 41 and 42 on "Uniform and insignia" and "Decorations of honor," respectively.

926. Returns by officers accountable for clothing and camp equipage.—Every officer who receives clothing or camp equipage for the use of his command, or for issue to the troops, shall render to the Quartermaster-General, at the expiration of each regular quarter of the year, quarterly returns of such supplies, according to the forms which may be prescribed, accompanied by the requisite vouchers for any issues which shall have been made. *R. S. 1221.*

Section twelve hundred and twenty-one is amended by adding at the end of the section the following:

"Said returns and vouchers, after due examination by the Quartermaster General shall be transmitted for settlement to the proper accounting officer of the Treasury Department." *Act of Feb. 27, 1877 (19 Stat. 243), amending R. S. 1221.*

Provisions requiring officers who at any time were accountable for public property, before final payment to them on discharge from the service, to obtain certificates of nonindebtedness to the United States from bureaus of the War Department and from the Chief of the Division of Bookkeeping and Warrants of the Treasury Department, etc., post, 1617.

927. Alteration of clothing issued to soldiers.—Section twelve hundred and twenty is amended by adding at the end of the section the following:

"It shall be lawful for the commanding officer of each regiment, whenever it may be necessary, to cause the coats, vests, and overalls or breeches which may from time to time be issued to and for his regiment to be altered and new-made, so as to better to fit them to the persons respectively for whose use they shall be delivered; and for defraying the expense of such alterations, to cause to be deducted and applied out of the pay of such persons a sum or sums not exceeding twenty-five cents for each coat, eight cents for each vest and for each pair of overalls or breeches." *Act of Feb. 27, 1877 (19 Stat. 243), amending R. S. 1220.*

* * * *Provided also*, That hereafter the regimental price fixed for altering and fitting soldiers' clothing shall not exceed the cost of making the same at the clothing depots: *Act of Mar. 2, 1889 (25 Stat. 831), making appropriations for the support of the Army.*

928. Clothing for ordnance sergeants.— * * * *Provided*, That sergeants of ordnance shall receive the same allowance of clothing as other sergeants in like staff departments. *Act of July 16, 1892 (27 Stat. 178), making appropriations for the support of the Army.*

But see 1671, post.

929. Clothing to soldiers by mail.—Packages of woolen, cotton, or linen clothing, not exceeding two pounds in weight, may be sent through the mail to any non-commissioned officer or private in the Army of the United States, if prepaid, at the rate of one cent for each one ounce or fraction thereof, subject to such regulations as the Postmaster-General may prescribe. *R. S. 3911.*

930. Replacement of clothing destroyed.—The Secretary of War may, on the recommendation of the Surgeon-General, order gratuitous issues of clothing to soldiers who have had contagious diseases, and to hospital attendants who have nursed them, to replace any articles of their clothing destroyed by order of the proper medical officers to prevent contagion. *R. S. 1298.*

Where the clothing of certain enlisted men of volunteers was destroyed near Santiago, Cuba, in 1898, by order of the proper military authority, on account of having been exposed to contagion, and replaced by new clothing which was charged to the enlisted men receiving it on their clothing accounts, it was decided by the Comptroller of the Treasury, Nov. 28, 1900, that the issue was proper under the circumstances of the case, and that the charges therefor in the clothing accounts were erroneous and should be canceled.

931. Indemnity for clothing, etc., destroyed.— * * * and the payment of reasonable damages not otherwise provided for, for bedding and clothing injured or destroyed in such prevention; * * * *Act of June 5, 1920 (41 Stat. 967), making appropriations for the support of the Army: Medical Department.*

* * * for indemnity to officers and men of the Army for clothing and bedding, and so forth, destroyed since April 22, 1898, by order of medical officers of the Army for sanitary reasons, * * * *Act of June 5, 1920 (41 Stat. 962), making appropriations for the support of the Army: Clothing and camp and garrison equipage.*

Similar provisions appear in previous appropriation acts.

932. Wearing of uniform by discharged soldiers.— * * * *Provided*, That the foregoing provision shall not be construed * * * nor to prevent any person who has been honorably discharged from the United States Army, Navy, or Marine Corps, Regular or Volunteer, from wearing his uniform from the place of his discharge to his home, within three months after the date of such discharge; * * * *Sec. 125, act of June 3, 1916 (39 Stat. 216).*

Officers in former wars may wear their uniforms on occasions of ceremony. See, post, 2730–2732.

933. Return of uniforms by discharged soldiers.—That section one hundred and twenty-five of said Act be, and is hereby, amended by striking out the period at the end thereof, substituting therefor a colon, and adding thereafter the following: "*Provided*, That hereafter, upon the discharge or furlough to the Reserve of an enlisted man, all uniform outer clothing then in his possession, except such articles as he may be permitted to wear from the place of termination of his active service to his home, as authorized by this section, will be retained for military use; and within four months after such termination of his active service he shall return all uniform clothing, which he was so permitted to retain for wear to his home, by mail, under a franked label which shall be furnished him for the purpose, and in conformity with the instructions given him at the time of such termination of his active service; and in case he shall fail to return the same within such period, and in accordance with such instructions, he shall be deemed guilty of a misdemeanor, and, upon conviction, suffer the punishment prescribed by this section: * * *" *Sec. 10, chap. XVII, act of July 9, 1918 (40 Stat. 891), amending section 125, act of June 6, 1916 (39 Stat. 217).*

Sec. 125, above, was continued in full force and effect by sec. 8, act of June 4, 1920 (41 Stat. 836), post, 2728.

934. Uniform returned by National Guardsmen. * * * *Provided further*, That upon the release from Federal service of an enlisted man of the National Guard called as such into the service of the United States, all uniform outer clothing then in his possession shall be taken up and accounted for as property issued to the National Guard of the State to which the enlisted man belongs, in the manner prescribed by section sixty-seven of said Act: * * * *Sec. 10, chap. XVII, act of July 9, 1918 (40 Stat. 891), amending sec. 125, act of June 3, 1916 (39 Stat. 217).*

For section 67, above, see 2581, post.

935. Clothing retained by veterans of the war with Germany.—Any person who served in the United States Army, Navy, or Marine Corps in the present war may, upon honorable discharge and return to civil life, permanently retain one complete suit of outer uniform clothing, including the overcoat, and such articles of personal apparel and equipment as may be authorized, respectively, by the Secretary of War or the Secretary of the Navy, and may wear such

uniform clothing after such discharge: *Provided*, That the uniform above referred to shall include some distinctive mark or insignia to be prescribed, respectively, by the Secretary of War or the Secretary of the Navy, such mark or insignia to be issued, respectively, by the War Department or Navy Department to all enlisted personnel so discharged. The word "Navy" shall include the officers and enlisted personnel of the Coast Guard who have served with the Navy during the present war. *Sec. 1, act of Feb. 28, 1919 (40 Stat. 1202).*

That the provisions of this Act shall apply to all persons who served in the United States Army, Navy, or Marine Corps during the present war honorably discharged since April sixth, nineteen hundred and seventeen. And in cases where such clothing and uniforms have been restored to the Government on their discharge the same or similar clothing and uniform in kind and value as near as may be shall be returned and given to such soldiers, sailors, and marines. *Sec. 2, act of Feb. 28, 1919 (40 Stat. 1203).*

See 2728, post.

The distinctive mark prescribed by the War Department, under the above provision, was a red chevron. Circular 166, W. D., Apr. 2, 1919.

936. Clothing for dishonorably discharged soldiers.— * * * *And provided further*, That when an enlisted man is discharged otherwise than honorably, all uniform outer clothing in his possession shall be retained for military use, and, when authorized by regulations prescribed by the Secretary of War, a suit of citizen's outer clothing to cost not exceeding $15 may be issued to such enlisted man: * * * *Sec. 10, chap. XVII, act of July 9, 1918 (40 Stat. 891), amending sec. 125, act of June 3, 1916 (39 Stat. 217).* See 537 ante

937. Clothing for alien enemies.— * * * for a suit of citizens' outer clothing, to cost not exceeding $40, to be issued * * * to each enlisted man ordered interned by reason of the fact that he is an alien enemy, or, for the same reason, discharged without internment; * * * ~~*Act of June 5, 1920 (41 Stat. 961), making appropriations for the support of the Army: Clothing and camp and garrison equipage.*~~ W.D. appropriation act of June 30, 1922 (42 Stat 729)

~~Similar provisions appear in previous appropriation acts.~~ See 537 ante, for statutes

938. Commutation for uniforms of the Reserve Officers' Training Corps.— * * * *Provided further*, That the Secretary of War may, in his discretion and under such regulations as he may prescribe, permit such institutions to furnish their own uniforms and receive as commutation therefor the sum allotted by the Secretary of War to such institutions for uniforms. *Act of June 5, 1920 (41 Stat. 967), making appropriations for the support of the Army.*

939. Sale of uniforms, etc., to cadets and officers.—That hereafter uniforms, accouterments, and equipment shall, upon the request of any officer of the Army or cadet at the Military Academy, be furnished by the Government at cost, subject to such restrictions and regulations as the Secretary of War may prescribe. *Sec. 9, act of Aug. 31, 1918 (40 Stat. 957).*

The title of the act of Aug. 31, 1918, declares it to be generally amendatory of the act of May 18, 1917 (40 Stat. 76).

940. Sale of uniforms, etc., to officers of the National Guard.— * * * *Provided*, That section 9 of an Act amending the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917, approved August 31, 1918, shall also apply to the purchase of uniforms, accouterments, and equipment for cash by officers

of the National Guard and National Guard Reserve, whether in State or Federal service, on proper identification and under such rules and regulations as the Secretary of War may prescribe. *Sec. 109, act of June 3, 1916 (39 Stat. 209), as amended by sec. 47, act of June 4, 1920 (41 Stat. 784).*

941. **Sale of scraps.**—*Provided*, That hereafter the proceeds derived from the sale of surplus cuttings of material for clothing manufactured by the Quartermaster Corps of the Army shall be deposited to the credit of that appropriation out of which the material was purchased: * * * *Act of Aug. 29, 1916 (39 Stat. 635), making appropriations for the support of the Army.*

942. **Equipage issued to general prisoners.**— * * * for equipage, including authorized issues of toilet articles, barbers' and tailors' materials, for use of general prisoners confined at military posts without pay or allowances and applicants for enlistment while held under observation; * * * *Act of June 5, 1920 (41 Stat. 961), making appropriations for the support of the Army: Clothing and camp and garrison equipage.*

Similar provisions appear in previous appropriation acts.

943. **Regular supplies, Quartermaster Corps.**—Regular supplies of the Quartermaster Corps, including their care and protection; * * * and the necessary power for the operation of moving-picture machines; * * * for ice machines and their maintenance where required for the health and comfort of the troops and for cold storage; ice for issue to organizations of enlisted men and offices at such places as the Secretary of War may determine, and for preservation of stores; * * * for the authorized issues of laundry materials for use of general prisoners confined at military posts without pay or allowances, and for applicants for enlistment while held under observation; authorized issues of soap, toilet paper and towels; * * * for the purchase and issue of instruments, office furniture, stationery, and other authorized articles for the use of officers' schools at the several military posts; for purchase of relief maps for issue to organizations, commercial newspapers, market reports, and so forth; * * * stationery, typewriters and exchange of same, including blank books and blank forms for the Army, certificates for discharged soldiers, and for printing department orders and reports, * * *. *Act of June 5, 1920 (41 Stat. 957–958), making appropriations for the support of the Army: Quartermaster Corps, Regular supplies.*

Similar provisions appear in previous appropriation acts.

944. **Surplus ice, electric current and laundry facilities.**— * * * For the fiscal year ending June thirtieth, nineteen hundred and nineteen, whenever the ice machines, steam laundries, and electric plants shall not come in competition with private enterprise for sale to the public, and in the opinion of the Secretary of War it becomes necessary to the economical use and administration of such ice machines, steam laundries, and electric plants as have been or may hereafter be established in pursuance of law, surplus ice may be disposed of, laundry work may be done for other branches of the Government, and surplus electric light and power may be sold on such terms and in accordance with such regulations as may be prescribed by the Secretary of War: *Provided*, That the funds received from such sales and in payment for such laundry work shall be used to defray the cost of operation of said ice, laundry, and electric plants, and the sales and expenditures herein provided for shall be accounted for in accordance with the methods prescribed by law, and any sums remaining after such cost

of maintenance and operation have been defrayed shall be deposited in the Treasury to the credit of the appropriation from which the cost of operation of such plant is paid. *Act of July 9, 1918 (40 Stat. 857), making appropriations for the support of the Army: Quartermaster Corps, regular supplies.*

All funds hereafter derived from the sale of ice or as receipts from the sale of electric current or laundry work under the appropriations of the Quartermaster Corps shall be deposited in the Treasury of the United States as miscellaneous receipts. *Act of Nov. 4, 1918 (40 Stat. 1028), making appropriations to supply deficiencies.*

Similar provisions as to ice machines, steam laundries, and electric plants appear in previous acts. See act of May 12, 1917 (40 Stat. 52). No similar provision appears in the subsequent appropriation acts to date of publication.

945. Furniture, etc., for enlisted men.— * * * *Provided*, That for the current fiscal year and thereafter there may be expended from the appropriation for regular supplies the amounts required for the necessary equipments of the bake-house to carry on post bakeries: for the necessary furniture, textbooks, paper and equipments of the post schools; for the tableware and mess furniture for kitchens and mess halls; * * * each and all for use of the enlisted men of the Army: * * * *Act of June 13, 1890 (26 Stat. 152), making appropriations for the support of the Army.*

* * * for post bakeries, including bake ovens and apparatus pertaining thereto and the repair thereof; * * * for the necessary furniture, textbooks, paper, and equipment for the post schools and libraries, and schools for noncommissioned officers; * * * for the tableware and mess furniture for kitchens and mess halls, each and all for the enlisted men, including recruits; * * * for straw for soldiers' bedding, * * * *Act of June 5, 1920 (41 Stat. 958), making appropriations for the support of the Army: Quartermaster Corps, Regular supplies.*

Similar provisions appear in previous appropriation acts.

946. Furniture on hand to be used.— * * * *Provided further*, That all furniture now owned by the United States in other public buildings or in buildings rented by the United States shall be used, so far as practicable, whether it corresponds with the present regulation plan for furniture or not. *Act of July 1, 1918 (40 Stat. 639), making appropriations for sundry civil expenses.*

Provisions for purchasing furniture appear in the specific appropriations for each bureau, etc., and in Quartermaster Corps appropriations "Regular supplies," "Barracks and quarters," "Clothing and equipage," "Military post exchanges," "Vocational training."

See act of July 11, 1919 (41 Stat. 114, 118).

947. Gas warfare materials.—For the purchase, manufacture, and test of chemical warfare gases or other toxic substances, gas masks, or other offensive and defensive materials or appliances required for gas warfare purposes, including all necessary investigation, experimentation, and operations connected therewith, construction and repair of buildings and equipment and the machinery therefor; expenses incidental to the organization, training, and equipment of gas troops not otherwise provided for, $100,000,000: * * * *Provided further*, That the appropriations and authorizations above made shall be in addition to all allotments received for these purposes from the Medical Department of the Army and the Ordnance Department of the Army for the fiscal year 1919: *Provided further*, That not to exceed $2,000,000 of all amounts available for

the Chemical Warfare Service for the fiscal year 1919 shall be available for the acquisition of land. *Act of Nov. 4, 1918 (40 Stat. 1031).*

This is the first specific appropriation for the Chemical Warfare Service.

Unexpended balances of funds appropriated for the expenses of the Chemical Warfare Service were to be covered into the Treasury according to sec. 2, act of Feb. 25, 1919 (40 Stat. 1172). This affected the deleted portion of the above item.

948. Provision for heat and light.— * * * stoves and heating apparatus required for the use of the Army for heating offices, hospitals, barracks and quarters, and recruiting stations, and United States disciplinary barracks; also ranges, stoves, coffee roasters, and appliances for cooking and serving food at posts, in the field, and when traveling, and repair and maintenance of such heating and cooking appliances; * * * authorized issues of candles and matches; for furnishing heat and light for the authorized allowance of quarters for officers, including members of the Officers' Reserve Corps when ordered to active duty, and enlisted men, warrant officers, and field clerks, including enlisted men of the Regular Army Reserve and retired enlisted men when ordered to active duty; contract surgeons when stationed at and occupying public quarters at military posts; for officers of the National Guard attending service and garrison schools, and for recruits, guards, hospitals, storehouses, offices, the buildings erected at private cost, in the operation of the Act approved May 31, 1902, and buildings for similar purposes on military reservations authorized by War Department regulations; for sale to officers, and including also fuel and engine supplies required in the operation of modern batteries at established posts; * * * *Act of June 5, 1920 (41 Stat. 958), making appropriations for the support of the Army: Quartermaster Corps, Regular supplies.*

Similar provision appears in previous appropriation acts.

949. Sale of fuel to officers.— * * * *Provided*, That hereafter, fuel may be furnished to commissioned officers on the active list by the Quartermaster's Department, for the actual use of such officers only, at the rate of three dollars per cord for standard oak wood, or at an equivalent rate for other kinds of fuel, the amount so furnished to each to be limited to the officer's actual personal necessities as certified to by him: * * * *Act of June 12, 1906 (34 Stat. 250), making appropriations for the support of the Army.*

A subsequent provision that heat and light for quarters for officers and enlisted men shall be furnished at the expense of the United States, made by act of Mar. 2, 1907, is set forth, post, 1761.

See par. 1044, A. R., 1913, for table showing allowance of rooms, fuel, and cooking and heating stoves for officers.

Notes of Decisions.

Fuel.—Under act June 18, 1878, sec. 8, which contained provisions similar to those in this section, it was held that the provisions therein, giving to army officers the privilege of purchasing fuel at the rate of $3 per cord for standard oak wood, did not extend to retired officers of the army. And it was further held that the words "or an equivalent rate for other kinds of fuel, according to the regulations now in existence," in said section, were to be understood as only authorizing a sale of the quantity of other fuel for $3 (viz, 1,500 pounds of anthracite coal or 30 bushels of bituminous coal) which, by the regulations, was made the equivalent of a cord of standard oak wood. (1878) 16 Op. Atty. Gen. 93.

Under the act of July 15, 1870 (16 Stat. 320), the allowances to officers in the Army for fuel in kind for their servants was authorized. (1871) 13 Op. Atty. Gen. 417. Also notes to 1766, post.

Held that upon the evidence submitted the conclusion would not at present be adopted that the fuel allowances prescribed in the regulations were largely in excess of the quantities of fuel actually necessary for heating the authorized allowance of quarters for officers, and [illegible] Secre-

tary of War had had time to consider and amend said regulations the accounting officers would continue to assume that the quantities of fuel therein prescribed did not exceed the quantities necessary.

With reference to the payment of the value of the fuel allowance to officers on detached service in foreign countries, held that the amendment to the regulations authorizing such payment at the local rates of fuel at the place where the officer is serving, should be interpreted as requiring, in a case to which the regulation applies, a computation based upon the value of the equivalent of the wood allowance in the fuel actually used at the local price of such fuel and not upon the price of oak wood at such place where the same was not actually used for fuel. (Asst. Comp. W. W. Warwick, Sept. 23, 1913.)

950. Inspection of fuel.— * * * It shall not be lawful for any officer or person in the civil, military, or naval service of the United States in the District of Columbia to purchase anthracite or bituminous coal or wood for the public service except on condition that the same shall, before delivery, be inspected and weighed or measured by some competent person, to be appointed by the head of the Department or chief of the branch of the service for which the purchase is made from among the persons authorized to be employed in such Department or branch of the service. The person appointed under this section shall ascertain that each ton of coal weighed by him shall consist of two thousand two hundred and forty pounds, and that each cord of wood to be so measured shall be of the standard measure of one hundred and twenty-eight cubic feet. Each load or parcel of wood or coal weighed and measured by him shall be accompanied by his certificate of the number of tons or pounds of coal and the number of cords or parts of cords of wood in each load or parcel. *R. S. 3711, as amended by sec. 6, act of Mar. 15, 1898 (30 Stat. 316).*

As originally enacted, R. S. 3711 provided that an inspector should be appointed and bonded, and should receive a fee for each ton of coal or cord of wood measured by him. When amended by sec. 6, act of Mar. 2, 1895 (28 Stat. 808), the fees were omitted. It was next amended as set forth above.

951. Certificate of inspector of fuel.—It shall not be lawful for any accounting officer to pass or allow to the credit of any disbursing officer in the District of Columbia any money paid by him for purchase of anthracite or bituminous coal or for wood unless the voucher therefor is accompanied by a certificate of the proper inspector, weigher, and measurer that the quantity paid for has been determined by such officer. *R. S. 3713.*

952. Copy of appointment of inspector of fuel.—The proper accounting officer of the Treasury shall be furnished with a copy of the appointment of each inspector, weigher, and measurer appointed under the preceding section. *R. S. 3712.*

953. Gas for public buildings.—That hereafter no part of any money appropriated by this or any other Act shall be used for the payment to the Washington Gas Light Company or the Georgetown Gas Light Company for any gas furnished by said companies for use in any of the public buildings of the United States or the District of Columbia at a rate in excess of 70 cents per one thousand cubic feet. *Sec. 6, act of Sept. 1, 1916 (39 Stat. 716).*

954. Draft and pack animals.— * * * for the purchase and hire of draft and pack animals in such numbers as are actually required for the service, including reasonable provision for replacing unserviceable animals; * * * *Act of June 5, 1920 (41 Stat. 960), making appropriations for the support of the Army: Transportation of the Army and its supplies.*

Similar provisions appear in previous appropriation acts.

955. Horses purchased under contract and after inspection.— * * * *And provided further*, That hereafter all purchases of horses under appropriations for horses for the cavalry and artillery and for the Indian scouts shall be made by contract, after legal advertisement, by the Quartermaster's Department, under instructions of the Secretary of War, the horses to be inspected under the orders of the General commanding the Army; and no horse shall be received and paid for until duly inspected. * * * *Act of July 5, 1884 (23 Stat. 109), making appropriations for the support of the Army.*

This was a proviso, annexed to an appropriation for purchase of horses, in the Army appropriation act for the fiscal year 1885, cited above.

A further provision of said proviso, omitted here, required the Quartermaster General to report to the Secretary of War promptly, for transmission to Congress annually, all purchases and contracts for horses, mules, and military supplies for the Army, made by his department. It was repealed by act Mar. 2, 1895 (28 Stat. 787).

956. Horses for Cavalry, Artillery, Engineers, etc.—For the purchase of horses of ages, sex, and size as may be prescribed by the Secretary of War for remounts, for officers entitled to public mounts for the Cavalry, Artillery, Signal Corps, and Engineers, the United States Military Academy, service schools, and staff colleges and for the Indian Scouts, and for such Infantry and members of the Medical Department in field campaigns as may be required to be mounted, and the expenses incident thereto, $1,500,000: *Provided*, That the number of horses purchased under this appropriation, added to the number now on hand, shall be limited to the actual needs of the mounted service, including reasonable provisions for remounts, and unless otherwise ordered by the Secretary of War, no part of this appropriation shall be paid out for horses not purchased by contract after competition duly invited by the Quartermaster Corps and an inspection under the direction and authority of the Secretary of War. When practicable, horses shall be purchased in open market at all military posts or stations, when needed, at a maximum price to be fixed by the Secretary of War: * * * *Act of June 5, 1920 (41 Stat. 962), making appropriations for the support of the Army: Horses for Cavalry, etc.*

Similar provisions appear in previous appropriation acts.

957. Standard of Army Horses.— * * * *Provided further*, That no part of this appropriation shall be expended for the purchase of any horse below the standard set by Army Regulations for Cavalry, and Artillery horses, except when purchased as remounts or for instruction of cadets at the United States Military Academy: * * * *Act of June 5, 1920 (41 Stat. 962), making appropriations for the support of the Army: Horses for Cavalry, Artillery, etc.*

Similar provisions appear in previous appropriation acts.

958. Polo ponies.— * * * *Provided further*, That no part of this appropriation shall be expended for polo ponies except for West Point Military Academy, and such ponies shall not be used at any other place: * * * *Act of June 5, 1920 (41 Stat. 962), making appropriations for the suppor of the Army: Horses for Cavalry, etc.*

Similar provisions appear in previous appropriation acts.

959. Purchases of mounts of officers ordered overseas.— * * * *And provided further*, That hereafter when a mounted officer is ordered to duty beyond the seas or to make a change of station in the United States in which the cost of transportation for his authorized number of owned horses exceeds the sum at the time allowed for that purpose in the Army Regulations, the Secretary of War is authorized, under such regulations in respect to inspection and valua-

tion as he may prescribe, in his discretion to permit the purchase of said horses by the Quartermaster's Department, at a price not exceeding the average contract price paid for horses during the preceding fiscal year, the exact price to be fixed by a board of officers. *Act of Mar. 23, 1910 (36 Stat. 254), making appropriations for the support of the Army: Horses for Cavalry, etc.*

960. Breeding of Army horses.— * * * *Provided further*, That not to exceed $250,000 of the appropriation hereby made shall be available for the encouragement of the breeding of riding horses suitable for the Army, including cooperation with the Bureau of Animal Industry, Department of Agriculture, and for the purchase of animals for breeding purposes and their maintenance: *Provided further*, That the Secretary of War may, in his discretion, and under such rules and regulations as he may prescribe, accept donations of animals for breeding and donations of money for other property to be used as prizes or awards at agricultural fairs, horse shows, and similar exhibitions, in order to encourage the breeding of riding horses suitable for Army purposes: *And provided further*, That the Secretary of War shall report annually to Congress, at the commencement of each session, a statement of all expenditures under this appropriation, and full particulars of means adopted and carried into effect for the encouragement of the breeding of riding horses suitable for the military service. * * * *Act of June 5, 1920 (41 Stat. 962), making appropriations for the support of the Army.*

In 1918, by direction of the Secretary of War, mares were sent from remount depots to Front Royal, Va., Fort Keogh, Mont., and Fort Reno, Okla., where breeding has been undertaken, which is paid for out of the appropriation for "Regular supplies, Quartermaster Corps."

961. Care of animals.— * * * for forage, salt, and vinegar for the horses, mules, oxen, and other draft and riding animals of the Quartermaster Corps at the several posts and stations and with the armies in the field, and for the horses of the several regiments of Cavalry and batteries of Artillery, and such companies of Infantry and Scouts as may be mounted; for remounts and for the authorized number of officers' horses, including bedding for the animals; for seeds and implements required for the raising of forage at remount depots and on military reservations in the Hawaiian and Philippine Islands, and for labor and expenses incident thereto, including, when specifically authorized by the Secretary of War, the cost of irrigation; * * * *Act of June 5, 1920 (41 Stat. 958), making appropriations for the support of the Army: Quartermaster Corps, Regular supplies.*

Similar provisions appear in previous appropriation acts.

962. Sale of surplus horses and mules.—*Provided, however*, That the Secretary of War is hereby authorized upon the approval of this Act to sell for cash at either public or private sale such horses and mules as are not needed for either the Regular Army or the National Guard and the proceeds shall be turned into the United States Treasury as miscellaneous receipts. *Act of May 12, 1917 (40 Stat. 55), making appropriations for the support of the Army.*

963. Carrier pigeons.—That it be, and it hereby is, declared to be unlawful to knowingly entrap, capture, shoot, kill, possess, or in any way detain an Antwerp, or homing pigeon, commonly called carrier pigeon, which is owned by the United States or bears a band owned and issued by the United States having thereon the letters "U. S. A." or "U. S. N." and a serial number. *Sec. 1, act of Apr. 19, 1918 (40 Stat. 533).*

That the possession or detention of any pigeon described in section one of this Act by any person or persons in any loft, house, cage, building, or structure in the ownership or under the control of such person or persons without giving immediate notice by registered mail to the nearest military or naval authorities, shall be prima facie evidence of a violation of this Act. *Sec. 2, act of Apr. 19, 1918 (40 Stat. 533).*

That any person violating the provisions of this Act shall, upon conviction, be punished by a fine of not more than $100, or by imprisonment for not more than six months, or by both such fine and imprisonment. *Sec. 3, act of Apr. 19, 1918 (40 Stat. 533).*

964. Aircraft, motor-propelled vehicles, etc., exchanged.—That, subject to the approval of the Secretary of War, motor-propelled vehicles, airplanes, engines, parts thereof, balloons, and appurtenances may be exchanged in part payment for new equipment of the same or similar character to be used for the same purposes as those proposed to be exchanged. *Act of July 9, 1918 (40 Stat. 849), making appropriations for the support of the Army.*

This is similar to the act of July 24, 1917 (40 Stat. 247), except that balloons are there omitted. It is somewhat similar to act of May 12, 1917 (40 Stat. 43).

965. Band instruments, sewing machines, etc., exchanged.— * * * *Provided further,* That hereafter sewing machines and other labor-saving machinery used in the manufacture of clothing and equipage, motor trucks and passenger-carrying vehicles, and band instruments may be exchanged in part payment for new machines, vehicles, and instruments used for the same purpose as those proposed to be exchanged. *Act of Aug. 29, 1916 (39 Stat. 635), making appropriations for the support of the Army.*

966. Typewriters, adding machines, and labor-saving devices exchanged.—That the executive departments and other Government establishments and all branches of the public service may hereafter exchange typewriters, adding machines, and other similar labor saving devices in part payment for new machines used for the same purpose as those proposed to be exchanged. There shall be submitted to Congress, on the first day of the session following the close of each fiscal year, a report showing, as to each exchange hereunder, the make of the article, the period of its use, the allowance therefor, and the article, make thereof, and price, including exchange value, paid or to be paid for each article procured through such exchange. *Sec. 5, act of Mar. 4, 1915 (38 Stat. 1161).*

* * * *Provided further,* That hereafter the Signal Corps may exchange typewriters and adding machines in the purchase of similar equipment. *Act of Mar. 4, 1915 (38 Stat. 1064), making appropriations for the support of the Army.*

967. Prices of typewriters limited.—That no part of any money appropriated by this or any other Act shall be used during the fiscal year 1922 for the purchase of any standard typewriting machine, except bookkeeping and billing machines, at a price in excess of the following, to wit: For correspondence models with carriages which will accommodate paper ten inches in width, $70; for models with carriages which will accommodate paper twelve inches in width, $75; for models with carriages which will accommodate paper fourteen inches in width, $77.50; for models with carriages which will accommodate paper sixteen inches in width, $82.50; for models with carriages which will accommodate paper eighteen inches in width, $87.50; for models with carriages which will accommodate paper twenty inches in width, $94; for models with

carriages which will accommodate paper twenty-two inches in width, $95; for models with carriages which will accommodate paper twenty-four inches in width, $97.50; for models with carriages which will accommodate paper twenty-six inches in width, $103.50; for models with carriages which will accommodate paper twenty-eight inches in width, $104; for models with carriages which will accommodate paper thirty inches in width, $105; for models with carriages which will accommodate paper thirty-two inches in width, $107.50. *Sec. 4. act of Mar. 3, 1921 (41 Stat. 1307), making appropriations for legislative, executive, and judicial expenses.*

Similar provisions appear in previous appropriation acts.

Appropriations for specific bureaus usually contain a provision for the procurement of typewriters; also the Quartermaster appropriation "Regular supplies."

968. Typewriting machines to be sold through the General Supply Committee.—Hereafter no department or other Government establishment shall dispose of any typewriting machines by sale, exchange, or as part payment for another typewriter, that has been used less than three years. *Sec. 7, act of June 5, 1920 (41 Stat. 947), making appropriations for sundry civil expenses.*

* * * All purchases of typewriting machines during the fiscal year 1921 by the various branches of the Government of the United States for use in the District of Columbia or in the field, except as hereinafter provided, shall be made from the surplus machines in the stock of the General Supply Committee. The War Department shall furnish the General Supply Committee, immediately upon the approval of this Act, a complete inventory of the various makes, models, and classes of typewriters in its possession, the condition of such machines, and the point of storage, and shall turn over to the General Supply Committee such typewriting machines in such quantities as the Secretary of the Treasury from time to time may call for by specific requisition for sale to the various services of the Government. If the General Supply Committee is unable to furnish serviceable machines to any branch of the Government, it shall furnish unserviceable machines at current exchange prices and such machines shall then be applied by the branch of the Government receiving them as part payment for new machines from commercial sources in accordance with the prices fixed in the preceding paragraph. And in selling typewriting machines to the various services the General Supply Committee may accept an equal number of unserviceable machines as part payment thereon at the exchange prices quoted in the current general schedule of supplies. *Sec. 4, act of Mar. 3, 1921 (41 Stat. 1308), making appropriations for legislative, executive, and judicial expenses.*

* * * *Provided further*, That typewriters and computing machines transferred to the General Supply Committee as surplus, where such machines have become unfit for further use, may, in the discretion of the Secretary of the Treasury, be issued to other Government departments and establishments at exchange prices quoted in the current general schedule of supplies or sold commercially provided the price obtained is in excess of the exchange prices. *Act of Mar. 3, 1921 (41 Stat. 1265–1266), making appropriations for legislative, executive, and judicial expenses: Treasury Department.*

968½. Repair of typewriters.—Repairs to typewriting machines (except bookkeeping and billing machines) in the Government service in the District of Columbia may be made at cost by the General Supply Committee, payment therefor to be effected by transfer and counter warrant, charging the proper appropriation and crediting the appropriation "General Supply Committee, Transfer of Office Material, Supplies, and Equipment." *Act of Mar. 3, 1921*

(41 Stat. 1266), *making appropriations for legislative, executive, and judicial expenses: Treasury Department.*

969. Transfer of machines, etc., to the Chief of Engineers.—That the Secretary of War be, and he is hereby, authorized and empowered, in his discretion, to transfer, free of charge, to the Chief of Engineers, United States Army, for use in the execution, under his direction, of any civil work or works authorized by Congress, such material, supplies, instruments, vehicles, machinery, or other equipment pertaining to the Military Establishment as are or may hereafter be found to be surplus and no longer required for military purposes. *Sec. 8, act of June 5, 1920 (41 Stat. 1015).*

970. Transfer of machine tools and equipment to the Federal Board for Vocational Education.—The Secretary of War shall have authority to transfer to the Federal Board for Vocational Education, without compensation therefor, certain surplus machine tools and other equipment belonging to the War Department and now in possession of the Federal board and being used by that board as equipment in schools for vocational education controlled by the board. Property so transferred shall be dropped from the records of the War Department on the filing with the War Department of an itemized receipt for the articles thus transferred. An itemized statement of the articles transferred hereunder and the cost price thereof shall be reported to Congress by the Secretary of War. *Act of Mar. 6, 1920 (41 Stat. 504).*

971. Sale of machine tools to schools, etc.—That the Secretary of War be, and he is hereby, authorized, under such regulations as he may prescribe, to sell at 15 per centum of their cost to trade, technical, and public schools and universities, and other recognized educational institutions, upon application in writing, such machine tools as are suitable for their use which are now owned by the United States of America and are under the control of the War Department and are not needed for Government purposes. The money realized from the sale may be used by the Secretary of War to defray expenses, except cost of transportation, incident to distribution of the tools, and the balance shall be turned into the Treasury of the United States as miscellaneous receipts: *Provided*, That in the event any such material is offered for sale by said institutions without the consent in writing of the Secretary of War, title thereto shall revert to the United States. *Act of Nov. 19, 1919 (41 Stat. 360).*

972. Loan of tractors.—That the Secretary of War be, and he is hereby, authorized and empowered, at his discretion, and under such rules and regulations as he may prescribe, to loan to any State of the Union, when so requested by the highway department of the State, such tractors as are retained and not distributed under the act approved March 15, 1920, for use in highway construction by the highway department of such State: *Provided*, That all expenses for repairs and upkeep of tractors so loaned and the expenses of loading and freight shall be paid by the State, both in transfer to the State and the return to the Army. *Sec. 2, act of Mar. 1, 1921 (41 Stat. 1155), making appropriations for the service of the Post Office Department.*

972½. Photographic material.— * * * for purchase of supplies for securing, developing, printing, and reproducing photographs in connection with aerial photography; * * * *Act of June 5, 1920 (41 Stat. 953), making appropriations for the support of the Army: Air Service.*

973. Purchase of books, periodicals, etc., as specified in an appropriation.—That hereafter law books, books of reference, and periodicals for use of any Executive Department, or other Government establishment not under an Executive Department, at the seat of Government, shall not be purchased or paid for from

any appropriation made for contingent expenses or for any specific or general purpose unless such purchase is authorized and payment therefor specifically provided in the law granting the appropriation. *Sec. 3, act of Mar. 15, 1898 (30 Stat. 316), making appropriations for legislative, executive, and judicial expenses.*

Notes of Decisions.

Construction in general.—The words "contingent expenses," as employed in acts making appropriations, mean such incidental, casual, and unforeseen expenses as are necessary and appropriate to the execution of duties required by law in connection with the object for which the appropriation is made. 4 Comp. Dec. 287. There is no discretion conferred upon heads of departments to use such appropriations for other purposes. Id. 287.

The provisions in the act of Mar. 15, 1898, that "hereafter law books, books of reference, and periodicals for the use of any executive department, or other Government establishment not under an executive department, at the seat of government, shall not be purchased or paid for from any appropriation made for contingent expenses or for any specific or general purpose, unless such purchase is authorized and payment therefor specifically provided in the law granting the appropriation" does not apply to those branches of the public service located outside of Washington, nor to the Army, which is not a part of the War Department proper. Id. 551.

A newspaper is not a periodical within the meaning of the requirement above set forth in the act of Mar. 15, 1898 (30 Stat. 316). Id. 694.

974. Purchase of periodicals, etc., out of contingent fund.—No executive officer, other than the heads of Departments, shall apply more than thirty dollars, annually, out of the contingent fund under his control, to pay for newspapers, pamphlets, periodicals, or other books or prints not necessary for the business of his office. *R. S. 1779.*

975. Expenditure for newspapers.—The amount expended in any one year for newspapers, for any Department, except the Department of State, including all the Bureaus and offices connected therewith, shall not exceed one hundred dollars. * * * *R. S. 192.*

This section, as enacted in the Revised Statutes, contained a further provision, "And all newspapers purchased with the public money for the use of either of the departments must be preserved as files for such department," which was repealed by sec. 7, act of June 22, 1906 (34 Stat. 449).

976. Advance payment of subscriptions for periodicals.—That hereafter subscriptions to periodicals, which have been certified in writing by the respective heads of the executive departments or other Government establishments to be required for official use, may be paid in advance from appropriations available therefor. *Sec. 5, act of Mar. 4, 1915 (38 Stat. 1049), making appropriations for legislative, executive, and judicial expenses.*

See 301, ante.

The act for the support of the Army, dated July 11, 1919 (41 Stat. 123), in making provision for the purchase of periodicals for the Engineer School, the library of the Surgeon General's Office, and the office of the Chief Signal Officer gives no directions as to advance payments.

977. Advance payment for periodicals out of Quartermaster funds.— * * * *Provided*, That hereafter subscriptions to newspapers, magazines, periodicals, and other publications, purchased from funds of the Quartermaster Corps, may be paid for in advance; * * * *Act of Apr. 27, 1914 (38 Stat. 362), making appropriations for the support of the Army: Quartermaster Corps, Regular supplies.*

978. Periodicals, books, and binding for the Coast Artillery School.—For purchase and binding of professional books treating of military and scientific

subjects for library, for use of school, and for temporary use in coast defenses, $2,360: *Provided*, That section 3648, Revised Statutes, shall not apply to subscriptions for foreign and professional newspapers and periodicals to be paid for from this appropriation. *Act of June 5, 1920 (41 Stat. 951), making appropriations for the support of the Army: Coast Artillery School.*

Similar provisions appear in previous appropriation acts.

979. Periodicals for the Air Service.— * * * *Provided further*, That section 3648, Revised Statutes, shall not apply to subscriptions for foreign and professional newspapers and periodicals to be paid for from this appropriation: * * * *Act of June 5, 1920 (41 Stat. 954), making appropriations for the support of the Army: Air Service.*

980. Periodicals for the Engineer School.— * * * *Provided further*, That section 3648, Revised Statutes, shall not apply to subscriptions for foreign and professional newspapers and periodicals to be paid for from this appropriation. *Act of June 5, 1920 (41 Stat. 969), making appropriations for the support of the Army: Engineer School.*

980½. Periodicals for the Ordnance Department.— * * * for publications for libraries of the Ordnance Department, including the Ordnance Office; subscriptions to periodicals, which may be paid for in advance; * * * *Act of June 5, 1920 (41 Stat. 970), making appropriations for the support of the Army: Ordnance Service.*

981. Printing and binding to be done at the Government Printing Office.— All printing, binding, and blank books for the Senate or House of Representatives and for the Executive and Judicial Departments shall be done at the Government Printing Office, except in cases otherwise provided by law. *Sec. 87, act of Jan. 12, 1895 (28 Stat. 622).*

* * * *Provided further*, That on and after July 1, 1919, all printing, binding, and blank-book work for Congress, the Executive Office, the judiciary, and every executive department, independent office, and establishment of the Government, shall be done at the Government Printing Office, except such classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to have done elsewhere than in the District of Columbia for the exclusive use of any field service outside of said District. *Sec. 11, act of Mar. 1, 1919 (40 Stat. 1270), making appropriations for legislative, executive, and judicial expenses.*

Sec. 87 superseded R. S. sec. 3786, which contained similar provisions. See also post, 984.

Notes of Decisions.

Discretion of Public Printer.—Secs. 4 and 5 of the act of June 17, 1910 (36 Stat. 531), 734, 735, ante, relating to the purchase of stationery and other miscellaneous supplies for the executive departments and other Government establishments in Washington, do not supersede or repeal sec. 87, above, and other provisions of law under which it is claimed the Public Printer has authority to purchase all articles that are manifestly products of the printing art and its kindred operation. (1911) 28 Op. Atty. Gen. 581.

The discretion to be exercised by the Public Printer under this section extends only to articles of a character which are to be "done," that is, "executed, manufactured, or made," at the Government Printing Office. (1911) 28 Op. Atty. Gen. 612.

Work required to be done at Printing Office.—This section does not include illustrations and engravings, maps, or charts. (1891) 20 Op. Atty. Gen. 41.

The Public Printer is, however, required to purchase from the schedule of the General Supply Committee any of the articles above referred to which are properly upon the schedule, where the same are required for the use of the Printing Office, but he is not required to purchase such articles from the schedule for the other departments or establishments of the Government, as they

would be ordered through the Secretary of the Treasury. (1911) 28 Op. Atty. Gen. 581.

The Public Printer is not required by law to supply a specifically described patented binding device on the requisition of an allottee of the appropriation for public printing and binding, the article being of a character required by this section to be "done" at the Government Printing Office, where in his opinion an article of different character is more in the interest of economy, uniformity, and better adapted to the needs of the service. Id.

Blank books, press copy books, stenographers' notebooks, etc., which have been scheduled by the General Supply Committee, and are of a staple character usually carried in stock by commercial houses, do not come within the terms of this section. Id.

In purchasing articles of supplies not listed in the schedule of the General Supply Committee, or contracted for by the Secretary of the Treasury, the head of a department making the requisition is not required to state the specific reasons why such articles are necessary in lieu of other articles of a more or less similar nature which are listed on the schedule. Nor is the head of a department required to submit a similar statement in making a requisition upon the Public Printer for an article within the description of articles enumerated in the act of June 28, 1902 (32 Stat. 481), 988, post, but which is not required to be made to order, or "done," at the Government Printing Office under the provisions of this section. (1911) 28 Op. Atty. Gen. 612.

The fact that a similar article is listed upon the General Supply Committee's schedule authorized by sec. 4 of the act of June 17, 1910 (36 Stat. 531), ante, 734, 735, which might possibly subserve the purpose desired, is a matter that concerns only the head of the department making the requisition. Id.

982. Printing and binding as specified in appropriations.— * * * and after the fiscal year nineteen hundred and seven no appropriations other than those made specifically and solely for printing and binding shall be used for such purposes in any Executive Department or other Government establishment in the District of Columbia: *Provided*, That nothing in this section shall apply to stamped envelopes, or envelopes and articles of stationery other than letter heads and note heads, printed in the course of manufacture. *Sec. 2, act of June 30, 1906 (34 Stat. 762), making appropriations for civil expenses.*

See also, post, 998.

983. Printing, etc., chargeable to appropriations for the support of the Army and the National Guard.—That the appropriations herein made for the support of the Army and the National Guard are available for such printing, binding, and blank books as may be necessary in putting in effect the objects of the appropriations. *Act of July 11, 1919 (41 Stat. 128), making appropriations for the support of the Army.*

984. Funds advanced to the Public Printer.—During the fiscal year 1922, any department or independent establishment of the Government ordering printing and binding from the Government Printing Office (other than that specifically provided for by allotment) shall advance to the Public Printer upon written request 90 per centum of the estimated cost of the work at the time the order is placed and upon completion of such work shall pay to the Public Printer a sum sufficient to complete payment of the actual cost thereof. The sums so advanced to the Public Printer shall be placed to the credit of the appropriation "public printing and binding," on the books of the Treasury Department and be subject to requisition by the Public Printer. *Act of Mar. 4, 1921 (41 Stat. 1429), making appropriations for sundry civil expenses: Public printing and binding.*

985. Quarterly allotment of printing funds.—Not more than an allotment of one-half of the sum hereby appropriated for the public printing and for the public binding shall be expended in the first two quarters of the fiscal year, and no more than one-fourth thereof may be expended in either of the last two

quarters of the fiscal year, except that, in addition thereto, in either of said last quarters the unexpended balances of allotments for preceding quarters may be expended; and no department or Government establishment shall consume in any such period a greater percentage of its allotment than can be lawfully expended during the same period of the whole appropriation. *Act of Mar. 4, 1921 (41 Stat. 1430), making appropriations for sundry civil expenses: Government Printing Office.*

986. Accounting for printing and binding.—That hereafter in the printing and binding of documents or reports emanating . the Executive Departments, bureaus, and independent offices of the ..overnment, the cost of which is now charged to the allotment for printing and binding for Congress, or to appropriations or allotments of appropriations other than those made to the Executive Departments, bureaus, or independent offices of the Government, the cost of illustrations, composition, stereotyping, and other work involved in the actual preparation for printing, apart from the creation of manuscript, shall be charged to the appropriation or allotment of appropriation for the printing and binding of the Department, bureau, or independent office of the Government in which such documents or reports originate; the balance of cost shall be charged to the allotment for printing and binding for Congress, and to the appropriation or allotment of appropriation of the Executive Department, bureau, or independent office of the Government, in proportion to the number delivered to each; the cost of any copies of such documents or reports distributed otherwise than through Congress, or the Executive Departments, bureaus, and independent offices of the Government, if such there be, shall be charged as heretofore: *Provided*, That on or before the first day of December in each fiscal year each Executive Department, bureau, or independent office of the Government to which an appropriation or allotment of appropriation for printing and binding is made, shall obtain from the Public Printer an estimate of the probable cost of all publications of such Department, bureau, or independent office now required by law to be printed, and so much thereof as would, under the terms of this resolution, be charged to the appropriation or allotment of appropriation of the Department, bureau, or independent office of the Government in which such publications originate, shall thereupon be set aside to be applied only to the printing and binding of such documents and reports, and shall not be available for any other purpose until all of such allotment of cost on account of such documents and reports shall have been fully paid. *Joint Res. 13, Mar. 30, 1906 (34 Stat. 825).*

All expenditures from appropriations made herein under Government Printing Office, except appropriations for salaries and for stores and general expenses in and for the office of superintendent of documents, shall be equitably apportioned and charged by the Public Printer to each publication or work executed under any of the foregoing allotments, so that the total charges for work done from the appropriations aforesaid shall not be less than the total amount actually expended from all of said appropriations. *Act of Mar. 4, 1921 (41 Stat. 1431), making appropriations for sundry civil expenses: Public printing and binding.*

Notes of Decisions.

"Documents and reports."—The phrase "documents or reports," as used in this section, is restricted to "executive documents and reports," and does not embrace the printed laws authorized by section 56 of the act of Jan. 12, 1895 (28 Stat. 609). (1908) 26 Op. Atty. Gen. 514.

Official Register.—The Official Register of the United [illegible] public document [illegible]ice, all ex-

pense incurred in its actual preparation for printing, apart from the creation of the manuscript, is chargeable under this section to the appropriation or allotment of appropriation for printing and binding for the Census Office; and the balance of the cost thereof, which includes the cost of binding and any charge which may be incurred in the creation of the manuscript, should be charged to the congressional allotment and the appropriate executive allotment in proportion to the number of copies delivered to Congress and to each department. (1908) 26 Op. Atty. Gen. 552.

987. Requisitions for printing.—No printing shall be done for the Executive Departments in any fiscal year in excess of the amount of the appropriation, and none shall be done without a special requisition, signed by the chief of the Department and filed with the Public Printer. * * * Heads of Executive Departments shall direct whether reports made to them by bureau chiefs and chiefs of divisions shall be printed or not. * * * *Sec. 89, act of Jan 12, 1895 (28 Stat. 622).*

Money appropriated under the foregoing allotments shall not be expended for printing or binding for any of the executive departments or other Government establishments, except such as shall be certified in writing to the Public Printer by the respective heads or chiefs thereof to be necessary to conduct the ordinary and routine business required by law of such executive departments or Government establishments, and except such reports, monographs, bulletins, or other publications as are authorized by law or specifically provided for in appropriations herein; all other printing required or deemed necessary or desirable by heads of executive departments or other Government establishments or offices or bureaus thereof shall be done only as Congress shall from time to time authorize. *Act of Mar. 4, 1921 (41 Stat. 1430–1431), making appropriations for sundry civil expenses: Public printing and binding.*

This section superseded that part of R. S. 3802 which prohibited the execution of any printing or binding for departments in excess of the appropriation; also a provision of act June 3, 1874 (18 Stat. 204), that the Congressional Printer should print, upon the order of the heads of the executive departments, respectively, only such limited number of the annual reports of such departments, and necessary accompanying reports of subordinates, as should be deemed necessary for the use of Congress; and also provisions of act Aug. 5, 1892 (27 Stat. 388), similar to the ones in this section, prohibiting printing and binding in excess of the allotments, and the printing of the bureau reports.

988. Forms, etc.—The Public Printer is authorized hereafter to procure and supply, on the requisition of the head of any Executive Department or other Government establishment, complete manifold blanks, books, and forms, required in duplicating processes; also complete patented devices with which to file money-order statements, or other uniform official papers, and to charge such supplies to the allotment for printing and binding of the Department or Government establishment requiring the same. *Act of June 28, 1902 (32 Stat. 481), making appropriations for sundry civil expenses.*

Notes of Decisions.

Purchase of supplies not listed.—In purchasing articles of supplies not listed in the schedule of the General Supply Committee, or contracted for by the Secretary of the Treasury, the head of a department making the requisition is not required to state the specific reasons why such articles are necessary in lieu of other articles of a more or less similar nature which are listed on the schedule. Nor is the head of a department required to submit a similar statement in making a requisition upon the Public Printer for an article within the description of articles enumerated in this act, but which is not required to be made to order, or "done," at the Government Printing Office under the provisions of sec. 87 of the act, 981, ante. (1911), 28 Op. Atty. Gen. 612.

989. Printing by Government Printing Office restricted to ordinary business.—Hereafter no book or document not having to do with the ordinary business transactions of the Executive Departments shall be printed on the requisition of any Executive Department or unless the same shall have been expressly authorized by Congress. *Act of Mar. 3, 1905 (33 Stat. 1249).*

990. War Department printing fund.—For the War Department, its bureaus and offices, $450,000: *Provided*, That the sum of $3,000, or so much thereof as may be necessary, may be used for the publication, from time to time, of bulletins prepared under the direction of the Surgeon General of the Army, for the instruction of medical officers, when approved by the Secretary of War, and not exceeding $50,000 shall be available for printing and binding under the direction of the Chief of Engineers. *Act of Mar. 4, 1921 (41 Stat. 1429), making appropriations for sundry civil expenses: Public printing and binding.*

Similar provisions have been made in previous appropriation acts.

991. Medical and surgical history of the War with Germany.—Medical and surgical history of the War with Germany: Toward the preparation for publication under the direction of the Secretary of War of a medical and surgical history of the War with Germany, including printing and binding at the Government Printing Office and the necessary engravings and illustrations, $50,000: *Provided*, That the total cost of such history shall not exceed $150,000. *Act of Mar. 4, 1921 (41 Stat. 1392), making appropriations for sundry civil expenses: Medical Department.*

992. Estimate of printing for the Signal Service.— * * * *Provided further*, That all printing and engraving for the Geological Survey, the Coast and Geodetic Survey, the Hydrographic Office of the Navy Department, and the Signal Service shall hereafter be estimated for separately and in detail, and appropriated for separately for each of said Bureaus. * * * *Act of Aug. 4, 1886 (24 Stat. 255), making appropriations for sundry civil expenses: Public printing and binding.*

993. Periodicals representing a branch of Government service.— * * * *Provided*, That hereafter no journal, magazine, periodical, or other similar publication, shall be printed and issued by any branch or officer of the Government service unless the same shall have been specifically authorized by Congress, * * * *Sec. 11, act of Mar. 1, 1919 (40 Stat. 1270), making appropriations for legislative, executive, and judicial expenses: Public printing and binding.*

Any journal, magazine, periodical, or similar publication which is now being issued by a department or establishment of the Government may, in the discretion of the head thereof, be continued, within the limitation of available appropriations or other Government funds, until Dec. 1, 1921, when, if it shall not have been specifically authorized by Congress before that date, such journal, magazine, periodical, or similar publication shall be discontinued. *Sec. 3, act of Mar. 4, 1921 (41 Stat. 1433), making appropriations for sundry civil expenses.*

994. Illustrations.— * * * *Provided further*, That hereafter no part of the appropriations made for printing and binding shall be used for any illustration, engraving, or photograph in any document or report ordered printed by Congress unless the order to print expressly authorizes the same, nor in any document or report of any executive department or other Government establishment until the head of the executive department or Government establishment shall certify in a letter transmitting such report that the illustration is necessary and relates entirely to the transaction of public business

Act of Mar. 3, 1905 (33 Stat. 1213), making appropriations for sundry civil expenses: Public printing and binding.

Previous similar provisions, but without the word "hereafter," and applicable only to the appropriations therein made, were contained in sec. 3, act Mar. 3, 1903 (32 Stat. 1147).

Previous restrictions on printing, engraving, etc., and illustrations, were imposed by sec. 94 of the printing and binding act of 1895 (28 Stat. 623).

995. Number of copies of a printed work.—No report, publication, or document shall be printed in excess of the number of one thousand of each in any one fiscal year without authorization therefor by Congress, except that of the annual report of the head of the Department without appendices there may be printed in any one fiscal year not to exceed five thousand copies, bound in pamphlet form; and of the reports of chiefs of bureaus without appendices there may be printed in any one fiscal year not to exceed two thousand five hundred copies, bound in pamphlet form: * * * *Sec. 89, act of Jan. 12, 1895 (28 Stat. 622).*

Notes of Decisions.

Number and size of special reports.—This section authorizes the printing of 2,500 copies of special as well as annual reports of department bureau chiefs, when such printing is directed by the head of a department. (1905) 25 Op. Atty. Gen. 377.

996. Editions of a public document or report.— * * * *And provided further*, That the number of copies of any public document or report now authorized to be printed or which may hereafter be authorized to be printed for any of the Executive Departments, or bureaus or branches thereof, or independent offices of the Government may be supplied in two or more editions, instead of one, upon a requisition on the Public Printer by the official head of such Department or independent office, but in no case shall the aggregate of said editions exceed the number of copies now authorized, or which may hereafter be authorized: * * * *Joint Res. 14, of Mar. 30, 1906 (34 Stat. 826).*

This was a joint resolution to prevent unnecessary printing and binding and to correct evils in the present method of distribution of public documents.

997. Printing at commercial establishments in an emergency.— * * * *Provided*, That no part of the appropriations for the Quartermaster Corps shall be expended on printing unless the same shall be done at the Government Printing Office, or by contract after due notice and competition, except in such cases as the emergency will not admit of the giving notice of competition, and in cases where it is impracticable to have the necessary printing done by contract the same may be done with the approval of the Secretary of War, by the purchase of material and hire of the necessary labor for the purpose. * * * *Act of Aug. 29, 1916 (39 Stat. 631), making appropriations for the support of the Army: Regular supplies, Quartermaster Corps.*

998. Printing and binding at commercial establishments during hostilities.—Section eighty-seven of the printing and binding act, approved January twelfth, eighteen hundred and ninety-five (volume twenty-eight, Revised Statutes, page six hundred and twenty-two), and section two of the act approved June thirtieth, nineteen hundred and six (volume thirty-four, Revised Statutes, page seven hundred and sixty-two), are hereby amended as follows:

"That in time of actual hostilities the Secretary of War may procure from commercial or other printing establishments, by contract or open market purchase, such printing and binding as may be required for the use of the Army

and also for the National Guard of the several States and Territories and of the District of Columbia or other military forces while in the military service of the United States or about to be called into said service, payment for such printing and binding to be made from available appropriations." *Act of May 12, 1917 (40 Stat. 74), amending sec. 87, act of Jan. 12, 1895 (28 Stat. 622).*

For sec. 87 mentioned above, see 981, ante, and for sec. 2, act of June 30, 1906, see 982, ante.

The words "Revised Statutes" evidently refer to the "Statutes at Large."

The act of June 12, 1917 (40 Stat. 126), making appropriations for sundry civil expenses, made a special appropriation for printing and binding publications and manuals necessary for the organization and instruction of the land forces of the United States, or such other necessary printing as the Secretary of War might prescribe; and provided that the printing and binding therein authorized might be executed under contract with private concerns, if, in the judgment of the Secretary of War, the public interest required, notwithstanding the provisions of the law requiring such printing and binding to be done in the Government Printing Office.

999. Printing outside the District of Columbia.— * * * *Provided*, That printing, binding, and blank books required for use outside of the District of Columbia in connection with the support of the Army and the National Guard may be done or procured elsewhere than at the Government Printing Office when in the opinion of the Secretary of War such work can be more advantageously done or procured locally, the cost thereof to be paid from the proper appropriations: *Provided*, That where practical so to do no work be done or contract made under or by authority of any provision of this act on or under a percentage or cost-plus percentage basis, nor shall any contract, where circumstances so permit, be let involving more than $1,000 until at least three responsible competing contractors shall have been notified and considered in connection with such contract and all contracts to be awarded to the lowest responsible bidder, the Government reserving the right to reject any and all bids. *Act of July 9, 1918 (40 Stat. 877), making appropriations for the support of the Army.*

See 981, ante.

1000. Printing, binding, and blank books for the United States Military Academy.—Hereafter printing, binding, and blank books required for the use of the United States Military Academy may be done or procured elsewhere than at the Government Printing Office when in the opinion of the Secretary of War such work can be more advantageously done or procured locally, the cost thereof to be paid from the proper appropriation or appropriations made for the Military Academy. *Act of June 27, 1918 (40 Stat. 632).*

1001. Official Postal Guide.—Hereafter contracts let for the publication of the Official Postal Guide shall provide for the supply of such copies as may be required for public use by the several executive departments and other Government establishments at a price not exceeding the cost of such guides to the Post Office Department. *Act of May 10, 1916 (39 Stat. 108), making appropriations for legislative, executive, and judicial expenses.*

1002. Annual report on publications.—Hereafter the head of each department and independent establishment of the Government shall on the first day of each regular session submit in writing a report to the Congress giving the aggregate number of the various publications it has issued during the preceding fiscal year giving same in detail, and shall also report the [illegible] used for such publications, cost of printing and the cost [illegible] publication, and the number of each which he[illegible] *1920 (41 Stat. 1057).*

1003. Waste, etc., to be remedied by the Joint Committee on Printing.—That the Joint Committee on Printing shall have power to adopt and employ such measures as, in its discretion, may be deemed necessary to remedy any neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications: * * * *Sec. 11, act of Mar. 1, 1919 (40 Stat. 1270), making appropriations for legislative, executive, and judicial expenses.*

The Joint Committee on Printing was created by sec. 1, act of Jan. 12, 1895 (28 Stat. 601), to consist of three members of the Senate and three members of the House of Representatives. Sec. 6, act of Mar. 3, 1917 (39 Stat. 1121), provides that this committee shall continue to exercise its powers and duties when Congress is not in session.

1004. Road material transferred to the Department of Agriculture.—That the Secretary of War be, and he is hereby, authorized in his discretion to transfer to the Secretary of Agriculture all available war material, equipment, and supplies not needed for the purposes of the War Department, but suitable for use in the improvement of highways, and that the same be distributed among the highway departments of the several States to be used on roads constructed in whole or in part by Federal aid, such distribution to be made upon a value basis of distribution the same as provided by the Federal aid road Act, approved July 11, 1916: *Provided*, That the Secretary of Agriculture, at his discretion, may reserve from such distribution not to exceed 10 per centum of such material, equipment, and supplies for use in the construction of national forest roads or other roads constructed under his direct supervision. *Sec. 7, act of Feb. 28, 1919 (40 Stat. 1201).*

Transfer in accordance with the above statute was provided for by sec. 2, act of Mar. 15, 1920 (41 Stat. 530), which gave a specific list of articles to be transferred.

1005. Bridge material loaned to the city of West Point, Ga.—That the Secretary of War be, and he is hereby, authorized in his discretion to construct and maintain a pontoon bridge across the Chattahoochee River at West Point, Georgia, and to loan to the city of West Point, Georgia, without expense of transportation to the Government, the necessary material for such construction now in possession of the War Department and not needed for immediate use: *Provided*, That the use of such bridge as a highway under the supervision, regulation, and control of the duly constituted authorities of said city of West Point, Georgia, is hereby permitted for such time as the Secretary of War shall determine to be necessary: *And provided further*, That all cost of construction shall be borne by the city of West Point, Georgia, and the Secretary of War is hereby authorized to make such rules and regulations for the return of the material to the Government herein authorized to be loaned as he may deem necessary. *Joint Res. 25, Dec. 23, 1919 (41 Stat. 370).*

1006. Telephone material transferred to the Department of Agriculture.—That the Secretary of War is also hereby authorized and directed to transfer to the Department of Agriculture, for the use of the Forest Service, such telephone supplies pertaining to the Military Establishment which have been found to be surplus and no longer required for military purposes and are needed for the present use of the said service. *Sec. 3, act of Mar. 15, 1920 (41 Stat. 531).*

1007. Tents loaned to veterans.—That hereafter no loan of tents shall be made except to the Grand Army of the Republic, the United Confederate Veterans, the United Spanish War Veterans, and to recognized organizations of veterans of the late World War by whatever name they may be known. *Joint Res. 11,*

Joint Res 65

Mar. 2, 1913 (37 Stat. 1025), as amended by ~~Joint Res. 6,~~ July 26 1919 (41 Stat. 272). See note C ML 2 p. 7

1008. Tobacco.—Tobacco shall be furnished to the enlisted men by the commissaries of subsistences, at cost prices, exclusive of the cost of transportation, in such quantities as they may require, not exceeding sixteen ounces per month. *R. S. 1149.*

R. S. 1301 provides that amounts due from men for tobacco sold to them are to be deducted from their pay. See 1614, post.

1009. Commission on the Standardization of Screw Threads.—That a commission is hereby created, to be known as the Commission for the Standardization of Screw Threads, hereinafter referred to as the commission, which shall be composed of nine commissioners, one of whom shall be the Director of the Bureau of Standards, who shall be chairman of the commission; two representatives of the Army, to be appointed by the Secretary of War; two representatives of the Navy, to be appointed by the Secretary of the Navy; and four to be appointed by the Secretary of Commerce, two of whom shall be chosen from nominations made by the American Society of Mechanical Engineers and two from nominations made by the Society of Automotive Engineers. *Sec. 1, act of July 18, 1918 (40 Stat. 912), as amended by act of Mar. 3, 1919 (40 Stat. 1291).*

That the commission shall serve without compensation, but nothing herein shall be held to affect the pay of the commissioners appointed from the Army and Navy or of the Director of the Bureau of Standards. *Sec. 4, act of July 18, 1918 (40 Stat. 913), as amended by act of Mar. 3, 1919 (40 Stat. 1291).*

That the commission may adopt rules and regulations in regard to its procedure and the conduct of its business. *Sec. 5, act of July 18, 1918 (40 Stat. 913), as amended by act of Mar. 3, 1919 (40 Stat. 1291).*

That the commission shall cease and terminate at the end of one year and six months from the date of its original appointment. *Sec. 6, act of July 18, 1918 (40 Stat. 913), as amended by act of Mar. 3, 1919 (40 Stat. 1291).*

That the term of the National Screw Thread Commission, created by an Act approved July 18, 1918, as amended by an Act approved March 3, 1919, be, and the same is hereby, extended for an additional period of two years from March 21, 1920. *Joint Res. 34, Mar. 23, 1920 (41 Stat. 536).*

1010. Standardization of screw threads.—That it shall be the duty of said commission to ascertain and establish standards for screw threads, which shall be submitted to the Secretary of War, the Secretary of the Navy, and the Secretary of Commerce for their acceptance and approval. Such standards, when thus accepted and approved, shall be adopted and used in the several manufacturing plants under the control of the War and Navy Departments, and, so far as practicable, in all specifications for screw threads in proposals for manufactured articles, parts, or materials to be used under the direction of these departments. *Sec. 2, act of July 18, 1918 (40 Stat. 913) as amended by act of Mar. 3, 1919 (40 Stat. 1291).*

That the Secretary of Commerce shall promulgate such standards for use by the public and cause the same to be published as a public document. *Sec. 3, act of July 18, 1918 (40 Stat. 913), as amended by act of Mar. 3, 1919 (40 Stat. 1291).*

1011. Gauges, dies, tools, etc., standardized.—To provide by cooperation of the Bureau of Standards, the War Department, and the Navy Department, for the standardization and testing of the standard gauges, screw threads, and standards required in manufacturing throughout the United States, and to

calibrate and test such standard gauges, screw threads, and standards, including necessary equipment, and personal services in the District of Columbia and in the field, $40,000. *Act of Mar. 3, 1921 (41 Stat. 1302), making appropriations for legislative, executive, and judicial expenses: Bureau of Standards.*

Similar provision appears in previous appropriation acts.

See acts of July 3, 1918 (40 Stat. 808); Mar. 28, 1918 (40 Stat. 495); June 15, 1917 (40 Stat. 216). In previous appropriations provision is also made for rental of quarters, erection of temporary structures, books and periodicals, and other necessary items.

1012. Procurement of gauges, dies, jigs, etc.—The Secretary of War be, and he is hereby, authorized to prepare or cause to be prepared, to purchase or otherwise procure, such gauges, dies, jigs, tools, fixtures, and other special aids and appliances, including specifications and detailed drawings, as may be necessary for the immediate manufacture, by the Government and by private manufacturers, of arms, ammunition, and special equipment necessary to arm and equip the land forces likely to be required by the United States in time of war: *Provided*, That in the expenditure of any sums appropriated to carry out the purposes of this section the existing laws prescribing competition in the procurement of supplies by purchase shall not govern, whenever in the opinion of the Secretary of War such action will be for the best interests of the public service. *Sec. 123, act of June 3, 1916 (39 Stat. 215).*

1013. Perfection of inventions.— * * * *Provided*, That hereafter no money shall be expended at said armories in the perfection of patentable inventions in the manufacture of arms by officers of the Army otherwise compensated for their services to the United States. *Act of Mar. 3, 1875 (18 Stat. 455).*

1014. Patent granted to an officer.—The Secretary of the Interior and the Commissioner of Patents are authorized to grant any officer of the government, except officers and employees of the Patent Office, a patent for any invention of the classes mentioned in section forty-eight hundred and eighty-six of the Revised Statutes, when such invention is used or to be used in the public service, without the payment of any fee: *Provided*, That the applicant in his application shall state that the invention described therein, if patented, may be used by the government or any of its officers or employees in the prosecution of work for the government, or by any other person in the United States, without the payment to him of any royalty thereon, which stipulation shall be included in the patent. *Act of Mar. 3, 1883 (22 Stat. 625), making appropriations for sundry civil expenses.*

That where an invention was made by a person while serving abroad, during the war, with the forces of the United States, civil or military, the inventor thereof shall be entitled, in interference and other proceedings arising in connection with such invention, to the same rights of priority with respect of such invention as if the same had been made in the United States, and where an application became abandoned or forfeited, during the time the applicant was serving with the forces of the United States, by reason of his failure to take action or pay a fee within the time now required by law, such action may be taken, or the fee paid, within six months from the passage of this Act. *Sec. 6, act of Mar. 3, 1921 (41 Stat. 1314).*

Notes of Decisions.

Officers and employees of Government.—The mere fact that a person is in the employ of the Government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor as his in-

dividual property. Gill *v.* U. S. (1896), 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480.

The Commissioner of Patents is not disqualified from obtaining a patent, after expiration of his term of office, for an invention made during such term. Foote *v.* Frost (C. C. 1878), Fed. Cas. No. 4910.

The second section of the act of July 4, 1836 (5 Stat. sec. 118), disqualifying an employee in the Patent Office from acquiring an interest in a patent, does not disqualify such employee from obtaining a patent, after such employment has ceased, for an invention made prior to the commencement of such employment. Page *v.* Holmes Burglar Alarm Tel. Co. (C. C. 1880), 1 Fed. 304.

A naval officer or employee of the Government at a navy yard, who has invented an article for use in the naval service and patented it, if the invention does not relate to a matter as to which he was specially directed to experiment with a view to suggest improvements, is entitled to compensation from the Government for the use of such article, in addition to his salary or pay as such officer or employee. (1889) 19 Op. Atty. Gen. 407.

The Secretary of the Navy may lawfully contract with an ensign of the Navy for the purchase of patent rights and improvements in ordnance for use in the Navy, when the ensign was not employed to make experiments, but paid the expenses of obtaining letters patent, and when no expense was authorized or facility furnished by the Bureau of Ordnance to aid him in making or perfecting his invention. (1892) 20 Op. Atty. Gen. 329.

Invention by skilled mechanic.—Where a skilled mechanic in the Government employment, in the ordinary course of his employment, with the aids furnished by the Government and the suggestion and advice of his superior officer, produces a device upon which a patent is issued, he can not recover for its use by the Government. Eager *v.* U. S. 35 Ct. Cls. 556; Solomen's Case, 21 id. 479; Gill's Case, 22 id. 335; 25 id. 415.

Invention by one not specifically employed for the purpose.—When not specifically employed for the purpose, if he makes an invention he is entitled to the benefits of the same. U. S. *v.* Burns, 12 Wal. 246; Solomons *v.* U. S., 21 Ct. Cls. 479–83, and 22 id. 335; Solomons *v.* U. S., 137 U. S. 346; Gill *v.* U. S., 160 U. S. 426; Gill *v.* U. S., 25 Ct. Cls. 415; McAleer *v.* U. S., 150 U. S. 424; and Eager *v.* U. S., 35 Ct. Cls. 556–568.

See, however, act of June 25, 1910, post, 1018, which authorizes a suit against the United States for infringement of patent rights with the proviso that the act shall not "apply to any device discovered or invented" by an employee of the United States, "during the time of his employment or service." While no suit for infringement can be brought under the statute in respect to such device, the statute stops short of changing the law as above stated.

1015. Inventions important to armament or defenses.—All applications for patents shall be completed and prepared for examination within one year after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable: *Provided, however,* That no application shall be regarded as abandoned which has become the property of the Government of the United States and with respect to which the head of any department of the Government shall have certified to the Commissioner of Patents, within a period of three years, that the invention disclosed therein is important to the armament or defense of the United States: *Provided further,* That within ninety days, and not less than thirty days, before the expiration of any such three-year period the Commissioner of Patents shall, in writing, notify the head of the department interested in any pending application for patent, of the approaching expiration of the three-year period within which any application for patent shall have been pending. *R. S. §§89, as amended by act of July 6, 1916 (39 Stat. 348).*

Provisions for extension of time for filing application were made by act Aug. 17, 1916.

The acquisition of an invention for radiodynamic control of water-borne carriers of high explosives was provided for by the act of July 6, 1916 (39 Stat. 347) and by sec. 7, act of Mar. 2, 1919 (40 Stat. 1309).

Notes of Decisions.

Failure to prosecute application and effect thereof.—An inventor can not without cause hold his application pending during a long period of years, leaving the public uncertain whether he intends ever to prosecute it. **Woodbury Patent Planing** Mach. Co. *v.* **Keith (1879), 101 U. S. 479,** 25 L. Ed. 939.

1016. Inventions kept secret in time of war.—That whenever during a time when the United States is at war the publication of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the public safety or defense or might assist the enemy or endanger the successful prosecution of the war he may order that the invention be kept secret and withhold the grant of a patent until the termination of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the commmissioner that in violation of said order said invention has been published or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives, without the consent or approval of the Commissioner of Patents, or under a license of the Secretary of Commerce as provided by law. *Act of Oct. 6, 1917 (40 Stat. 394).*

See 2004, post, being sec. 10 of the trading with the enemy act, to like effect.

1017. Compensation to inventors.—When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately received a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government. *Act of Oct 6, 1917 (40 Stat. 395).*

1018. Inventions used by the United States without license.—That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: *Provided, however*, That said Court of Claims shall not entertain a suit or award compensation under the provisions of this Act where the claim for compensation is based on the use or manufacture by or for the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided further*, That in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise: *And provided further*, That the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service. *Act of June 25, 1910 (36 Stat. 851), as amended by act of July 1, 1918 (40 Stat. 705).*

That portion of this paragraph as originally enacted, which differed from the enactment of July 1, 1918, was as follows:

"Whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the new owner thereof or lawful right to use the same, such owner may recover reasonable compensation for

such use by suit in the Court of Claims: *Provided, however,* That said Court of Claims shall not entertain a suit or reward [award] compensation under the provisions of this act where the claim for compensation is based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of the United States." The rest of this paragraph is similar to the act of June 25, 1910 (36 Stat. 851).

Notes of Decisions.

Purpose of statute.—The purpose of the statute is to give further security to the rights of patentees by permitting suit and recovery of compensation in the Court of Claims in those cases where their inventions are availed of for the benefit of the United States by officials of the Government, in dealing with subjects within the scope of their authority, but under circumstances not justifying the implication of contract with the patentees. Cramp & Sons v. Curtis Turbine Co. (1917), 246 U. S. 28; Marconi Wireless Telegraph Co. of America v. Simon (1917), 246 U. S. 46.

CHAPTER 22.

LAND AND BUILDINGS.

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1019. Purchase of land to be authorized by law.—No land shall be purchased on account of the United States, except under a law authorizing such purchase. *R. S. 3736.*

See note to R. S. 3733, post, 1153.

Notes of Decisions.

Construction and effect of section in general.—The general effect of the section is to render the exercise by an executive department of a power to purchase land on account of the United States illegal, unless the intention of Congress that such power should be exercised has been so clearly expressed as to amount to an express authority. (1865) 11 Op. Atty. Gen. 201.

An act authorizing the Secretary of War to purchase for the United States land necessary for wharves for transportation of the Army and its supplies is a law authorizing the purchase of land within the statute. (1899) 22 Op. Atty. Gen. 665.

A conveyance of lands to the United States is void and inoperative unless the purchase is authorized by Congress. U. S. v. Tichenor (C. C. 1882), 12 Fed. 415.

This section is directed not against the acquisition of real property otherwise than for a valuable consideration but against the expenditure of public money. Hence the word "purchase" should not be deemed herein to apply to the acquisition of real property by any means other than by devise but given a narrower meaning, in which it appears clearly it was intended to be used. (1910) 28 Op. Atty. Gen. 413, 415; Id. 462.

Implication of authority to purchase land.—Under the section an act authorizing a public improvement and appropriating money therefor is sufficient authority for the purchase of land necessary or proper to such improvement. Burns v. U. S. (1908), 160 Fed. 631, 87 C. C. A. 533.

The compromise of a suit, receiving real and other property in discharge of the debt in trust, and selling the same, does not come under any authority to purchase lands. U. S. v. Lane (C. C. 1844), Fed. Cas. No. 15,559.

Act Mar. 3, 1875, making an appropriation for a movable dam, impliedly authorizes the purchase, with the approval of the Secretary of War, of such land as is necessary for the construction of the dam. (1877) 15 Op. Atty. Gen. 212.

Exchange of lands.—The Secretary of the Treasury may, if authorized by the President, accept a site for a Federal building in Honolulu acquired in exchange for public land in Hawaii and assume the custody and control thereof, no objection thereto arising under the section. (1903) 24 Op. Atty. Gen. 600.

The expense of procuring an abstract of title to land to be used as a site for a fortification is a proper charge against the appropriation made for the purchase of the site, if the abstract is needed by the United States attorney to assist him in examining the title, provided the land is to be purchased and not condemned. 3 Comp. Dec. 216.

The act of Congress does not prohibit the acquisition by the United States of the legal

title to land, without express legislative authority, when it is taken by way of security for debt. Neilson v. Lagow, 12 How. 98.

Construction of section to defeat Government title.—This section should not be construed to apply to executed contracts so as to defeat the title of the United States to land it has paid for. Burns v. U. S. (1908), 160 Fed. 631, 87 C. C. A. 533.

Taking title or security.—A deed to trustees to pay a debt due the United States, being an authority to sell so much of the land as might be necessary to pay the debt, is not such a purchase as is forbidden by this section, but the statute does not prohibit the acquisition directly by the United States of the legal title to land, when it is taken by way of security for a debt. Neilson v. Lagow (1851), 12 How. 98, 106, 107, 13 L. Ed. 909.

Purchase of mine.—The leasing of a mine in Pennsylvania by the United States on a cash payment of $1,500, for experimentations in mine rescue work, constitutes a purchase of land within the meaning of the section (1910), 28 Opp. Atty. Gen. 463.

Sites for monuments.—An appropriation for the erection of monuments or memorial tablets for the purpose of marking the position of each of the commands of the Regular Army engaged at Gettysburg is not applicable to the purchase of lands for the sites of such monuments or tablets. (1887) 19 Op. Atty. Gen. 79.

1020. Assent of States to purchases of land by the United States.—The President of the United States is authorized to procure the assent of the legislature of any State within which any purchase of land has been made for the erection of forts, magazines, arsenals, dockyards, and other needful buildings without such consent having been obtained. *R. S. 1838.*

Notes of Decisions.

Jurisdiction of Federal courts.—See ante, 431, and notes.

Payment for land.—Payment of the purchase money for the land may be made, though the legislature of the State has not consented to the purchase. See 1029, post, considered in connection with this section, and construed. (1877) 15 Op. Atty. Gen. 212.

1021. Price of land limited by appropriation.—And hereafter no money shall be paid nor contracts made for payment for any site for a public building in excess of the amount specifically appropriated therefor; * * * *R. S. 3734, as amended by sec. 33, act of June 25, 1910 (36 Stat. 699).*

See also notes to R. S. 3733, post, 1153.
Requisites of estimates for appropriations for public works, see 208, ante.
Unexpended balances to be carried to surplus fund, exceptions, see 231, ante.
Restriction on purchases of land, see 1103, post.

Notes of Decisions.

Right to object on ground of insufficiency of appropriation.—An exception to a petition by the United States for viewers to assess the compensation for a site for public buildings that there was not sufficient of the amount appropriated by Congress to pay for exceptant's lot will not be sustained. In re U. S. (Pa. 1874), 24 Pittsb. Leg. J. 105.

1022. Condemnation of land.—That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within

thirty days from the receipt of the application at the Department of Justice. *Sec. 1, act of Aug. 1, 1888 (25 Stat. 357).*

The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding. *Sec. 2 act of Aug. 1, 1888 (25 Stat. 357).*

Notes of Decisions.

Power of eminent domain by United States.—The United States, in proceedings to condemn land for governmental purposes, exercises its own right of eminent domain, subject to the limitation of the Federal Constitution that private property shall not be taken for public use without just compensation, and does not proceed under the right of the State; and the right to compensation and its measure may be different from that in a State condemnation proceeding with respect to property which had previously been appropriated to public or municipal uses under the laws of the State. Town of Nahant *v.* U. S. (1905)), 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723, modifying decree In re Condemnation of Land at Nahant (D. C. 1904), 128 Fed. 185, and decree modified (1907), 153 Fed. 520, 82 C. C. A. 470.

The United States has never, by any legislation, undertaken to confer upon the States authority to judge of its needs of lands for national purposes or to assess the compensation it should pay, and any such judgment and assessment must, therefore, be wholly provisional and subject to its acceptance and ratification. People *v.* Humphrey (1871), 23 Mich. 471, 9 Am. Rep. 94.

The United States may, in the exercise of its right of eminent domain, by observing the constitutional requirement of making due compensation therefor, seize and condemn the property of individuals for the purpose of erecting lighthouses thereon. Id.

The proceeding under Laws Mich. 1867, p. 158, authorizing the condemnation of private lands for the purpose of turning it over to the United States for the maintenance of a lighthouse, can not be sustained on the ground of the interest of the State by reason of its coastwise commerce in the establishment of lighthouses on such waters. Id.

Any attempted distinction between "requisition" and "condemnation" is largely technical; "requisition" is more often used with reference to the taking of personal property, and "condemnation" to the taking of real property; but in either case the Fifth Amendment requires just compensation to be made. Filbin Corporation *v.* U. S. (D. C. 1920), 266 Fed. 911.

The exemption of the United States from a suit by an individual does not affect the rule that property may only be taken in the manner prescribed by law. Id.

The omission from the statute of a provision for a jury trial does not deprive the owner of any right. Id.

Property subject to appropriation.—The rule that land in public use can not be taken for another and inconsistent public use under general legislative power of condemnation, but that the right must appear, to seize the particular property, by express provision directed toward the special property, in some pertinent legislation or be the inevitable implication arising from such legislation, does not apply to a proceeding by the United States to condemn a portion of a public alley for a post office site; the comparative importance of the contending public uses under such circumstances being a matter for judicial determination. U. S. *v.* City of Tiffin (C. C. 1911), 190 Fed. 279.

Query, whether property already lawfully taken and held for the uses of the State as a public way can be taken for the uses of the United States without express authority from Congress therefor, or under a statute authorizing in general terms the condemnation of land for such use. U. S. *v.* Certain Land in Town of New Castle, Rockingham County (C. C. 1908), 165 Fed. 783. See (1893) 20 Op. Atty. Gen. 628.

Validity of statute.—The manner in which the power of eminent domain shall be exercised is a matter of legislative discretion. Chappell *v.* U. S. (1897), 81 Fed. 764, 26 C. C. A. 600. And this section is a constitutional exercise of the powers of Congress. Chappell *v.* U. S. (1896), 16 Sup. Ct. 397, 400, 160 U. S. 499, 40 L. Ed. 510. And is not in conflict with Const. Amend. 5. In re Ruggeimer (D. C. 1888), 36 Fed. 369.

Construction and applicability of statute.—The purpose of this section is to

authorize condemnation when theretofore or thereafter an act of Congress authorized land to be procured. U. S. *v.* Beaty (D. C. 1912), 198 Fed. 284. But it confers no general authority to acquire land, but only authority to institute proceedings for condemnation where its acquirement is otherwise authorized, but 1536, post, intrusts the Secretary of War with power and duty of determining specifically what land, right of way, or material is needed for such works as are authorized by law. Same *v.* Certain Lands in the Town of Narragansett, R. I. (C. C. 1906), 145 Fed. 654.

Under act of Mar. 3, 1911, making appropriation for the purchase of land in Virginia for assembling, grazing, and training horses for the mounted service, the land may be acquired by condemnation under this act. U. S. *v.* Beaty (D. C. 1912), 198 Fed. 284; judgment reversed, Beatty *v.* U. S. (C. C. A. 1913), 203 Fed. 620.

Under sec. 1 of the act of Aug. 18, 1890, post 1100, the provision that proceedings for the condemnation of property for military purposes shall be prosecuted in accordance with the laws of the States wherein they are instituted, applies only to matters of procedure. Kanakanui *v.* U. S. (C. C. A. 1917), 244 Fed. 923.

The provisions of sec. 3 of the act of Aug. 19, 1890 (26 Stat. 334), entitled "An act to establish a national military park at the battlefield of Chickamauga," do not authorize the acquisition of the lands described therein in any other mode than by condemnation under this section. (1890) 19 Op. Atty. Gen. 673.

There is nothing in this section which qualifies or removes this condition against compensation. In re Manderson (1892), 51 Fed. 501, 2 C. C. A. 490, affirming In re Montgomery (D. C. 1892), 48 Fed. 896.

The United States can not take private land for the construction of a road in one of the Territories without some legal form of expropriation either by act of Congress or of the Territory. (1855) 7 Op. Atty. Gen. 320.

Express legislative power is necessary to authorize the condemnation of private property for public use, and statutes claimed to confer such power must be strictly construed. U. S. *v.* Rauers (D. C. 1896), 70 Fed. 748.

The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty and requires no constitutional recognition. The provision found in the fifth amendment to the Federal Constitution, and in the constitutions of the several States for just compensation for property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. U. S. *v.* Jones, 109, U. S. 513, 518; Boom Co. *v.* Patterson, 98 U. S. 106; Kohl *v.* U. S., 91 U. S. 367; Cooley Con. Lim., 526; U. S. *v.* Oregon Railway and Nav. Co., 16 F. R. 524.

It is now well settled that whenever, in the execution of the powers granted to the United States by the Constitution, lands in any State are needed by the United States for a fort, magazine, dockyard, lighthouse, customhouse, post office, or any other public purpose, and can not be acquired by agreement with the owners, the Congress of the United States, exercising the right of eminent domain, and making just compensation to the owners, may authorize such lands to be taken, either by proceedings in the courts of the State with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State, as Congress may direct or permit. Chappell *v.* U. S., 160 U. S. 499, 509, and 510; citing Harris *v.* Elliott, 10 Pet. 25; Kohl *v.* U. S., 91 U. S. 367; U. S. *v.* Jones, 109 U. S. 513; Fort Leavenworth R. R. *v.* Lowe, 114 U. S. 525, 531, 532; Cherokee Nation *v.* Kansas Rwy., 135 U. S. 641, 656; Monongahela Navigation Co. *v.* U. S., 148 U. S. 312; Luxton *v.* North River Bridge Co., 147 U. S. 337, and 153 U. S. 525; Burt *v.* Merchants' Ins. Co., 106 Mass. 356; U. S., petitioners, 96 N. Y. 227.)

Amount and elements of compensation.—See notes under Const. Amend. 5, ante, 392.

Where property is taken pursuant to an act of Congress, the Government is under an implied obligation to make just compensation to the owner. U. S. *v.* Great Falls Mfg. Co. (1884), 5 Sup. Ct. 306, 112 U. S. 645, 28 L. Ed. 846. Which should be such as to put the owner in as good condition pecuniarily as he would have been if the property had not been taken. U. S. *v.* Town of Nahant (1907), 153 Fed. 520, 82 C. C. A. 470.

An owner was not entitled to an allowance for the removal from the condemned premises of the business as distinguished from the plant and machinery. In re Post Office Site in Borough of the Bronx (C. C. A. 1914), 210 Fed. 832.

In estimating compensation, the adaptability of the property in its present state and surroundings for other and more valuable purposes than those to which it has been put is a proper element to be considered in determining its market value; but its possible value under circumstances and conditions which do not exist, but which the owner may intend to create, can

not be considered. Thus, in taking for a national park land which formed a part of a battlefield, the measure of compensation to which the owner is entitled is the market value of the land, and, if such value is enhanced by its historical associations, such fact is a proper element to be considered; but the fact that the land is desired by the United States for a particular purpose is not an element of market value, and evidence of price paid for land on other battlefields, purchased for similar purposes, is inadmissible to furnish a basis of comparison by which to establish the market value of that in question. Five Tracts of Land in Cumberland Tp., Adams Co., Pa., v. U. S. (1900), 101 Fed. 661, 41 C. C. A. 580.

Since, when proceedings are taken to condemn lands for a lock and dam on a navigable river, in a State which has no statute relating to the condemnation of land for such purposes, no allowance can be made for consequential damages, neither a temporary flooding of other lands than those taken, nor an anticipated change in the current of the stream, nor an anticipated increase of danger to the property of the landowner from fire during the construction, is a proper subject of compensation. High Bridge Lumber Co. v. U. S. (1895), 69 Fed. 320, 16 C. C. A. 460.

Interest.—Under this section and Rev. Laws Minn. 1905, sec. 2534, declaring that on payment of damages, with costs and interest, if any, in condemnation proceedings, the petitioner may take possession etc., and sec. 2535, declaring that all damages, whether assessed by commissioners or on appeal, shall bear interest from the time of filing the commissioners' report, an order in proceedings in the United States district court, confirming a report of commissioners in proceedings by the United States, properly awarded interest on the damages assessed from the date of the commissioners' report. U. S. v. Sargent (1908), 162 Fed. 81, 89 C. C. A. 81.

In a proceeding in conformity to Rev. Laws Mass. ch. 1, sec. 7, the rule of Bauman v. Ross (1897), 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270, was applied, to the effect that the owner is not entitled to interest pending the proceedings, at least unless he proves that he has in fact suffered loss of the use of the land by reason thereof. Town of Hingham v. U. S. (1908), 161 Fed. 295, 88 C. C. A. 341, 15 Ann. Cas. 105. And thus an award of compensation to a town for its water and sewer systems should not include interest from the time of the institution of the proceedings where up to the time of the trial there has been no actual taking and the use by the town of its systems has not been interfered with, but the award is based on the estimated cost in the future of completing the systems in view of their contemplated impairment. U. S. v. Town of Nahant (1907), 153 Fed. 520, 82 C. C. A. 470, modifying decree Town of Nahant v. U. S. (1905), 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723.

Interest was improperly allowed on an award, as, assuming it was a final judgment, especially where the owner had the use of the property for the time during which he claimed interest. In re Post Office Site in Borough of the Bronx (C. C. A. 1914), 210 Fed. 832.

Persons entitled to compensation.—The constitutional rule of just compensation entitles a municipal corporation to be compensated for physical structures and improvements which, under the laws of State, it has, by means of taxation, placed or acquired on the lands or streets taken for the use of its inhabitants or the local public, such as water or sewer pipes, curbing, or the like, of which it is deprived by the taking of the property by the general government. Town of Nahant v. U. S. (1905), 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723, modifying decree In re Condemnation of Land of Nahant (D. C. 1904), 128 Fed. 185, and modified U. S. v. Town of Nahant (1907), 153 Fed. 520, 82 C. C. A. 470.

Where a town having statutory power to condemn land or right of way for sewer purposes actually acquired and took possession of land for such purpose, and constructed at large expense and had maintained for a number of years a sewer over the same without objection from the landowner, it has such an interest in the land and structure as entitles it to be justly compensated therefor when the same are taken by the United States for a paramount public use, without regard to the strict regularity of the proceedings by which it acquired the right. Such right of compensation also extends to structures placed by the town in public streets or roads such as water or sewer pipes where such streets are taken, but not to the easements in the streets themselves, nor to mat rial thinly spread upon the ground for road purposes of such character that it loses its identity and tangibility as property when so used. U. S. v. Town of Nahant (1907), 153 Fed. 520, 82 C. C. A. 470, modifying decree Town of Nahant v. U. S. (1905), 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723.

A town has a beneficial interest in an easement of aqueduct acquired by it for water pipes through private land, by whatever title it is held, as distinguished from property acquired by it for a city pub-

lic use, and it is entitled to compensation when such property is condemned for another public use. In re Condemnation of Land at Nahant (D. C. 1904), 128 Fed. 185, decree modified Town of Nahant v. U. S. (1905), 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723, which is modified U. S. v. Town of Nahant (1907), 153 Fed. 520, 82 C. C. A. 470.

Under the laws and decisions of Massachusetts, governing in a proceeding by the United States to condemn land in that State for a post office, a city in which land has been dedicated for use of its inhabitants as a public park can not have compensation therefor, it having no legal estate in the land. In re Certain Land in Lawrence (D. C. 1902), 119 Fed. 453.

Tenants may not recover special damages on account of cost of removing their fixtures to a new location, nor for loss of profits of their business during such removal. U. S. v. Meyers (D. C. 1911), 190 Fed. 688.

Distribution of compensation.—Where the entire value of condemned land was paid out under order of court to the heirs of the last tenant under the confiscation sale, neither the owner in fee nor his heirs appearing, any error in such payment was not chargeable to the United States therewith, since the court was not the agent of the Government in such payment, and the Government was under no obligation to see that the money was properly distributed. U. S. v. Dunnington (1892), 13 Sup. Ct. 79, 146 U. S. 338, 36 L. Ed. 996.

Where, after the condemnation by the United States in a Federal court of the easements appurtenant to the lands of a decedent, but before the award of damages, the widow obtained an assignment of her dower in the probate court, the Federal court will not award her a dower interest in the fund paid into court as damages on the unsupported assertion that the value of the easements was not taken into account in the probate court, in the face of the decree which does not show such fact, but she will be required to make application for any desired modification of such decree to the probate court. U. S. v. Certain Lands in Town of Portsmouth, R. I. (C. C. 1909), 173 Fed. 676.

Nature and form of proceeding.—A proceeding by the United States for the condemnation of land for public use, and for the assessment and payment of damages therefor, is not a proceeding to collect an account or claim against the United States, but an adversary proceeding instituted by the United States against landowners for the taking thereof. U. S. v. Sargent (1908), 162 Fed. 81, 89 C. C. A. 81.

When officers of the Government purchase land from one having an interest therein, legal or equitable, and do not attempt to obtain it by condemnation, the right of eminent domain is not exercised. Jackson v. U. S. (1891), 27 Ct. Cl. 74.

Conditions precedent.—See Gilmer v. Lime Point (1861), 19 Cal. 47. In re United States (Pa. 1874), 24 Pittsb. Leg. J. 105.

A proceeding to ascertain the value of property proposed to be taken for a public use, not being a taking, but only preliminary thereto, may be maintained, though at the time no provision has been made for payment for such property. U. S. v. Oregon Ry. & Nav. Co. (C. C. 1883), 16 Fed. 524.

The consent of the State is not a condition precedent to the taking of lands by the General Government. Its consent is required only for the purpose of a transfer of jurisdiction. People v. Humphrey (1871), 23 Mich. 471, 9 Am. Rep. 94.

For the purpose of the statute of limitations, a taking held to date from the date of the approval or ratification by the Secretary of War of an unauthorized action of a military commander in taking possession, as the Secretary alone possessed the requisite authorization from Congress to determine whether an Army post should be established or not. U. S. v. N. A. Transp. & Trading Co. (1920), 253 U. S. ——; 64 L. Ed. 75.

Jurisdiction of State or Federal court.—See notes under 1100, post.

See Gilmer v. Lime Point (1861), 18 Cal. 229; (1886) 18 Op. Atty. Gen. 35.

A Federal court in which proceedings are instituted acquires exclusive jurisdiction of all matters properly arising in such proceedings, and it must retain jurisdiction and determine all such questions; but the jurisdiction is special, and limited to the determining of matters which are material to and directly connected with the judgment sought to be obtained, and does not necessarily extend to a determination of the ownership of the land sought to be condemned, as between different claimants, to the exclusion of a State court. U. S. v. Eisenbeis (1901), 112 Fed. 190, 50 C. C. A. 179.

This section and sec. 1100, post, are in pari materia, and on application by the Secretary of War under the latter section the Attorney General may, at his election, cause proceedings to be instituted for the condemnation of land for military purposes in either the State or Federal courts. Chappell v. U. S. (1897), 81 Fed. 769, 26 C. C. A. 600.

Under this section a Federal circuit court is a court having jurisdiction of proceedings under 1100, post. U. S. v. Certain

Land in Town of New Castle, Rockingham County (C. C. 1908), 165 Fed. 783.

Petition for condemnation.—A petition must affirmatively show that the officer is authorized by Congress to acquire the lands, and that in his opinion it is "necessary or advantageous" to proceed by judicial process; and these facts can not be inferred from an allegation that such officer has requested the Attorney General to institute such proceedings. In re Montgomery (D. C. 1892), 48 Fed. 896; judgment affirmed, In re Manderson (1892), 51 Fed. 501, 2 C. C. A. 490. But it need not be in the name of the United States, but may be in the name of its designated agent, as it must appear that application is made by an authorized officer, and that in his opinion the condemnation of the property is necessary; but the final questions for the jury should be submitted in the name of the United States. In re Rugheimer (D. C. 1888), 36 Fed. 369. And see In re United States (Pa. 1874), 24 Pittsb. Leg. J. 105.

Evidence as to compensation.—See notes under 1100, post.

The compensation is measured by its market value at the time of the taking, and evidence is inadmissible to show that it has a peculiar and enhanced value to defendant. U. S. v. Honolulu Plantation Co. (1903), 122 Fed. 581, 58 C. C. A. 279.

Evidence showing the price fixed by agreement and paid by the Government for an adjoining tract several years back should be excluded, as likely to be misleading. U. S. v. Freeman (D. C. 1902), 113 Fed. 370.

In determining compensation to which a town was entitled on the taking of a part of its water and sewer systems by the United States, where the parts taken were essential to enable the systems to perform their functions, it was not error to permit the town to show the fair cost of restoring the water and sewer systems to their original efficiency of circulation, or to make such cost the measure of compensation. U. S. v. Town of Nahant (1907), 153 Fed. 520, 82 C. C. A. 470, modifying decree Town of Nahant v. U. S. (1905), 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723.

Confirmation or setting aside award of commissioners.—The award of commissioners appointed to fix compensation, where the fairness of the commissioners is not impeached, should not be changed by the court, except on clear evidence of error or mistake. U. S. v. Beaty (D. C. 1812), 198 Fed. 284; judgment reversed Beatty v. U. S. (C. C. A. 1913), 203 Fed. 620.

Voluntary dismissal of proceedings.—Proceedings to condemn land for a public building or other governmental purpose may be dismissed at any time before the actual acceptance of the property and payment therefor, until which time there is no "taking" of the property and the United States is not subject to the payment of costs or damages to the landowners on such dismissal. U. S. v. Dickson (C. C. 1903), 127 Fed. 774; Kanakanui v. U. S. (C. C. A. 1917), 244 Fed. 923.

An order made in a proceeding by the United States to condemn land for a public use vacated, and the proceeding dismissed on motion of complainant. In re Lighthouse at Hell Gate (D. C. 1912), 196 Fed. 174.

Adoption of State procedure.—The direction to adopt the State practice must give way when to do so must be inconsistent with the terms, defeat the purpose, or impair the effect of legislation of Congress. Chappell v. U. S. (1896), 16 Sup. Ct. 397, 400, 160 U. S. 499, 40 L. Ed. 510.

In some instances the States, by virtue of their own right of eminent domain, have condemned lands for the use of the General Government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. Kohl v. U. S., 91 U. S. 367, 373; Gilmer v. Lime Point, 18 Cal. 729; Burt v. Merchants' Ins. Co., 106 Mass. 356; U. S. v. Jones, 109 U. S. 513.

The estate acquired by such exercise of the right of eminent domain on the part of the United States may be a fee simple or may be in the nature of an easement. 16 Op. Att. Gen. 387.

The legislature is the judge of the necessity for exercising the right in any case. Cooley Const. Law. 527.

1023. Condemnation of land for military uses.—That hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war

and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided*, That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: * * * *Act of July 2, 1917 (40 Stat. 241), as amended by act of April 11, 1918 (40 Stat. 518).*

Chap. XXIV, act of July 9, 1918 (40 Stat. 895), provides that during the World War land may be condemned as sites for electric power plants operated by private individuals if the plan is approved by the Secretary of War.

Notes of Decisions.

Implied repeal.—This section was not repealed by the provision in the Army appropriation act of July 11, 1919, post 1103. In re Military Training Camp (D. C. 1919), 260 Fed. 986.

Jurisdiction.—Under 1022, ante, the district court has jurisdiction of proceedings by the Secretary of War to condemn land, as authorized by this act, for a military training camp. In re Military Training Camp (D. C. 1919), 260 Fed. 986.

Purpose.—The condemnation of land for a military training camp is for a public purpose. Id.

The courts are not authorized to question the necessity for the condemnation, Congress having bestowed on the Secretary of War the power to determine the necessity. U. S. *v.* Forbes (D. C. 1919), 259 Fed. 585; affirmed (C. C. A. 1920), 268 Fed. 273.

Delegation of power.—Congress may delegate the authority to decide upon the necessity for taking to the Secretary of War. Id.

Funds.—In a proceeding under this section, it will be presumed that there are funds on hand to pay for the land, as asserted by the Secretary of War. In re Military Training Camp (D. C. 1919), 260 Fed. 986.

Rights of parties.—The rights of the parties are fixed at the time the petition for condemnation is granted, the only matter remaining to be decided being the amount of compensation to be awarded the owner. U. S. *v.* Forbes (D. C. 1919), 259 Fed. 585.

Damages.—U. S. *v.* First Nat. Bank (D. C. 1918), 250 Fed. 299, for instructions to commissioners appointed to assess damages.

Where land is condemned under this section for a military camp, the owners are entitled to the rental value of their property, if it is tillable or occupied, and to compensation for improvements which will necessarily be wholly or partly destroyed, and in such case the rental value will be for the land, without the improvements. If the land is wild, and not subject to cultivation, the rental should be the prevailing rate of interest on its par value. The judgment should provide that the Government, in addition to paying the fair rental value of the land and for improvements necessarily destroyed, will obligate itself either to return the land in as good condition as when taken, natural wear and tear excepted, or that it will pay the owner such damages as will enable him to restore the land to the condition it was when the Government took possession. In re Condemnation of Lands for Military Camp (D. C. 1918), 250 Fed. 314.

See notes to 392, subdivision VI, ante.

1024. Donations of lands.— * * * *Provided further*, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above mentioned purposes: * * * *Act of July 2, 1917 (40 Stat. 241), as amended by act of April 11, 1919 (40 Stat. 519).*

And the Secretary of War is hereby authorized to accept on behalf of the United States donations of land for road or other purposes. *Act of Aug. 18, 1894 (28 Stat. 405), making appropriations for sundry civil expenses.*

See 1023, ante, for the "above mentioned purposes."

1025. Donation of land for an aviation field and remount station.—The Secretary of War is hereby authorized to accept for the United States from any

citizen of the United States a donation of a tract or tracts of land suitable and desirable in his judgment for the purposes of an aviation field and remount station, the terms of the donation also to authorize the use of the property donated for any other service of the United States which may hereafter appear desirable. *Act of Aug. 29, 1916 (39 Stat. 622), making appropriations for the support of the Army.*

1026. Donation of land for mobilization, training and supply stations.—The Secretary of War is hereby authorized to accept for the United States from any person such tract or tracts of land suitable and desirable in his judgment for permanent mobilization, training, and supply stations; and he is directed to investigate and report to Congress as soon as practicable what additional tracts are necessary for said purposes for use by the National Guard and by the Regular Army and the probable cost of the same. *Act of Aug. 29, 1916 (39 Stat. 623), making appropriations for the support of the Army.*

1027. Releases of interests in lands by officers to the United States.—Whenever any lands have been or shall be conveyed to individuals or officers, for the use or benefit of the United States, the President is authorized to obtain from such person a release of his interest to the United States. *R. S. 3752.*

1028. Title papers to be furnished to the Attorney General.—Section eleven hundred and thirty-six is amended by adding at the end of the section the following:

"It shall be the duty of all officers of the United States having any of the title papers (property purchased, or about to be purchased, for erection of public buildings) in their possession, to furnish them forthwith to the Attorney-General. No public money shall be expended until the written opinion of the Attorney-General shall be had." *Act of Feb. 27, 1877 (19 Stat. 242), amending R. S. 1136.*

1029. Examination of land titles prior to expenditures.—No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. The district attorneys of the United States, upon the application of the Attorney-General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the Secretaries of the Departments, upon the application of the Attorney-General, shall procure any additional evidence of title which he may deem necessary, and which may not be in the possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments respectively. *R. S. 355.*

Joint Resolution No. 16, act of Oct. 6, 1917 (40 Stat. 427), provided that this section should not apply to the expenditure of appropriations for the Ordnance Department of the Army now available for the purchase of land and for improvements upon such land.

All legal services connected with the procurement of titles to sites for public buildings, other than life-saving stations and pier headlights, were to be rendered by United States district attorneys and the Attorney General was directed to require from the grantors of sites for public buildings that they should furnish free of all expense to the Government the requisite abstracts, official certifications, and evidences of title that the Attorney General shall deem necessary, by sec. 1, act of March 3, 1889 (25 Stat. 921).

The President was authorized to procure the assent of the legislature of any State to the purchase of land within the State, for the erection of forts, etc., and other needful buildings, 1020, ante.

Notes of Decisions.

Applicability and construction of statute.—This section does not forbid the purchase of land incumbered by outstanding liens which have not yet matured; but in such case the department making the purchase should stipulate with the vendors that the amount of purchase money necessary to pay off the incumbrances shall be withheld until they are due, when, if they are discharged by the vendors, the purchase money so withheld shall be paid; or, if not then discharged by the vendors, that the retained purchase money shall be applied by the Government to their payment. (1862) 10 Op. Atty. Gen. 353. And it does not apply to the buildings and grounds now occupied by the legation of the United States at Constantinople, Turkey, the purchase of which was provided for by act June 16, 1906 (34 Stat. 286, 293), since no erection of a building is contemplated by that act. (1907) 26 Op. Atty. Gen. 380. It is not applicable to the expenditures authorized by act Mar. 3, 1903 (32 Stat. 1188), for the erection of necessary improvements on lands at Guantanamo, Cuba, leased by the United States from the Republic of Cuba for the purposes of a naval station. (1904) 25 Op. Atty. Gen. 160.

This act enters into and becomes part of every contract for the purchase of land by the Government. (1857) 9 Op. Atty. Gen. 100.

"State" within the statute.—The word "State" signifies a State of the Union. (1906) 20 Op. Atty. Gen. 12.

"Purchase" within the statute.—Lands, or interest in lands, acquired without consideration, or for a mere nominal sum, do not evidence a purchase. (1910) 28 Op. Atty. Gen. 413.

Duty of Attorney General and district attorneys and assistants.—The purpose of the statute was to gather into the Department of Justice all legal business of the Government, and to break up the practice of employing attorneys in the public service; and it was held that legal proceedings for the acquisition of park property are a part of the duties of the Attorney General, and district attorney. Perry *v.* U. S. (1893), 28 Ct. Cl. 483. And where title to land to be acquired is to be vested in the United States, and the land is to be used as a public park, it is the duty of a district attorney and his assistant to render professional services in regard to the acquisition or the protection of the same. Cole *v.* U. S. (1893), 28 Ct. Cl. 501.

Examining and certifying title.—This section does not require the Attorney General to inquire into and report on whether the State in which the land lies has consented to the purchase. (1861) 10 Op. Atty. Gen. 35. But the validity of the titles to the lands proposed to be acquired for mine rescue work should be submitted to the Attorney General. (1910) 28 Op. Atty. Gen. 413.

If title to real estate is to be submitted to the Attorney General for his approval before it is accepted, and he rejects it, nothing to the contrary being stated, it will be presumed, if he subsequently approve a title to the same premises, that objections to the title as at first presented have been obviated. Merchants' Exchange Co. of Baltimore *v.* U. S. (1865), 1 Ct. Cl. 332.

Exposition of duty of Attorney General in examining and certifying title to lands purchased by the United States. (1857) 8 Op. Atty. Gen. 405. He must look at the question as one of pure law, and can not relax the rules of law on account either of the desirableness of the object or the smallness of the value of the land. (1854) 6 Op. Atty. Gen. 432.

Acquisition of land by the United States, through the means of a statute process of expropriation, is a "purchase," which, if done in strict accordance with the statute, may be certified by the Attorney General as vesting a valid title in the United States. (1855) 7 Op. Atty. Gen. 114. But this opinion contains no intimation that when this section does not apply the opinion of the Attorney General is not necessary. (1910) 28 Op. Atty. Gen. 463.

Liability for delay in passing on title.—Delay by Attorney General in passing on title is not a ground for claim on the Government for damages, especially where it is not alleged that the delay was contumacious or unreasonable, or, if so, that it was induced by the Government. Merchants' Exchange Co. of Baltimore *v.* U. S. (1865), 1 Ct. Cl. 332.

Compensation for examining title.—District attorney entitled to fees for examining land titles. Weed *v.* U. S. (D. C. 1897), 82 Fed. 414, 420.

Acquisition and sufficiency of title.—Power of United States to acquire land within States, see Constitution, art. 1, sec. 8, par. 17, and notes thereunder.

A proposal to sell a site for a public building on condition that the United States institute condemnation proceedings against any part thereof that can not be

secured by grant, and deduct the cost of such proceedings from the contract price, and the acceptance thereof by the Secretary of the Treasury, do not constitute a contract obligatory on the United States. (1889) 19 Op. Atty. Gen. 269.

Tax receipts are sufficient evidence that the land is discharged and redeemed from a tax sale and taxes, and a deed to such land held sufficient to convey to the Government a valid title. (1892) 20 Op. Atty. Gen. 430.

By joint resolution of July 7, 1898 (30 Stat. 750), accepting the cession of the Hawaiian Islands and the transfer to the United States of the ownership of all public lands therein, and by acquiring by purchase from individuals the leases held by them covering the lands comprising the military reservation at Kahauiki, Oahu Island, the United States acquired complete title to that reservation. (1904) 25 Op. Atty. Gen. 225.

The facts contained in a certificate of the record by the registrar of property at Humacao are sufficient evidence that the United States will, upon the purchase thereof, acquire from the grantors a good and unencumbered title to Cabras Island, Porto Rico. (1904) 25 Op. Atty. Gen. 226.

The conveyance should be to the "United States of America" instead of to the "Department of Lighthouses of the United States." Id.

Validity of title, see Ryan v. U. S. (1890), 10 Sup Ct. 913, 136 U. S. 68, 34 L. Ed 447; (1888), 19 Op Atty. Gen. 137; (1886), 18 Op. Atty. Gen. 327; (1886), 18 Op. Atty. Gen. 400; (1896), 21 Op. Atty. Gen. 302.

Obligation to pay price. -The obligation to pay for property arises when a valid title thereto is conveyed and becomes vested in the United States; hence not until acceptance of the deeds tendered by the vendors. (1889) 19 Op. Atty. Gen. 297

Necessity and requisites of consent to purchase. The reservation which has usually accompanied the consent of the States that civil and criminal process of the State courts may be served in places purchased by the United States does not interfere with the supremacy of the United States over them. Ft Leavenworth R. R. Co. v. Lowe (1885), 114 U. S. 525, 533, 5 Sup Ct 995, 29 L. Ed 264.

The Executive can not lawfully expend money on a site for public uses, purchased with the assent of the State in which it lies, if with express refusal of the latter to cede jurisdiction to the United States. (1885) 8 Op Atty. Gen. 102

A legislative act of a State consenting to the purchase of land within the same by the United States, for a specific purpose, expressly ceding jurisdiction, is not rendered insufficient by providing, in addition, that the Federal jurisdiction shall cease with the proposed use, and that meantime lawful process of the courts of the State may continue to be served within the limits of the land, jurisdiction of which has been ceded to the United States. (1857) 8 Op. Atty. Gen. 387.

Construction of a legislative act of the State of North Carolina, consenting to the purchase, by the United States, of land within the same for the site of a marine hospital. (1857) 8 Op. Atty. Gen. 388.

The act of the Legislature of Georgia giving consent to the purchase of Blythe Island in that State for naval purposes is sufficient to authorize expenditure of money in its purchase. (1857) 9 Op. Atty. Gen. 129.

An act of the legislature of a State which gives a complete and unequivocal consent to the purchase of land therein by the United States for the erection of public buildings is such a cession of jurisdiction as is contemplated by this act. (1858) 9 Op. Atty. Gen. 263.

This section does not forbid the payment of the purchase money of any site or land acquired for the purpose of erecting public buildings, before the consent of the legislature of the State is given to the purchase, but prohibits the expenditure of public money on the improvement of the land by the erection thereon of the needful public buildings until that consent is given to the purchase. (1861) 10 Op. Atty. Gen. 35; (1877) 15 Op. Atty. Gen. 212

Accession of jurisdiction over land purchased by the United States by a constitutional convention of a State is not a consent to the purchase by the legislature. (1868) 12 Op. Atty. Gen. 428.

Before jurisdiction over a national cemetery can become vested in the United States, the consent of the legislature of the State in which the cemetery is situated must be obtained. (1869) 13 Op. Atty. Gen. 131.

Where compensation has been paid for land to be used as a national cemetery without having obtained the consent of the State legislature to the acquisition, the Secretary of War may apply to such legislature for its consent. Id.

Cession may take place in two ways, indirectly, by the State consenting to the purchase of the land by the United States, and directly, by the State granting the jurisdiction to the United States. (1871) 13 Op. Atty. Gen 460.

An act merely giving the consent of the State to the use of the land for a specific purpose, which consent is declared to be "as provided in the sixteenth clause of

the eighth section of the first article of the Constitution of the United States, and in the acts of Congress in such case made and provided," does not meet the requirements of the law. Id.

It is not competent for the Lighthouse Board to erect a lighthouse without a cession from the State, although the site is located under navigable waters of the United States. (1879) 16 Op. Atty. Gen. 369.

Where land, at the city of Omaha, Nebr., was donated to the United States for a site for a public building, for the construction of which an appropriation was made by act June 23, 1879, the consent of the legislature of the State to the grant is required before any part of the appropriation can be lawfully expended in the erection of the building. (1880) 16 Op. Atty. Gen. 414.

The certificate of the governor of Wisconsin, in conformity to sec. 2, c. 1, R. S. Wis. 1878, consenting to the purchase of certain land by the United States, provided the State shall forever retain concurrent jurisdiction over any such place to the extent that all legal and military process issued under the authority of the State may be executed anywhere on such place or in any building thereon or any part thereof, and that any offense against the laws of the State committed on such place may be tried and punished by any competent court or magistrate of the State, to the same extent as if such place had not been purchased by the United States, does not satisfy this section. (1893) 20 Op. Atty. Gen. 611.

The "consent" of the legislature of a State to the purchase of lands therein by the United States, required by this section, must be free from any conditions or reservations inconsistent with the exercise by Congress of "exclusive legislation" thereover; but the reservation by a State of the right to serve and execute its civil and criminal process in the place ceded has always been held permissible. (1903) 24 Op. Atty. Gen. 617.

Act La. June 30, 1892, ceding jurisdiction to the United States over certain lands in that State for public purposes, and providing for the purchase and condemnation thereof, satisfies this section, and no further cession of jurisdiction is legally required. Id.

The United States may establish aids to navigation on submarine sites under navigable waters of Porto Rico without cession of jurisdiction having first been made by Porto Rico to the United States. (1904) 25 Op. Atty. Gen. 166.

Effect of cession by States.—Under the South Carolina act ceding jurisdiction to certain lands in Charleston to be used by the United States for a public building, jurisdiction to vest when the United States shall have acquired title by "grant or deed," the words "grant or deed" do not exclude the idea of title by condemnation, as the title so acquired is by deed executed by order of the court, and, whether executed by the owner or by a court officer, it is in law the deed of the owner. The United States therefore can condemn and pay for land under the act of 1887, providing an appropriation for a site, no part to be expended until a valid title was vested in the United States, and jurisdiction ceded by the State. In re Rugheimer (D. C. 1888), 36 Fed. 369.

Jurisdiction, concurrent or exclusive.—When the United States acquire lands within a State by purchase, with the consent of the State legislature, for the erection of forts, magazines, arsenals, dockyards, and other buildings, they have exclusive jurisdiction of the tract, but when they acquire such lands in any other way, their exclusive jurisdiction is confined to the buildings and lands used for public purposes. Ft. Leavenworth R. R. Co. v. Lowe (1885), 114, U. S. 525, 530, 5 Sup. Ct. 995, 29 L. Ed. 264.

The purchase of lands by the United States for public purposes, within the territorial limits of a State, does not of itself oust the jurisdiction of such State over the lands purchased. U. S. v. Cornell (C. C. 1819), Fed. Cas. No. 14,867.

Jurisdiction is acquired by the United States by the consent of a State to the purchase of land within the same for constitutional uses of the Union. (1856) 7 Op. Atty. Gen. 628.

Phrases of legislative acts of the States retaining concurrent jurisdiction for certain purposes do not impair the Federal jurisdiction conferred by the Constitution. Id.

Decisions under temporary or local acts or treaties.—In re Rugheimer (D. C. 1888), 36 Fed. 369; (1891) 20 Op. Atty. Gen. 242; (1892) 20 Op. Atty. Gen. 298; (1904) 25 Op. Atty. Gen. 242.

1030. Expenditures for land prior to examination of title in time of war.—* * * *And provided further*, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid,

immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, and the provision of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency. *Act of July 2, 1917 (40 Stat. 241), as amended by act of April 11, 1918 (40 Stat. 519).*

1031. Temporary fortifications erected prior to examination of title.—That in case of emergency when, in the opinion of the President, the immediate erection of any temporary fort or fortification is deemed important and urgent, such temporary fort or fortification may be constructed upon the written consent of the owner of the land upon which such work is to be placed; and the requirements of section three hundred and fifty-five of the Revised Statutes shall not be applicable in such cases. *Joint Res. 21, Apr. 11, 1898 (30 Stat. 737).*

1032. Title to land obtained by condemnation proceedings.— * * * four attorneys, at $5,000 each, one of whom shall have charge of all condemnation proceedings in the District of Columbia and supervise the examination of titles and matters arising from such condemnation proceedings in which the United States shall be a party or have an interest, and no special attorney or counsel, or services of persons other than of those provided for herein, shall be employed for such purposes; * * * *Act of Mar. 3, 1917 (39 Stat. 1110), making appropriations for legislative, judicial and executive expenses: Office of the Attorney General.*

1033. Control of public land by Congress.—The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; * * * *Art. IV, sec. 3, Constitution of the United States.*

Notes of Decisions.

Construction in general.—This fundamental rule of our public law is expressed by Attorney General Hoar (13 Opins. 46) as follows: "I am clearly of opinion that the Secretary of War can not convey to any person any interest in land belonging to the United States, except in pursuance of an act of Congress expressly or impliedly authorizing him to do so." And see U. S. v. Nichols, 1 Paine 646 (cited post); Seabury v. Field, McAllister 1; U. S. v. Hare, 4 Sawyer 653, 669; U. S. v. Forbes (D. C. 1919), 259 Fed. 585.

See Friedman v. Goodwin, 1 McAllister 148, where a lease made by the post commander at San Francisco, of a part of a "Government reserve," though approved by the military governor of the then Territory, and also by the Secretary of the Interior, was held void because not authorized by Congress. The court declares the "utter impotency of any attempt by an officer of the Government to alien any land, the property of the United States, without the authority of an act of Congress"; adding that "the President, with the heads of the departments combined," could not effect such an object. And see 4 Opins. Atty. Gen. 480; 9 id. 476; 13 id. 46; U. S. v. Hare, 4 Sawyer 670–671. In the last case the court say: "The Secretary of the Treasury can not execute or approve of a lease of any property belonging to the United States without special authority of law."

The leading case on this point is United States v. Nichols, 1 Paine, U. S. Circ. Ct. R. 646, in which it was held that a sale or loan, by the commandant of an arsenal, of a quantity of *lead* belonging to the United States, was illegal and invalid. The court say: "The Constitution declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' No public property can therefore be disposed of without the authority of law, either by an express act of Congress for that purpose, or by giving the authority to

some department or subordinate agent. No law has been shown authorizing the sale of this lead; nor is any such authority to be inferred from the general power vested in any of the departments of the Government. The power, if lodged anywhere, would seem most appropriately to belong to the War Department. But there is no such express or implied power in that department to sell the public property put under its management." And see the same principle recognized in an opinion of the Attorney General (in 16 Opins. 477), in which it is held that the Secretary of War was not empowered to sell *arms* to a State in the absence of authority from Congress.

Lands acquired by the United States for public uses, by purchase with the consent of the legislatures of the States, or acquired by an exercise of the right of eminent domain are not "public lands," that term applying only to such lands as are subject to sale or other disposition under general laws. Newhall *v.* Sanger, 92 U. S. 761; 5 Opin. Atty. Gen. 578.

Power over such lands is vested in Congress by the Constitution, without limitation, and is the foundation upon which the Territorial governments rest. U. S. *v.* Gratiot, 14 Pet. 526.

The power of Congress over the public land and the effect of its grants can not be interfered with by State legislation. Gibson *v.* Chouteau, 13 Wall. 92.

Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal Government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the Government; by the patent it passes to the grantee, and he is entitled to recover the possession in ejectment. Bagnell *v.* Broderick, 13 Peters, 436, 450; Wilcox *v.* Jackson, id. 498, 516; Langdon *v.* Sherwood, 124 U. S. 74, 83; Hussman *v.* Dunham, 165 U. S. 144; Carter *v.* Ruddy, 166 U. S. 493; Kirwan *v.* Murphy, 83 Fed. Rep. 275.

There is no way for titles to land to be divested out of the United States, except in strict pursuance of some law of the United States, and, as no statute of limitations runs against the United States, occupancy and possession alone, even for a great length of time, can not ripen into title as against the United States. Drew *v.* Valentine, 18 Fed. Rep. 712.

In the administration of the public lands the decisions of the Land Department upon questions of fact are conclusive, and only questions of law can be reviewed by the courts. Catholic Bishop of Nesqually *v.* U. S., 158 U. S. 155.

Military and naval reservations.—The State under its power of eminent domain, may make public roads through the lands of the United States, unrestricted by the proprietary right of the latter. U. S. *v.* Railroad Bridge Co. (C. C. 1855), Fed. Cas. No. 16,114.

Congress has full power to reserve from sale, or set aside, any portion of the public domain for military or other governmental purposes, and may authorize the President to exercise such power. U. S. *v.* Tully (C. C. 1905), 140 Fed. 899.

Public lands once reserved by the President for military or other purposes, and subsequently no longer needed for such purposes, can not be restored to the public domain without authority from Congress. (1881) 17 Op. Atty. Gen. 168.

The United States has a right to remove or sell buildings or improvements erected or made on what was supposed to be the public domain, used as a military reservation and known as Fort Union, but which afterwards proved to be covered by a Mexican land grant, and had been subsequently patented by the owner; the laches or mistake of the Government officers in regard to the ownership of the land being no bar to the Government's right in the premises. (1891) 20 Op. Atty. Gen. 284.

An application should be made to Congress to authorize said disposition of the buildings, etc., as neither the President nor the Secretary of War has authority to dispose of the same. Id.

Congress alone can restore to the public domain land reserved therefrom for the use of the Navy Department. (1895) 21 Op. Atty. Gen. 120.

Congress having set apart a portion of the public domain for a military road, and having constructed thereon such road, it is not within the power of any other department of the Government to abandon, vacate, or alienate the road, or the land on which it is constructed, and a patent issued for such lands would, to that extent, be inoperate and void. (1900) 23 Op. Atty. Gen. 283.

Military roads built by the United States under the authority of Congress, though within a State, are not subject to State, municipal, or private control or interference in any way. Id.

Lands reserved for military purposes can not be transferred by the President to another department without an act of Congress. (1910) 28 Op. Atty. Gen. 143.

The President had power to reserve part of the public domain for a military reservation. Florida Town Imp. Co. *v.* Bigalsky (1902), 33 So. 450, 44 Fla. 771.

The Fort Leavenworth Military Reservation, originally ceded to the United States by France, and brought under the sovereignty of Kansas at its admission to the Union, was by Comp. Laws Kan. 1879, p. 515, transferred to the United States for jurisdiction, saving to the State the right "to tax railroad, bridge, and other corporations on said reservation." This transfer was never accepted by the United States, though the reservation has been constantly used as a military post. Held, that the State had authority to tax railroad property, belonging to a private corporation, situated exclusively within said reservation. Ft. Leavenworth R. Co. v. Lowe (1882), 27 Kan. 749.

Under Pamph. Acts Miss. (Called Sess.), pp. 49, 50, passed Nov. 15, 1858, for the purpose of enabling the United States to construct fortifications, magazines, arsenals, etc., on Ship Island, which ceded to the United States jurisdiction over such island "to include all of such island above and within low-water mark, and over all the contiguous shores, flats, and waters within 1,760 yards from low-water mark," but retained jurisdiction for the purpose of executing therein all criminal process for crimes committed outside of such territory, the State courts have no jurisdiction of a crime committed within 1,760 yards of low-water mark of such island, since, in the absence of a showing to the contrary, the United States will be presumed to have accepted such cession, and to be using the island for the purposes for which the same was made. State v. Seymour (1900), 28 So. 799, 78 Miss. 134.

Section 10, act of Feb. 22, 1889 (25 Stat. 679), granting land to the proposed State of Montana, provided that the thirty-sixth section in each township embraced in permanent reserves for national purposes should not at any time be subject to the grant of lands made to the proposed State by such statute, "nor shall any land embraced in military or other reserves of any character be subject to the grants * * * of this act until the reserve shall have been exhausted, and such lands be restored to, and become a part of, the public domain." Held, that neither title nor sovereignty over sec. 36 adjoining the Fort Missoula Military Reservation ever passed to the State of Montana, and the State court had no jurisdiction over a homicide committed thereon; and this notwithstanding act of Mar. 19, 1904 (33 Stat. 143), authorizing the Secretary of War to accept from citizens of Missoula deeds for the enlargement of the military reservation—such lands so donated, as referred to in the act, embracing a part of sec. 36—since the Federal Government had the right to quiet title to its lands without litigation. State v. Tully (1904), 78 P. 760, 31 Mont. 305.

A writ of habeas corpus issuing under the authority of a State may be executed within the limits of the land ceded by the State to the United States for the purpose of a fort and lighthouse. State v. Dimick (1841), 12 N. H. 194, 37 Am. Dec. 197

A State court has jurisdiction of habeas corpus proceedings to release a prisoner detained at West Point. In re Carlton (N. Y. 1827), 7 Cow. 471.

Where the United States holds land by purchase, with the consent of the State, as a military post, the Federal courts have exclusive jurisdiction of offenses committed thereon, including any part of the grant outside of the garrison wall and fence, though it is used as a street. Baker v. State (1904), 83 S. W. 1122, 47 Tex. Cr. R. 482.

Public buildings.—A sale by the Secretary of War of buildings at an abandoned military post, located upon lands belonging to the United States, would be in contravention of this clause. Lear v. U. S. (D. C., 1892), 50 Fed. 65.

The United States may remove or sell buildings or improvements erected on what was supposed to be the public domain, but which afterwards proved to be covered by a Mexican land grant, and had been subsequently patented by the owner, the laches or mistake of the Government officers in regard to the ownership of the land being no bar to the Government's right in the premises. (1891) 20 Op. Atty. Gen. 284.

Where a State cedes to the United States exclusive jurisdiction over land purchased as a site for a public building, "for all purposes except the administration of the criminal laws of this State," the State has no jurisdiction for the punishment of crimes committed on the purchased land, but only the right to execute criminal process there for the violation of the laws of the State committed elsewhere within the State. State v. Mack (1897), 47 P. 763, 23 Nev. 359, 62 Am. St. Rep. 811.

A New York State court has no jurisdiction to prosecute a person for larceny committed in the United States post office building in the city of New York. People v. Marra (1886), 4 N. Y. Cr. R. 304

Jurisdiction over Canal Zone.—In the absence of action by Congress distinctly denying that right, the President would have the power to administer the Canal Zone merely because control, with the incidents of sovereignty, over it was passed to the United States, and no other provision for its orderly government had been made. (1907) 26 Op. Atty. Gen. 113.

Arts. 2 and 3 of the treaty between the United States and the Republic of Panama

(33 Stat. 2234) imposed upon the United States the obligations as well as the powers of a sovereign within the Canal Zone, including among these the obligation of providing a government for the territory in question. Id.

Laws governing a territory which has passed from one sovereign power to another continue in force after the authority which enacted them has ceased to exist only by the consent of the succeeding authority to their continuing validity, implied from its failure to modify or repeal them. Id.

It is well settled that, in cases of acquisition of inhabited territory, the acquiring sovereign becomes entitled to the allegiance of the inhabitants, unless there is something in the treaty or act of cession providing otherwise. Hence citizens of Panama residing in the Canal Zone at the time of the treaty between the United States and Panama, who have not taken affirmative action to retain citizenship in Panama, owe allegiance to the United States. (1907) 26 Op. Atty. Gen. 376.

1034. Highways over public lands.—The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted. *R. S. 2477.*

Any bona fide settler under the preemption, homestead, or other settlement law may transfer any portion of his claim for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it, without vitiating his right to complete and perfect title to his claim, by R. S. 2288.

Notes of Decisions.

Grant of right of way.—By this section the United States grants a right of way for the construction of highways over public lands not reserved for public use. Van Brocklin *v.* Anderson (1886), 6 Sup. Ct. 670, 676, 117 U. S. 151, 29 L. Ed. 845. [C. S. p. 5919.]

In the absence of a reservation in a grant of public land, there is no implied reservation of a right of way over the land granted to afford access by the public to other land belonging to the Government. U. S. *v.* Rindge (D. C. 1913), 208 Fed. 611.

The word "highways" should be construed in accordance with recognized local laws. City of Butte *v.* Mikosowitz (1909), 102 P. 593, 39 Mont. 350.

A reservation of public lands for Indians is a reservation for public use within this section. Stofferan *v.* Okanogan County (1913), 136 P. 484, 76 Wash. 265.

Nature of grant.—This section was a grant in præsenti, and when accepted by the public it took effect as of the date of the grant. Tholl *v.* Koles (1902), 65 Kan. 802, 70 Pac. 881. [C. S. p. 5919.]

The grant remains in abeyance until a highway is established and takes effect from that time. McAllister *v.* Okanogan County (1909), 100 P. 146, 51 Wash. 647; Stofferan *v.* Same (1913), 136 P. 484.

A roadway used by the public over public land does not become a public highway from mere use for 20 years, or by prescription. Cross *v.* State (1906), 41 South. 875, 147 Ala. 125.

This section does not operate to grant rights of way and establish highways contrary to the local laws. Tucson Consol. Copper Co. *v.* Reese (1909), 12 Ariz. 226, 100 Pac. 777.

Validity and effect of grant as against subsequent claimants.—A grant of right of way under this section is valid as against a subsequent conveyance by the Government of the land by metes and bounds to a private person. Verdier *v.* Port Royal R. Co. (1881), 15 S. C. 476; Same *v.* Port Royal & A. Ry. Co. (1881), 15 S. C. 484. And the status of the highway is not changed by the subsequent establishment of a forest reserve. Duffield *v.* Ashurst (1909), 100 Pac. 820, 12 Ariz. 360.

Under this section a patent is not necessary, the offer and its acceptance by the construction of the road are equivalent to a grant that is good as against the Government, and also as against a subsequent patentee, unless the latter's patent antedates the grant by relation, or unless his equities preclude the acquisition of adverse rights. Flint & P. M. Ry. Co. *v.* Gordon (1879), 2 N. W. 648, 41 Mich. 420.

A right of way perfected by a railway company under this section can not be defeated by mere relation back from a homesteader's subsequent patent to the time of his antecedent entry on the land. Id.

A settler on public lands on which there is a road in common use as a highway takes subject to the public easement of such way as a road, though it was never established by the public authorities under the general road laws. Van Wanning *v.* Deeter (Neb. 1907), 110 N. W. 703; judgment affirmed on rehearing (1907), 112 N. W. 902.

Persons filing on public lands take the same subject to the right of way along section lines for highway purposes. Wells *v.* Pennington Co. (1891), 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758; Keen *v.*

Fairview Tp. (1896), 8 S. D. 558, 67 N. W. 623.

Railroad right of way.—A railroad is a "highway," within the meaning of this section. Tennessee & C. R. Co. v. Taylor (1893), 102 Ala. 224, 14 South. 379. But see Burlington, K. & S. W. R. Co. v. Johnson (1887), 38 Kan. 142, 16 Pac. 125.

A homesteader is entitled to compensation for improvements made on land over which a railroad company after the homestead entry, but before patent, obtained a right of way under this section. Flint & P. M. Ry. Co. v. Gordon (1879), 2 N. W. 648, 41 Mich. 420.

Under this section a railroad company, by constructing its line over public lands after they had been entered as a homestead, but before the homestead title had been perfected, acquires title to the right of way. Id.

Railways, though not strictly "highways" like plank and macadamized roads, are highways within this section. Id.

1035. Leases granted by the Secretary of War.—That authority be, and is hereby, given to the Secretary of War, when in his discretion it will be for the public good, to lease, for a period of not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: *Provided*, That nothing in this act contained shall be held to apply to mineral or phosphate lands. *Act of July 28, 1892* (*27 Stat. 321*).

Notes of Decisions.

Extent of power of the Secretary.—Such an act would give the State of Oregon not merely a revocable license, but a vested right to operate the railway and derive revenue therefrom, and consequently is beyond the power of the Secretary of War, not having been authorized by the resolution in question. (1891) 20 Op. Atty. Gen. 93.

The Secretary of War is not authorized by the joint resolution of Mar. 3, 1891 (26 Stat. 1116), to construct a portage railway at the Cascades, Oregon, and turn the same over after completion to the State of Oregon for operation on certain conditions. Id.

The Secretary of War has no power to turn over Government property to States or individuals, to be used for any purpose not authorized by some act of Congress. (1891) 20 Op. Atty. Gen. 96.

The "lease," as it is termed, operated only as a revocable license, and did not carry any estate in the land in question. (1893) 20 Op. Atty. Gen. 527, 537.

The Secretary of the Treasury has no authority to grant or lease a right of way through the lighthouse reservation at Cape May, N. J., to the Delaware Bay and Cape May R. R. Co., for the consideration of free passage on such road to all officers and employees of the lighthouse establishment. Id.

A revocable license, without limitation as to time, by the Secretary of War to a Roman Catholic archbishop to erect and maintain a chapel on the military reservation at West Point transcends the statute. (1897) 21 Op. Atty. Gen. 537.

The Secretary of War has no authority to grant permission for the erection of a bethel, reading room, and library within the Army reservation on Ship Island. (1897) 21 Op. Atty. Gen. 565; following (1897) 21 Op. Atty. Gen. 537.

The granting of a revocable license to the Washington and Glen Echo Ry. Co. to lay a single track on the Aqueduct Reservation near Cabin John Bridge does not conflict with the acts July 29, 1892 (27 Stat. 326), and June 3, 1896 (29 Stat. 246), authorizing the construction of the Washington and Great Falls Ry. and providing that there shall be but one railway parallel to and near the Conduit road, that provision being merely a restriction upon the latter company. (1898) 22 Op. Atty. Gen. 240.

Long-continued exercise of a power of this kind by the Secretary of War, and the open and notorious use of Government reservations by such licensees without legislative objection from Congress or the adoption of any legislative rule on the subject, implies the tacit assent of Congress to this custom. Id.

Such portion of the Fort Sill military reservation can be set apart as may be required for the erection of the necessary buildings to be used as a mission and school for the Apache prisoners of war. (1899) 22 Op. Atty. Gen. 303.

During the military control of Porto Rico, leave or license may be granted an individual to make temporary use of portions of the public domain. (1899) 22 Op. Atty. Gen. 544.

Under this and other statutes, the Secretary of War held to have authority to

lease certain unoccupied and unproductive Alaska islands for the propagation of foxes. Whelpley *v.* Grosvold (C. C. A. 1918), 249 Fed. 812.

Duration of license.—Upon the statement of facts submitted, advised, that the right of the South Boston Iron Works to the possession and use of certain property (two lathes and a crane) belonging to the United States, derived under an agreement with the latter, dated Jan. 21, 1885, has terminated, and that the right to the possession of the property is now in the United States exclusively. (1887) 19 Op. Atty. Gen. 73.

The Secretary of War has no power to accept for the Government a donation of a building to be erected upon a military reservation, where the acceptance is accompanied by a limitation for its use in perpetuity by Roman Catholics. (1897) 21 Op. Atty. Gen. 537.

The act of July 28, 1892 (27 Stat. 321), authorizing the Secretary of War to lease such property of the United States under his control as may not for the time be required for the public use, forbids an occupation which contemplates permanency or duration longer than five years. Id.

The right to issue a license to a railroad to lay a track on a reservation can not be maintained upon any ground except the benefit to the public interests, and can not be used as a basis for granting, under the guise of a temporary license, a permanent right to maintain a railroad. It confers no contractual right upon the licensee. (1898) 22 Op. Atty. Gen. 240.

The grant of a right or privilege to an individual to use portions of the public domain, in perpetuity, or as long as the conditions of the grant are fulfilled, is beyond the power of the Secretary of War, and ought not to be made. (1899) 22 Op. Atty. Gen. 544.

Terms of license.—The license granting the right to construct a railroad on a reservation should contain such restrictions or regulations as may be necessary to fix its location and protect Government property. (1898) 22 Op. Atty. Gen. 240.

The Secretary of War may make such rules and regulations as shall be deemed suitable and necessary to control the methods and operations of the persons engaged in erecting a mission and school for Apache prisoners of war. (1899) 22 Op. Atty. Gen. 303.

Revocability of license.—Arrangements made by the Secretary of War and the President, allowing private individuals to enter military reservations and prosecute undertakings for the common benefit of themselves and the United States have had no contractual feature and have always been revocable at the pleasure of the Government. (1891) 20 Op. Atty. Gen. 93.

The Secretary of the Treasury has power to revoke a license to a railway of a right of way through the lighthouse reservation at Cape May, N. J., at pleasure, and to remove the property of the company from the reservation upon its failure to do so after reasonable notice. (1893) 20 Op. Atty. Gen. 527, 537.

1036. Homestead entry by a discharged soldier.—Every private soldier and officer who has served in the Army of the United States during the recent rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February thirteenth, eighteen hundred and sixty-two, and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, and every private soldier and officer who has served in the Army of the United States during the Spanish war, or who has served, is serving, or shall have served in the said Army during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged; and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the Spanish War, or who has served, is serving, or shall have served in the said forces during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work not otherwise reserved or appro-

priated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement. *R. S. 2304, as amended by act of Mar. 1, 1901 (31 Stat. 847).*

The above refers to the so-called "bounty lands." For further provisions pertaining to bounty lands and bounty warrants see R. S. 2414–2446 and act of Dec. 13, 1894 (28 Stat. 594).

This section was amended by act of Mar. 1, 1901, cited above, by inserting the provisions relating to soldiers, seamen, marines, and officers serving during the Spanish War or during the suppression of the insurrection of the Philippines, as set forth here.

The provisions of this section and of R. S. sec. 2305, post, 1045, 1053, were made applicable to entries on particular ceded Indian lands, with various modifications and special provisions in the different acts. See sec. 18, act of May 2, 1890 (26 Stat. 90).

Sec. 15, act of June 4, 1920 (41 Stat. 756), provides for the sale of lands of the Crow Indians to veterans of any war in which the United States was engaged with a foreign power, or of the Civil War, who will actually settle thereon.

The rights of this section were extended to homestead settlements in Oklahoma by secs. 19 and 20, act of May 2, 1890 (26 Stat. 90–91); and in Nebraska by sec. 2, act of Mar. 2, 1907 (34 Stat. 1224); and in Idaho by act of June 17, 1910 (36 Stat. 531).

For statute providing for punishment for forging military bounty-land warrants, see sec. 73, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1101).

Notes of Decisions.

Honorable discharge.—An order disbanding an irregular body of troops (though entirely creditable to the troops thus disbanded) is not an honorable discharge within this section. (1878) 1 Op. Atty. Gen. 148.

Alienation of soldier's right.—The same affidavits in respect to alienation are required from Federal soldiers as in other cases. Anderson v. Carkins (1890), 10 Sup. Ct. 905, 906, 135 U. S. 483, 34 L. Ed. 272.

Military reservations.—No specific statutory authority exists empowering the President to reserve public lands; but the right to reserve such lands for public uses is recognized by the courts. 14 Dec. Int. Dept. 426, 607, 628; Wolsey v. Chapman, 101 U. S. 755, 768; Walcott v. Des Moines Co., 5 Wall. 681.

Such reservation may be effected by proclamation or by Executive order. 13 Dec. Int. Dept. 426.

Mineral lands belonging to the public domain, which are reserved from sale under sec. 2318 of the Revised Statutes, may be reserved for military or other purposes by the President. Where such lands are included in a military reservation, they are not open to exploration and purchase under sec. 2319 of the Revised Statutes. It is otherwise where a right has once attached to mineral land, under the laws relating thereto, in favor of the locator of a mining claim. Here the land, during the existence of such right, is not subject to reservation by the President; and if it be subsequently reserved, the locator may nevertheless perfect his title. 17 Op. Att. Gen. 230.

When public land subject to homestead settlement has been duly entered under the homestead law, it thenceforth ceases to be at the disposal of the Government so long as the entry of the settler subsists. Hence it can not, while such entry stands, be set apart by the President for a military reservation. Id. 160.

Where a part of the public domain has once been reserved by the President for military or other public purposes, and subsequently the land so reserved becomes unnecessary for such purposes, it can not be restored to the public domain without authority from Congress. Id. 168; 16 Id. 123.

That land can not be reserved or occupied for military purposes to the prejudice of a title previously vested in an individual or a corporation, see, further, 9 Id. 339; 13 Id. 469.

Soldiers' and sailors' homesteads.—Where a general law provides in detail for the creation of a privilege and the fees and commissions incident thereto, it is not to be inferred, in the absence of an express intention to the contrary, that a subsequent modification of the basic privilege is intended to affect the lawful charges imposed upon an applicant by the prior statute, and sec. 2306, Revised Statutes, does not warrant a construction that the entry and perfection of title is to be free from charges of fees and commissions as a homestead entry. Maginnis v. U. S. (1917), 52 Ct. Cl. 271.

The entryman must in good faith claim the land for his own benefit, and can make no agreement for alienation, and must reside upon the land continuously for the time that the law requires, and must make it his home. U. S. *v.* Jones (C. C. A. 1917), 242 Fed. 609; (C. C. A. 1920), 265 Fed. 235; Eldred *v.* U. S. (C. C. A. 1919), 257 Fed. 58.

One who without fraud has secured a patent by means of soldiers' additional homestead rights, which is canceled because issued in violation of law, may apply for repayment of the fees and commissions paid the land officers. U. S. *v.* Poland (1920), 251 U. S. 221, reversing 231 Fed. 810.

The defense of bona fide purchaser is an affirmative one and the burden of establishing it rests upon the purchaser in order to defeat the right of the Government to have a cancellation of the patent, fraudulently obtained. Krueger *v.* U. S. (1918), 246 U. S. 69.

A patent issued for more than 160 acres in a single body in Alaska under soldiers' additional homestead rights, is void, even without fraud and if issued with full knowledge of all the facts. U. S. *v.* Poland (1920), 251 U. S. 221; U. S. *v.* Kern River Co. (C. C. A. 1920), 264 Fed. 412, 417.

A construction of R. S. 2309, post 1041, authorizing a soldier's entry by agent, but requiring actual entry in person thereafter for the homestead given by R. S. 2304, as not showing a homestead entered, which could be the basis of an additional homestead claim under R. S. 2306, post 1038, where an agent had filed but the soldier had not taken possession within the required time, is not so unreasonable as to authorize revision of the action of the Secretary of the Interior by the courts, even though the sections may be open to another construction. Shanks *v.* Lane (Ct. App. D. C. 1920), 269 Fed. 206.

1037. Homestead entry by a veteran of the war with Germany.—That hereafter, for the period of ~~two~~ years following the passage of this Act, on the opening of public or Indian lands to entry, or the restoration to entry of public lands theretofore withdrawn from entry, such opening or restoration shall, in the order therefor, provide for a period of not less than ~~sixty~~ ninety days before the general opening of such lands to disposal in which officers, soldiers, sailors, or marines who have served in the Army or Navy of the United States in the war with Germany and been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve shall have a preferred right of entry under the homestead or desert land laws, if qualified thereunder, except as against prior existing valid settlement rights and as against preference rights conferred by existing laws or equitable claims subject to allowance and confirmation: *Provided*, That the rights and benefits conferred by this Act shall not extend to any person who, having been drafted for service under the provisions of the Selective Service Act, shall have refused to render such service or to wear the uniform of such service of the United States. *Sec. 1, Joint Res. 29, Feb. 14, 1920 (41 Stat. 434)*, as amended by Joint Res. 36, Jan. 21, 1922 (42 Stat. 358).

That the Secretary of the Interior is hereby authorized to make any and all regulations necessary to carry into full force and effect the provisions hereof. *Sec. 2, Joint Res. 29, Feb. 14, 1920 (41 Stat. 435)*, as amended by Joint Res. 36, Jan. 21, 1922 (42 Stat. 358).

1038. Soldiers' additional homesteads.—Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres. *R. S. 2306.*

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General

Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees. *Act of Aug. 18, 1894* (*28 Stat. 397*), *making appropriations for sundry civil expenses.*

See also notes to 1036, ante.

Notes of Decisions.

Testamentary disposition.—Query, whether R. S. 2304, 2306, 2307 permit a soldier's additional right to receive land to be subject to testamentary disposition; but if not exercised or transferred by the soldier, his interest does not pass to his widow or orphan children. U. S. v. Lane (Ct. App., D. C. 1919), 266 Fed. 1005.

1039. Additional homestead rights in Idaho.—That any person who has made or shall make homestead entry of less than three hundred and twenty acres of lands of the character herein described, and who shall have submitted final proof thereon, shall have the right to enter public lands subject to the provisions of this Act, not contiguous to his first entry, which shall not with the original entry exceed three hundred and twenty acres: *Provided*, That the land originally entered and that covered by the additional entry shall first have been designated as subject to this Act or the Act of February nineteenth, nineteen hundred and nine (Thirty-fifth Statutes, page six hundred and thirty-nine), as provided by sections one of said Acts: *Provided further*, That in no case shall patent issue for the land covered by such additional entry until the person making same shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise complied with such laws, except that where the land embraced in the additional entry is located not exceeding twenty miles from the land embraced in the original entry no residence shall be required on such additional entry if the entryman is residing on his former entry: *And provided further*, That this section shall not be construed as affecting any rights as to location of soldiers' additional homesteads under section twenty-three hundred and six of the Revised Statutes. *Sec. 7, added to act of June 17, 1910, by act of Sept. 5, 1916* (*39 Stat. 724*).

Act of Feb. 19, 1909 (35 Stat. 639), mentioned in this section, is found in 37 Stat. 132.

1040. Deserters not entitled to bounty land.—No person who has been in the military service of the United States shall, in any case, receive a bounty-land warrant, if it appears by the muster-rolls of his regiment or corps that he deserted or was dishonorably discharged from service. *R. S. 2438.*

1041. Homestead entry filed by an agent.—Every soldier, sailor, marine, officer, or other person coming within the provisions of section twenty-three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in preemption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law. *R. S. 2309.*

Notes of Decisions.

Entry by agent.—A soldier may enter a homestead claim selected by an agent without ever viewing it. U. S. *v.* Richards (D. C. 1906), 149 Fed. 443.

Entry pending appeal in violation of rules.—A soldier's declaratory statement filed during the time allowed for an appeal from a decision of the Commissioner of the General Land Office against the validity of a prior homestead entry confers no rights upon the applicant. Holt *v.* Murphy (1908), 28 Sup. Ct. 212, 213, 207 U. S. 407, 52 L. Ed. 271, affirming decree (1904), 79 Pac. 265, 15 Okl. 12.

Affidavit.—While the homestead law does not prescribe that an affidavit shall accompany the declaratory statement, the Land Department may require one by regulation, and a charge of perjury may be based upon such regulation. U. S. *v.* Morehead (1917), 243 U. S. 607.

Failure to enter.—The failure of a soldier to make actual entry and improvements on his land within six months after his declaratory statement is filed by an agent forfeits his entry, under this section, without any affirmative action by the Land Office. Shanks *v.* Lane (Ct. App. D. C. 1920), 269 Fed. 206.

1042. Settlement of land by minors.—That any person, under the age of twenty-one, who has served or shall hereafter serve in the Army of the United States during the present emergency, shall be entitled to the same rights under the homestead and other land and mineral entry laws, general or special, as those over twenty-one years of age now possess under said laws: *Provided*, That any requirements as to establishment of residence within a limited time shall be suspended as to entry by such person until six months after his discharge from military service: *Provided further*, That applications for entry may be verified before any officer in the United States, or any foreign country, authorized to administer oaths by the laws of the State or Territory in which the land may be situated. *Sec. 8, act of Aug. 31, 1918 (40 Stat. 957).*

1043. Settlement of desert lands.—No desert-land entry made or held under the provisions of the Act of March third, eighteen hundred and seventy-seven, as amended by the Act of March third, eighteen hundred and ninety-one, by an officer or enlisted man in the Army, Navy, Marine Corps, or Organized Militia of the United States shall be subject to contest or cancellation for failure to make or expend the sum of $1 per acre per year in improvements upon such claim, or to effect the reclamation thereof, during the period said entryman or his successor in interest is engaged in the military service of the United States during the present war with Germany, and until six months thereafter, and the time within which such entryman or claimant is required to make such expenditures and effect reclamation of the land shall be, exclusive of the time of his actual service in the Army, Navy, Marine Corps, or Organized Militia of the United States: *Provided*, That said desert-land entry shall have been made by the said officer or enlisted man prior to his enlistment: *Provided further*, That each such entryman or claimant shall, within six months after the passage of this Act, or within six months after he is mustered into the service, file in the local land office of the district wherein his claim is situate a notice of his muster into the service of the United States and of his desire to hold said desert claim under this Act: *Provided further*, That the term "enlisted man," as used in this section shall include any person selected to serve in the military forces of the United States as provided by the Act entitled "An Act authorizing the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen. *Act of Aug. 7, 1917 (40 Stat. 250).*

1044. Residence for one year on a homestead.— * * * *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved,

and cultivated his homestead for a period of at least one year. *Sec. 1, act of July 28, 1917 (40 Stat. 248).*

Notes of Decisions.

Residence on land.—The entryman must reside upon the land continuously for the time that the law requires, and must make it his home. U. S. v. Jones (C. C. A. 1917), 242 Fed. 609; (C. C. A. 1920), 265 Fed. 235.

1045. Military service equivalent to residence on a homestead.—The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements; * * * *R. S. 2305, as amended by act of Mar. 1, 1901 (31 Stat. 847).*

Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the Army or Navy of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered. And if his entry has been canceled by reason of his absence from such tract while in the military or naval service of the United States, and such tract has not been disposed of, his entry shall be restored; but if such tract has been disposed of, the party may enter another tract subject to entry under the homestead laws, and his right to a patent therefor may be determined by the proofs touching his residence and cultivation of the first tract and his absence therefrom in such service. *R. S. 2308.*

That in every case in which a settler on the public land of the United States under the homestead laws enlists or is actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the existing war with Spain, or during any other war in which the United States may be engaged, his services therein shall, in the administration of the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, unless it shall be alleged in the preliminary affidavit or affidavits of contest, and proved at the hearing in cases hereafter initiated, that the settler's alleged absence from the land was not due to his employment in such service: *Provided*, That if such settler shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence without reference to the time of actual service: *Provided further*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements. *Act of June 16, 1898 (30 Stat. 473).*

That any settler upon the public lands of the United States; or any entryman whose application has been allowed; or any person who has made application for public lands which thereafter may be allowed under the homestead laws,

who, after such settlement, entry, or application, enlists or is actually engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, shall, in the administration of the homestead laws, have his services therein construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, entryman, or person unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases hereinafter initiated that the alleged absence from the land was not due to his employment in such military or naval service; that if he shall be discharged on account of wounds received or disability incurred in the line of duty, the the term of his enlistment shall be deducted from the required length of residence, without reference to the time of actual service: * * * *Sec. 1, act of July 28, 1917 (40 Stat. 248).*

For provisions of the act of Mar. 8, 1918 (40 Stat. 448), on this subject, see 1051, post.

Notes of Decisions.

Army service equivalent to residence—Cure of defective entry.—An entry on an affidavit failing to state that the entry man's family, or any member thereof, was residing on the land, is cured by this section. Hastings & D. R. Co. *v.* Whitney (1889), 10 Sup. Ct. 112, 115, 132 U. S. 357, 33 L. Ed. 363.

1046. Military service in camps equivalent to residence on a homestead.—That the provisions of the Act approved June sixteenth, eighteen hundred and ninety-eight, chapter four hundred and fifty-eight (Thirtieth Statutes at Large, page four hundred and seventy-three), shall be applicable in all cases of military service rendered in connection with operations in Mexico, or along the borders thereof, or in mobilization camps elsewhere, whether such service be in the military or naval organization of the United States or the National Guard of the several States now or hereafter in the service of the United States. *Joint resolution 32, Aug. 29, 1916 (39 Stat. 671).*

See 1045, ante, for act of June 16, 1898.

1047. Military service on Mexican border and in the war with Germany equivalent to residence on a homestead.—That subject to the conditions therein expressed, as to length of service and honorable discharge, the provisions of sections twenty-three hundred and four and twenty-three hundred and five, Revised Statutes of the United States, shall be applicable in all cases of military and naval service rendered in connection with the Mexican border operations or during the war with Germany and its allies as defined by public resolution numbered thirty-two, approved August twenty-ninth, nineteen hundred and sixteen (Thirty-ninth Statutes at Large, page six hundred and seventy-one), and the Act approved July twenty-eighth, nineteen hundred and seventeen (Fortieth Statutes at Large, page two hundred and forty-eight). *Act of Feb. 25, 1919 (40 Stat. 1161).*

That any settler or entryman under the homestead laws of the United States who, after settlement, application, or entry and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the war with Germany, who has been honorably discharged and because of physical incapacities due to service is unable to return to the land,

may make proof, without further residence, improvement, or cultivation, at such time and place as may be authorized by the Secretary of the Interior, and receive patent to the land by him so entered or settled upon: *Provided*, That no such patent shall issue prior to the survey of the land. *Act of Mar. 1, 1921 (41 Stat. 1202).* 3 & CML2 P7

1048. Leave of absence from homestead for vocational rehabilitation.—That every person who, after discharge from the military or naval service of the United States during the war against Germany and its allies, is furnished any course of vocational rehabilitation under the terms of the Vocational Rehabilitation Act approved June 27, 1918, upon the ground that he comes within article III of the Act of October 6, 1917, fortieth volume, Statutes at Large, page 398, and who before entering upon such course shall have made entry upon or application for public lands of the United States under the homestead laws, or who has settled or shall hereafter settle upon public lands, shall be entitled to a leave of absence from his land for the purpose of undergoing training by the Federal Board of Vocational Education, and such absence, while actually engaged in such training shall be counted as constructive residence: *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year. *Act of Sept. 29, 1919 (41 Stat. 288).* Wellpam. CML2 P7

1049. Leave of absence from homestead for farm labor.—That during the pendency of the existing war any homestead settler or entryman shall be entitled to a leave of absence from his land for the purpose of performing farm labor, and such absence, while actually engaged in farm labor, shall, upon compliance with the terms of this Act, be counted as constructive residence: *Provided*, That each settler or entryman within fifteen days after leaving his claim for the purpose herein provided shall file notice thereof in the United States Land Office, and at the expiration of the calendar year file in said land office of the district wherein his claim is situated a written statement, under oath and corroborated by two witnesses, giving the date or dates when he left his claim, date or dates of return thereto, and where and for whom he was engaged in farm labor during such period or periods of absence: *Provided further*, That nothing herein shall excuse any homestead settler or entryman from making improvements or performing the cultivation required by applicable law upon his claim or entry: *Provided further*, That the provisions of this Act shall apply only to homestead settlers and entrymen who may have filed their application prior to the passage of this Act. The Secretary of the Interior is authorized to provide rules and regulations for carrying this Act into effect. *Act of Dec. 20, 1917 (40 Stat. 430).*

1050. Absence from mining claim by a soldier.—That the provisions of section twenty three hundred and twenty-four of the Revised Statutes of the United States, which require that on each mining claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year, shall not apply to claims or parts of claims owned by officers or enlisted men who have been or may, during the present war with Germany, be mustered into the military or naval service of the United States to serve during their enlistment in the war with Germany, so that no mining claim or any part thereof owned by such person which has been regularly located and recorded shall be subject to forfeiture for nonperformance of the annual assessments during the period of his service or until six months after

such owner is mustered out of the service or until six months after his death in the service: *Provided*, That the claimant of any mining location, in order to obtain the benefits of this resolution, shall file, or cause to be filed, a notice in the office where the location notice or certificate is recorded, before the expiration of the assessment year during which he is so mustered, giving notice of his muster into the service of the United States and of his desire to hold said mining claim under this resolution. *Joint Res. 10, July 17, 1917 (40 Stat. 243).*

By Joint Resolution No. 12, act of Oct. 5, 1917 (40 Stat. 343), the provisions of this act were suspended during the years nineteen hundred and seventeen and nineteen hundred and eighteen.

1051. Perfection of title to homesteads during military service.—That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws, the desert-land laws, the mining-land laws, or any other laws of the United States, shall be forfeited or prejudiced by reason of his absence from such land, or of his failure to perform any work or make any improvements thereon, or to do any other act required by any such law during the period of such service. Nothing in this section contained shall be construed to deprive a person in military service or his heirs or devisees of any benefits to which he or they may be entitled under the Act entitled "An Act for the relief of homestead entrymen or settlers who enter the military or naval service of the United States in time of war," approved July twenty-eighth, nineteen hundred and seventeen; the Act entitled "An Act for the protection of desert-land entrymen who enter the military or naval service of the United States in time of war," approved August seventh, nineteen hundred and seventeen; the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," approved August tenth, nineteen hundred and seventeen; the joint resolution "To relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service," approved July seventeenth, nineteen hundred and seventeen; or any other Act or resolution of Congress: *Provided*, That nothing in this section contained shall be construed to limit or affect the right of a person in the military service to take any action during his term of service that may be authorized by law, or the regulations of the Interior Department thereunder, for the perfection, defense, or further assertion of rights initiated prior to the date of entering military service, and it shall be lawful for any person while in military service to make any affidavit or submit any proof that may be required by law, or the practice of the General Land Office in connection with the entry, perfection, defense, or further assertion of any rights initiated prior to entering military service, before the officer in immediate command and holding a commission in the branch of the service in which the party is engaged, which affidavits shall be as binding in law and with like penalties as if taken before the Register of the United States Land Office. *Sec. 501, act of March 8, 1918 (40 Stat. 448).*

1052. Affidavits as to homestead entries.—In case of any person desirous of availing himself of the benefits of this chapter; but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land-office which the preceding sections require; and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a bona-fide improvement

and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law. *R. S. 2293.*

That during the continuance of the present war with Germany, and until his discharge from service, any man serving in the armed forces of the United States, who, prior to the beginning of his services was a settler, an applicant, or entryman under the land laws of the United States, or who has, prior to enlistment, filed a contest, with the view of exercising preference right of entry therefor, may make any affidavit required by law or regulation of the department, affecting such application, entry, or contest, or necessary to the making of entry in the case of the successful termination of such contest awarding him preference right of entry, before his commanding officer as provided in section twenty-two hundred and ninety-three of the Revised Statutes of the United States, which affidavits shall be as binding in law and with like penalties as if taken before the Register of the United States Land Office. *Act of Oct. 6, 1917 (40 Stat. 391).*

Notes of Decisions.

Affidavit.—The failure of the entryman's affidavit to state that his family or any member there was residing on the land does not invalidate the entry. Hastings & D. R. Co. v. Whitney (1889), 10 Sup. Ct. 112, 113, 132 U. S. 357, 33 L. Ed. 363.

1053. Final proof of entry by widows or children of soldiers.—That any settler upon the public lands of the United States; or any entryman whose application has been allowed; or any person who has made application for public lands which thereafter may be allowed under the homestead laws, who dies while actually engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, then his widow, if unmarried, or in case of her death or marriage, his minor orphan children, or his or their legal representatives, may proceed forthwith to make final proof upon such entry or application thereafter allowed, and shall be entitled to receive Government patent for such land; and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation upon such homestead. *Sec. 2, act of July 28, 1917 (40 Stat. 248).*

* * * *Provided*, That in every case in which a settler on the public land of the United States under the homestead laws died while actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the war with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultiva-

tion for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, to make final proof upon and receive Government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage, his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such land shall issue. *Sec. 2305, R. S., as amended by act of Mar. 1, 1901 (31 Stat. 847).*

For application of provisions of R.S. 2304, see 104 Santa

1054. Invalid homestead entries corrected by purchasers.— * * * *And provided further*, That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the Government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate. *Act of Mar. 3, 1893 (27 Stat. 593), making appropriations for sundry civil expenses.*

1055. Relinquishment of entries made by a minor.—That no relinquishment of any public land entry made under and by authority of section eight of the Act of Sixty-fifth Congress, second session, entitled "An Act amending the Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,'" approved May eighteenth, nineteen hundred and seventeen, shall be valid or effective for any purpose unless executed after the entryman shall have actually resided upon and cultivated the land, in the case of a homestead entry, for at least six months, and in the case of an entry made under other than the homestead laws, after the entryman shall have complied with the provisions of the applicable law for at least one year.

Any person, firm, or corporation soliciting or dealing with the relinquishment of such claim or entry prior to the completion of compliance with the applicable law and with this resolution, and who or which solicits, demands, or receives or accepts any fee or compensation for locating, filing, or securing the claims or entries for persons entitled to the benefits of said section shall, upon conviction, be fined not to exceed $1,000 or imprisoned for not exceeding two years, or both. *Joint Res. 41, Sept. 13, 1918 (40 Stat. 960), amending sec. 8, act of Aug. 31, 1918 (40 Stat. 957).*

1056. Cancellation of fraudulent homestead entries by soldiers.—That in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled "An act to amend an act entitled 'An act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States', and amendments thereto," approved March third, eighteen hundred and seventy-three, and now incorporated in section twenty-three hundred and six of the Revised Statutes of the United States, which said claims were, after such location, found to be fraudulent and void, and the entries or locations made thereon canceled, the Secretary of the Interior is authorized to repay to such innocent parties the fees and

commissions, and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the Treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase-money on lands erroneously sold by the United States. *Sec. 1, act of June 16, 1880 (21 Stat. 287).*

No proof of loyalty was to be required in cases mentioned in this act, by Res. Apr. 18, 1904, No. 25, (33 Stat. 593).

1057. Unlawful inclosure of public lands.—That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose. *Sec. 5, act of Feb. 25, 1885 (23 Stat. 322).*

1058. Reserved lands not available for town sites.—The provision of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations for light-houses, custom-houses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the Land-Office by title derived from the Crown of Spain, or otherwise. *R. S. 2393.*

Notes of Decisions.

Entry on military reservations.– Settlement and entry of a public military reservation can not be made under the land laws. Crawford v. Burr (1903), 2 Alaska, 33; Gavigan v. Crary (1905), 2 Alaska, 370.

1059. Removal of marks of surveys.—Whoever shall willfully destroy, deface, change, or remove to another place any section corner, quarter-section corner, or meander post, on any Government line of survey, or shall willfully cut down any witness tree or any tree blazed to mark the line of a Government survey, or shall willfully deface, change, or remove any monument or bench mark of any Government survey, shall be fined not more than two hundred and fifty dollars, or imprisoned not more than six months, or both. *Sec. 57, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1099).*

1060. Refusal to surrender land in national parks.—That any person to whom land lying within any national parks may have been leased, who refuses to give up possession of the same to the United States after the termination of said lease, and after possession has been demanded for the United States by any park commissioner or the park superintendent, or any person retaining possession of land lying within the boundary of said park which he or she may have sold to the United States for park purposes and have received payment therefor, after possession of the same has been demanded for the United States by any park commissioner or the park superintendent, shall be deemed guilty of trespass, and the United States may maintain an action for the recovery of the possession of the premises so withheld in the courts of the United States, according to the statutes or code of practice of the State in which the park may be situated. *Sec. 4, act of March 3, 1897 (29 Stat. 622).*

1061. Entering a military reservation for an unlawful purpose.—Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than

five hundred dollars, or imprisoned not more than six months, or both. *Sec. 45, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1097).*

1062. Trespassing for hunting, etc., in national parks.—That every person who shall trespass upon any national park for the purpose of hunting or shooting, or who shall hunt any kind of game thereon with gun or dog, or shall set trap or net or other device whatsoever thereon for the purpose of hunting or catching game of any kind, shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars or by imprisonment for not less than five days or more than thirty days, or by both fine and imprisonment. *Sec. 2, act of Mar. 3, 1897 (29 Stat. 621).*

1063. Breaking inclosure of reserved lands.—Whoever shall knowingly and unlawfully break, open, or destroy any gate, fence, hedge, or wall inclosing any lands of the United States which, in pursuance of any law, have been reserved or purchased by the United States for any public use; * * * *Sec. 56, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1099).*

1064. Grazing on public lands.— * * * or whoever shall drive any cattle, horses, hogs, or other live stock upon any such lands for the purpose of destroying the grass or trees on said lands, or where they may destroy the said grass or trees; or whoever shall knowingly permit his cattle, horses, hogs, or other live stock, to enter through any such inclosure upon any such lands of the United States, where such cattle, horses, hogs, or other live stock may or can destroy the grass or trees or other property of the United States on the said lands, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both: *Provided*, That nothing in this section shall be construed to apply to unreserved public lands. *Sec. 56, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1099).*

Notes of Decisions.

Implied license to use land for pasture.—There is no implied license to use for pasture purposes public land reserved for the preservation of forests, to the destruction or injury of such forests. U. S. *v.* Tygh Valley Land & Live-Stock Co. (C. C. 1896), 76 Fed. 693.

1065. Depredations in national parks.—That every person who willfully destroys, mutilates, defaces, injures, or removes any monument, statue, marker, guidepost, or other structure, or who willfully destroys, cuts, breaks, injures, or removes any tree, shrub, or plant within the limits of any national parks shall be deemed guilty of a misdemeanor, punishable by a fine of not less than ten dollars nor more than one thousand dollars for each monument, statue, marker, guidepost, or other structure, tree, shrub, or plant destroyed, defaced, injured, cut, or removed, or by imprisonment for not less than fifteen days and not more than one year, or by both fine and imprisonment. *Sec. 1, act of March 3, 1897 (29 Stat. 621).*

This Act shall apply only to the military parks of the United States. *Sec. 5, act of March 3, 1897 (29 Stat. 622).*

1066. Cutting or injuring trees.—Whoever shall unlawfully cut, or aid in unlawfully cutting, or shall wantonly injure or destroy, or procure to be wantonly injured or destroyed, any tree, growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the

same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both. *Sec. 50, Criminal Code, act of March 4, 1909 (35 Stat. 1098), as amended by sec. 6, act of June 25, 1910 (36 Stat. 857).*

This section was amended as cited above, by inserting the words "or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States," as set forth here.

Notes of Decisions.

Power of Congress to enact law.—Congress has power to enact laws to punish the unauthorized cutting of timber on unallotted lands in an Indian reservation within a State, the title to which is in the United States, and to confer jurisdiction on Federal courts to enforce them. U. S. v. Kempf (D. C. 1909), 171 Fed. 1021.

Definition of "timber."—The term "timber" signifies the standing trees and the felled trees prepared for transportation to a vessel or sawmill, such as sawlogs or lumber in bulk, but does not embrace any article manufactured from the tree, such as shingles or boards. U. S. v. Schuler (C. C. 1853), Fed. Cas. No. 16,234.

Lands of United States.—The Cherokee tribe derived the title to their lands by grant from the United States, and such lands can not be held to be "lands of the United States," within R. S. 5388 (embodied herein). U. S. v. Reese (C. C. 1879), Fed. Cas. No. 16,137.

The lands lying in the "Cherokee Strip" which are leased to whites are not lands of the United States within the meaning of R. S. 5388 (embodied herein), which penalizes the cutting or destroying of timber on the lands of the United States. (1887) 18 Op. Atty. Gen. 555.

Lands reserved in general.—The general public domain is open to private entry, and lands can not be said to be reserved for such entry. The lands reserved are those severed from the mass of public land and appropriated for governmental purposes. U. S. v. Garretson (C. C. 1890), 42 Fed. 22, 24.

Cutting or removing from lands reserved for naval purposes.—An indictment will lie for cutting or removing timber from any of the public lands, though the same are not reserved for naval purposes. U. S. v. Body (C. C. 1852), Fed. Cas. No. 16,133; Same v. Schuler (C. C. 1853), Fed. Cas. No. 16,234.

Timber on military or Indian reservations or lands.—R. S. 5388, as amended June 4, 1888 (embodied herein), which forbids the cutting or wanton destruction of timber upon military or Indian reservations, does not apply to one who removes and uses for building purposes timber which has been cut on an Indian reservation by another person without his aid or encouragement. U. S. v. Konkapot (C. C. 1890), 43 Fed. 64.

The cutting or destroying of timber on lands which have been patented to individual Indians is not an offense. (1888) 19 Op. Atty. Gen. 183.

Indians occupying reservations, the title to which is in the United States subject to their occupancy, have no right to cut and remove the dead and fallen timber thereon for the purpose of sale alone; such timber, where not used by the Indians for fuel or for agricultural or other purposes connected with the occupation of the land, being the property of the United States. (1888) 19 Op. Atty. Gen. 194.

Turpentine boxing or wanton destruction on lands open to preemption and other entries.—R. S. 5388 (embodied herein), making the wanton destruction of timber on lands reserved for public uses a crime, does not cover turpentine boxing or wanton destruction of timber on lands open for preemption, homestead, and cash entries. U. S. v. Garretson (C. C. 1890), 42 Fed. 22.

Proceedings for cutting timber in general.—The Government may proceed civilly or criminally for cutting timber. Bly v. U. S. (C. C. 1877), Fed. Cas. No. 1,581.

Prosecution of citizen who has made homestead entry.—A citizen who has made a regular and proper homestead entry is nevertheless liable to a criminal prosecution under R. S. 2461 and 5388 (embodied herein) for cutting and removing standing trees and timber found upon the land. Shiver v. U. S. (1895), 16 Sup. Ct. 54, 159 U. S. 491, 40 L. Ed. 231.

Seizure of property belonging to wrongdoer.—R. S. 5388 (embodied herein), which imposes a fine for timber depredations upon the public lands of the United States, makes no provision for seizure of property belonging to a wrongdoer. (1887) 18 Op. Atty. Gen. 555.

Indictment.—The rule of proof on an indictment for cutting and removing timber from public lands is fixed by the statute. Act of Mar. 2, 1831. U. S. *v.* Darton (C. C. 1853), Fed. Cas. No. 14,919.

An indictment for cutting oak on public lands can not be sustained by evidence that defendant cut pine. Id.

An indictment for removing timber from public lands must state the particular section or quarter section from which the timber was taken, as a part of the description of the offense. U. S. *v.* Schuler (C. C. 1853), Fed. Cas. No. 16,234.

An indictment which describes the land, in general language, as "lands of the United States," is not sufficient. Id.

In an indictment for cutting timber it is not necessary to state the class of lands from which the trees were cut. U. S. *v.* Thompson (C. C. 1853), Fed. Cas. No. 16,490.

In such an indictment it is not necessary to describe every kind of timber cut. U. S. *v.* Redy (C. C. 1852), Fed. Cas. No. 16,133.

Evidence.—In prosecutions for cutting timber, the official plats and books in the land office are admissible to show title. Bly *v.* U. S. (C. C. 1877), Fed. Cas. No. 1,581.

Parol evidence is inadmissible to show that the locus in quo was swamp land. Id.

Nominal fine.—A nominal fine only imposed for cutting timber, where defendant had made full reparation, and there was no intention to defraud the public. U. S. *v.* Murray (C. C. 1851), Fed. Cas. No. 15,843.

1067. Securing pitch, etc., from trees on public land.—Whoever shall cut, chip, chop, or box any tree upon any lands belonging to the United States, or upon any lands covered by or embraced in any unperfected settlement, application, filing, entry, selection, or location, made under any law of the United States, for the purpose of obtaining from such tree any pitch, turpentine, or other substance, or shall knowingly encourage, cause, procure, or aid in the cutting, chipping, chopping, or boxing of any such tree, or shall buy, trade for, or in any manner acquire any pitch, turpentine, or other substace, or any article or commodity made from any such pitch, turpentine, or other substance, when he has knowledge that the same has been so unlawfully obtained from such trees, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both. *Sec. 51, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1098).*

See notes under 1066, ante.

Notes of Decisions.

Civil liability defined.—See U. S. *v.* Waters-Pierce Oil Co. (1912), 196 Fed. 767, 116 C. C. A. 391, modifying judgment (C. C. 1910), 180 Fed. 309; Union Naval Stores Co. *v.* U. S. (1913), 202 Fed. 491; affirmed (1916), 240 U. S. 284.

1068. Jurisdiction in a national park.—That the superintendent or any guardian of such park is authorized to arrest forthwith any person engaged or who may have been engaged in committing any misdemeanor named in this Act, and shall bring such person before any United States commissioner or judge of any district or circuit court of the United States within either of the districts within which the park is situated, and in the district within which the misdemeanor has been committed, for the purpose of holding him to answer for such misdemeanor, and then and there shall make complaint in due form. *Sec. 3, act of Mar. 3, 1897 (29 Stat. 621).*

That all persons employed in the forest reserve and national park service of the United States shall have authority to make arrests for the violation of the laws and regulations relating to the forest reserves and national parks, and any person so arrested shall be taken before the nearest United States commissioner, within whose jurisdiction the reservation or national park is located, for trial; and upon sworn information by any competent person any United States commissioner in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said laws and regulations; but

nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said laws and regulations. *Act of Feb. 6, 1905 (33 Stat. 700).*

Notes of Decisions.

Employees to make arrests, etc.—Employees of the Gettysburg National Park are authorized, under the act of Feb. 6, 1905 (33 Stat. 700), to make arrests for the violation of the laws and regulations relating to said park. (1915) 30 Op. Atty. Gen. 465.

1069. Arson or injury to arsenals, etc.—Whoever shall maliciously set fire to, burn, or attempt to burn, or by any means destroy or injure, or attempt to destroy or injure, any arsenal, armory, magazine, ropewalk, ship house, warehouse, blockhouse, or barrack, or any storehouse, barn, or stable, not parcel of a dwelling house, or any other building not mentioned in the section last preceding, or any vessel built, building, or undergoing repair, or any light-house, or beacon, or any machinery, timber, cables, rigging, or other materials or appliances for building, repairing, or fitting out vessels, or any pile of wood, boards, or other lumber, or any military, naval, or victualing stores, arms, or other munitions of war, shall be fined not more than five thousand dollars and imprisoned not more than twenty years. *Sec. 286, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1144).*

1070. Trespass or injury of mines, harbor defenses, etc., or disregard of defensive sea areas.—Whoever shall willfully trespass upon, injure, or destroy any of the works or property or material of any submarine mine or torpedo or fortification or harbor-defense system owned or constructed or in process of construction by the United States, or shall willfully interfere with the operation or use of any such submarine mine, torpedo, fortification, or harbor-defense system, or shall knowingly, willfully, or wantonly violate any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which defensive sea areas are hereby authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense, shall be punished on conviction thereof in a district or circuit court of appeals of the United States for the district or circuit in which the offense is committed, or into which the offender is first brought, by a fine of not more than $5,000, or by imprisonment for a term not exceeding five years, or by both, in the discretion of the court. *Sec. 44, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1097), as amended by act of Mar. 4, 1917 (39 Stat. 1194).*

That section 44 * * * be, and hereby is, amended by adding the following to said section:

"*Provided*, That offenses hereunder committed within the Canal Zone or within any defensive sea areas which the President is authorized to establish by said section, shall be cognizable in the District Court of the Canal Zone, and jurisdiction is hereby conferred upon said court to hear and determine all such cases arising under said section and to impose the penalties therein provided for the violation of any of the provisions of said section." *Sec. 19, act of May 22, 1917 (40 Stat. 89), amending sec. 44, Criminal Code, act of March 4, 1909 (35 Stat. 1097).*

Notes of Decisions.

Statute as grant of power to make regulations.—The statute can not be taken as a grant of power to make regulations on the subject in question, however important and desirable such regulations may be. (1907) 26 Op. Atty. Gen. 258.

The Attorney General concurs in the view that general legislation by Congress is necessary for the protection of submarine cables connecting the several military stations in the various fortified harbors of the United States. Id.

1071. Depredations with respect to antiquities.—That any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court. *Sec. 1, act of June 8, 1906 (34 Stat. 225).*

1072. Permits for the investigation of antiquities.—That permits for the examination of ruins, the excavation of archæological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: *Provided*, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums. *Sec. 3, act of June 8, 1906 (34 Stat. 225).*

That the secretaries of the Departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this Act. *Sec. 4, act of June 8, 1906 (34 Stat. 225).*

1073. Historic monuments.—That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected: *Provided*, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States. *Sec. 2, act of June 8, 1906 (34 Stat. 225).*

Notes of Decisions.

Power of President.—For case upholding President's power under this section, see Cameron *v.* U. S. (U. S. 1920), 64 L. E. 448.

1074. Legislation for military reservations and the seat of Government.—The Congress shall have Power * * *

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent

of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. *Art. I, sec. 8, Constitution of the United States.*

Notes of Decisions.

I. District of Columbia.
II. Places acquired or held by Government.

I. District of Columbia.

When jurisdiction of Federal Government vested.—The jurisdiction of the United States over the District of Columbia vested on the first Monday in Dec., 1800, the day on which, by law, the District became the seat of Government. U. S. v. Hammond (C. C. 1801), Fed. Cas. No. 15,293.

Operation and effect of cession.—The separation of the county of Alexandria from Virginia did not affect existing contracts between individuals. The insurance on buildings in A. did not cease on the separation, though the insurance company could insure only on houses in Virginia. Korn v. Mutual Assur. Soc. (1810), 10 U. S. (6 Cranch) 192, 3 L. Ed. 195.

States and governmental powers of District.—The act of Congress to provide a government for the District of Columbia confers such powers only as are granted in the statute creating that government, and such powers as are necessary to carry into practical effect those which are expressly granted. Barnes v. District of Columbia (D. C. 1874), 1 MacArthur, 322.

The District of Columbia has no legislative power, it being merely a municipal corporation bearing the same relation to Congress that a city does to the legislature of the State in which it is incorporated. U. S. v. Macfarland (1907), 28 App. D. C. 552.

The District of Columbia is a municipal corporation although its organization is peculiar, there being no general organic law covering all of the ordinary powers usually conferred in the creation of a municipal corporation; no formal charter. District of Columbia v. Tyrrell (1914), 41 App. D. C. 463.

It was the purpose of the framers of the Constitution that the 10 miles square, which by the cession of States and the acceptance of Congress might become "the seat of the Government," should be as permanent as the States from which it should be taken; and territory acquired from States for the seat of the Government continues to be national. The District of Columbia is a part of the United States for all purposes, domestic and international. James v. U. S. (1903), 38 Ct. Cl. 615, reversed (1906), 26 Sup. Ct. 685, 202 U. S. 401, 50 L. Ed. 1079.

Certain corporate powers are exercised by the District Government, yet the District of Columbia as the seat of the government is controlled by Congress exclusively. The United States Government is the sovereign and the District government one of the agencies of the sovereign power. Mackey v. U. S. (1911), 47 Ct. Cl. 121.

Constitutional guaranties.—The constitutional guaranties of life, liberty, and property apply to the District of Columbia, as elsewhere, and this section is not to be construed as excepting the District from the operation of the same. Willson v. McDonnell (App. D. C. 1919), 265 Fed. 432; Callan v. Wilson (1888), 127 U. S. 540.

Public improvements.—Congress has power to direct that the whole or any part of the cost of a public improvement in the District of Columbia shall be assessed against the lands benefited. Willard v. Presbury (1871), 81 U. S. (14 Wall.) 676, 20 L. Ed. 719. [C. S. p 13513.]

The United States possesses not only political, but municipal, authority over the District, and has authority to condemn lands in the District for a public park, an authority not limited by any provision in the Maryland act of cession (act Md. 1791, c. 45). Shoemaker v. U. S. (1893), 13 Sup. Ct. 361, 390, 147 U. S. 282, 37 L. Ed. 170.

In Code, sec. 483 (31 Stat. 1265), providing for the condemnation of land in this district for a right of way for sewers, or for any other municipal use authorized by Congress, the words "authorized by Congress" limit only the words preceding them in the same phrase, "or for any other municipal purpose," and have no reference to the preceding phrases; so that the commissioners have the right to institute and prosecute proceedings to condemn land for sewer purposes without express direction of Congress to do so. Macfarland v. Elverson (1908), 32 App. D. C. 81.

II. Places Acquired or Held by Government.

Construction and effect of clause in general. This constitutional provision is not applicable where a State cedes its jurisdiction over a military reservation within its borders. Benson v. U. S. (1892), 13 Sup. Ct. 60, 61, 146 U. S. 325, 36 L. Ed. 991.

This clause applies only to land acquired by actual purchase accompanied by a cession of jurisdiction by the State; and where land is acquired directly from the State as owner by an act of cession, as in the case of Fortress Monroe, the constitutional provision does not apply, and the United States holds the land only as prescribed in the act of cession. Crook, Horner & Co. *v.* Old Point Comfort Hotel Co. (C. C. 1893), 54 Fed. 604.

There must be an actual purchase for the purposes specified by the United States, and consent by the legislative authority of the State, as conditions precedent to the operation of the power of exclusive legislation, and thereupon all jurisdiction is ceded and passes to the General Government. In re Kelly (C. C. 1895), 71 Fed. 545, 549.

This clause contemplates the purchase of land "needful," for any reason, to the discharge of any of the constitutional duties, or the exercise of any of the constitutional powers, of the United States. (1907), 26 Op. Atty. Gen. 289.

Under this clause Congress has power to construct an aqueduct drawing its supply of water for the city of Washington from within the limits of Maryland, and using and occupying the land for that purpose in Maryland, by permission and consent of the State. Reddall *v.* Bryan (1859), 14 Md. 444, 74 Am. Dec. 550.

This clause does not apply to lands acquired otherwise than by purchase. Barrett *v.* Palmer (1891), 16 N. Y. Supp. 94.

Needful buildings.—This clause extends to land bought for post offices or courts. Battle *v.* U. S. (1908), 28 Sup. Ct. 422, 209 U. S. 36, 52 L. Ed. 670.

Lands acquired by the United States for needful public buildings with the consent of the State legislature are "places" within the jurisdiction of the Federal Government. U. S. *v.* Pierce County (D. C. 1912), 193 Fed. 529.

The reservoirs, aqueducts, and other constructions appurtenant to the water supply of the city of Washington, D. C., are to be considered "needful buildings," within this clause, and since a roadway is an appropriate and necessary appurtenance to such works, the Conduit Road constitutes territory within the exclusive jurisdiction of Congress. (1907) 26 Op. Atty. Gen. 289.

Meaning of purchase.—A purchase by its terms imports the assent of both buyer and seller, not an appropriation of property without the consent of the seller. It is therefore only where the United States have agreed to buy, and the owner to sell, and they disagree as to the price, that a case arises under a State law, consenting to a purchase, which provides a tribunal to determine the price in that event, but not before. Burt *v.* Merchants' Ins. Co. (1871), 106 Mass. 356, 8 Am. Rep. 339.

Consent of State and effect thereof in general.—Sufficiency of consent to warrant expenditure of appropriation for improvements, see 1029, ante, and notes thereunder.

Jurisdiction which a State has once exercised can not be withdrawn from it, and conferred on the General Government, without the consent of the State. U. S. *v.* Stahl (C. C. 1868), Fed. Cas. No. 16,373.

This clause provides the only constitutional method by which the United States may acquire lands within a State with exclusive jurisdiction thereover, but it does not affect the power of the Government to acquire the mere use of such lands without exclusive jurisdiction. Consent of the State is not required when exclusive jurisdiction is not sought. Stockton *v.* Baltimore & N. Y. R. Co. (C. C. 1887), 32 Fed. 9, 18.

The act of the legislature of Maryland empowering the United States to acquire land in said State, for the use of the Washington Aqueduct, is not in conflict with the Constitution either of that State or of the United States. (1855) 7 Op. Atty. Gen. 114.

Jurisdiction is acquired by the United States by the consent of a State to the purchase of land within the same for constitutional uses of the Union. (1856) 7 Op. Atty. Gen. 628.

Under this provision of the Constitution, there is no power in Congress to acquire or assert exclusive jurisdiction over any part of the territory of any State without the consent of the legislature of the State; and, to acquire exclusive jurisdiction over a national cemetery, the consent of the legislature of the State in which the same is situated must first be obtained. (1869) 13 Op. Atty. Gen. 131.

The assent of the State legislature is necessary to the establishment of forts and permanent garrisons by the United States within the boundaries of a State. Jackson *v.* Wilcox (Ill. 1837), 1 Scam. 344.

The consent of the State is not a condition precedent to the taking of lands by the General Government. Its consent is required only for the purpose of a transfer of jurisdiction. People *v.* Humphrey (1871), 23 Mich. 471, 9 Am. Rep. 94.

The purchase of land within a State by the United States for public purposes does not of itself oust the jurisdiction or the sovereignty of such State when it is so purchased; but it is only when land has been purchased by the National Government, by the consent of the legislature, that the former obtains exclusive control over such

land. Commonwealth v. Hutchinson (Pa. 1848), 2 Pars. Eq. Cas. 384.

The legislative power over a place purchased by the United States with the consent of the legislature of the State is transferred from the State to the Federal Government, except as restrained by some qualification in the expression of State consent. Allegheney County v. McClung (1867), 53 Pa. (3 P. F. Smith), 482.

Grant or conveyance to Government.—A conveyance of lands to the United States is void and inoperative, unless the purchase is authorized by Congress. United States v. Tichenor (C. C. 1882), 12 Fed. 415.

When the grant has been accepted by the General Government, and the conditions of the purchase have been fully performed, such grant becomes a solemn compact, which the General Government will not permit the State to violate. Bannon v. Burnes (C. C. 1889), 39 Fed. 802, 807.

A contention that a national soldiers' home was a corporation and a conveyance of the land to it was not a conveyance to the United States was without force. State v. Willett (Tenn. 1906), 97 S. W. 209.

The conveyance by the State of Virginia to the United States of the land at Old Point Comfort by the high-water mark boundary passed to the grantee the soil and jurisdiction to the low-water mark. French v. Bankhead (Va. 1854), 11 Grat. 136.

In ascertaining the boundaries of a tract of land at Old Point Comfort, conveyed by Virginia to the United States, the act, the report of the surveyor, and the deed are all to be consulted. Id.

Purchase of lands not intended for forts, arsenals, etc.—Under the provision for exclusive legislation over all places purchased by the consent of the legislature of the State for the erection of forts, etc., and other needful buildings, a purchase of land for any of these purposes made by the National Government, where the State legislature has given its consent to the purchase, the land so purchased, ipso facto, falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted. U. S. v. Cornell (C. C. 1819), Fed. Cas. No. 14,867.

Exclusive jurisdiction of Congress in general.—Where the purchase of land is made by consent of the State legislature, such land, under the constitutional provision, falls within the exclusive legislation of Congress. U. S. v. Cornell (C. C. 1819), Fed. Cas. No. 14,867.

This clause vests in the National Government exclusive jurisdiction over places occupied for military purposes, when the site has been acquired with the consent of the legislature of the State in which it is situated. U. S. v. Holt (C. C. 1909), 168 Fed. 141, judgment affirmed Holt v. U. S. (1910), 31 Sup. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

The land on which Fort Oglethorpe is located in Georgia, being a part of that acquired by the United States for a national military park with the consent of the State legislature, which ceded jurisdiction of the lands and roads therein, said fort being used as a military post, is within the provision of this clause, giving exclusive jurisdiction over forts, etc., to Congress, and neither the State nor other local authorities have power to interfere with any instrumentalities necessary to the proper use of such location as a military post. Pundt v. Pendleton (D. C. 1909), 167 Fed. 997.

The purchase by the United States of the land occupied by Fort Trumbull, Conn., and the consent of the State legislature to the purchase, though a formal cession of jurisdiction is wanting, give to Congress the exclusive power of legislation over the purchased land. (1871) 13 Op. Atty. Gen. 411.

The transfer of jurisdiction may take place in two ways: Indirectly, by the State consenting to the purchase of the land by the United States; and directly, by the State granting the jurisdiction to the United States. (1871) 13 Op. Atty. Gen. 461.

Where the United States has acquired title to lands by purchase by consent of the legislature of a State, and there was no reservation on the part of the State of concurrent jurisdiction over the lands so disposed of, the Federal jurisdiction is exclusive of all State authority. (1900) 23 Op. Atty. Gen. 254.

Congress has the right of exclusive jurisdiction over the entire length of the Conduit Road appurtenant to the water supply of the city of Washington, provided the roadbed is owned in fee by the United States and has been acquired in accordance with the consent of the legislature of the State of Maryland contained in the act of May 3, 1853 (Laws Md. 1853, ch. 179). (1907) 26 Op. Atty. Gen. 289.

The Conduit Road is not a public highway, but is subject to the control of the Chief of Engineers, and its use by the public may be subjected to such regulations as may be appropriate, obedience to which may be secured by the use of such reasonably sufficient force as the Secretary of War may deem advisable. Id.

Under this clause land purchased ipso facto falls within the exclusive jurisdiction of the United States. State v. Mack (1897), 47 P. 763, 23 Nev. 359, 62 Am. St. Rep. 811.

Cession or abandonment of jurisdiction by State.—At the time of the cession by the State of Kansas to the United States of exclusive jurisdiction over the Fort Leavenworth Military Reservation, then owned by the United States, there was a railroad running through the territory included in the cession. Held, that a law of the State, making a railroad company whose road was not included by a lawful fence liable to the owner of cattle killed or wounded by its engines or cars for the full value of the animals killed and the full damage to those wounded, whether the killing or wounding was caused by negligence or not, continued in force in the reservation after the cession. Chicago, R. I. & P. R. Co. *v.* McGlinn (1885), 114 U. S. 542, 5 Sup. Ct. 1005, 29 L. Ed. 270.

Laws Kans. 1875, p. 95, ceding to the United States exclusive jurisdiction over the Fort Leavenworth Military Reservation, with certain exceptions as to service of process and taxation by State authorities, constituted a valid session of jurisdiction, and, though made without any request by the General Government, yet, as it conferred a benefit, its acceptance is to be presumed. Benson *v.* U. S. (1892), 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991.

Lands over which jurisdiction has been ceded, or which are not within the limits of any State used for constitutional purposes, are subject only to the laws of Congress in the case of conflict. U. S. *v.* Ames (C. C. 1845), Fed. Cas. No. 14,441.

The acceptance by Congress of the cession by a State of exclusive jurisdiction over territory in a military reservation which existed before the State was created is not necessary to vest such jurisdiction in the United States under this clause. Ex parte Hebard (C. C. 1877), Fed. Cas. No. 6,312.

Cession by a State is only necessary to extinguish its jurisdiction in whole or in part and is not necessary to the use of land by the United States for public purposes, subject, like all lands within the limits of the Union, to the concurrent jurisdiction of both Governments; that of the Federal being supreme. Stockton *v.* Baltimore & N. Y. R. Co. (C. C. 1887), 32 Fed. 9, 19.

Inasmuch as this clause authorizes Congress to exercise exclusive jurisdiction over the places referred to therein, statutes abandoning State jurisdiction therein are held to have accomplished their evident intent. State jurisdiction is thereafter at an end. Beekman *v.* Hudson River West Shore R. Co. (C. C. 1888), 35 Fed. 3, 8.

That a State, being sovereign, may waive or transfer its right to exercise judicial authority over portions of its territory, can not be doubted. A State may sell or cede its own territory, with all its powers over it, to another power, as in the case of the cession of the District of Columbia to the United States, or in the sale to Congress of places to be used as forts, dockyards, hospitals, etc. Commonwealth *v.* Frazee (Pa. 1856) 5 Am. Law Reg. 167, 169, 2 Phila. 191.

A State legislature has no power to abdicate the jurisdiction of the State over places within its limits, except where the title to them has been acquired by the United States. In re O'Connor (1875), 37 Wis. 379, 19 Am. Rep. 765.

Relinquishment or retrocession of jurisdiction.—Acts 1897–98, p. 668, retroceding to Indiana and Illinois the jurisdiction of the United States over territory purchased by the consent of said States for the location of branches of the National Home for Disabled Volunteer Soldiers, does not violate this clause. State *v.* Board of Com'rs of Grant County (1899), 54 N. E. 809, 153 Ind. 302.

Where the United States has acquired the jurisdiction over lands within the territory of a State, for any of the purposes allowed by the Constitution, Congress has power to relinquish or recede to the State the jurisdiction, without abandoning the property; and acceptance of such recession by the State is not necessary. Renner *v.* Bennett (1871), 21 Ohio St. 431.

Act Jan. 21, 1871, relinquishing to a State "exclusive jurisdiction" over a place purchased for an asylum for disabled soldiers, is not so in conflict with a proviso reserving the "powers and rights" theretofore conferred on the board of managers incorporated by Congress, that they may not stand together and both be operative. Id.

Places held or acquired without consent or cession of jurisdiction.—The purchase of lands by the United States for public purposes within the territorial limits of a State does not of itself oust the jurisdiction of sovereignty of the State over such lands. U. S. *v.* Cornell (C. C. 1819), Fed. Cas. No. 14,867.

The rights and remedies of the United States in respect to land owned by it within the limits of the State and over which it has no cession of jurisdiction are governed by the lex rei sitæ, unless treaties or statutes of the United States otherwise provide. U. S. *v.* Ames (C. C. 1845), Fed. Cas. No. 14,441.

The United States have not sole and exclusive jurisdiction over land rented for a military camp, but only such jurisdiction as is necessary for military purposes. U. S.

v. Tierney (C. C. 1864), Fed. Cas. No. 16,517.

On the admission of Kansas into the Union, jurisdiction within forts of the United States within the State was not excepted, and the consent of the State was necessary to the exercise of Federal jurisdiction therein. U. S. v. Stahl (C. C. 1868), Fed. Cas. No. 16,373.

The site of the navy yard at Pensacola having been reserved out of the public domain of the United States for naval purposes while Florida was a Territory, and jurisdiction over such site not having been ceded by the legislature of Florida after its admission as a State, advised that, in this case, application be made to the State for a cession of its jurisdiction thereover to the United States, as without such cession the latter can not claim exclusive jurisdiction over the premises. (1855) 7 Op. Atty. Gen. 571.

There is nothing in the Constitution which prohibits the United States purchasing land within a State without the consent of the State legislature; but when land is purchased by them in a State without such consent the United States can not exercise "exclusive legislation" over the place. (1861) 10 Op. Atty. Gen. 35.

The United States have over lands within a State held for national cemeteries or other public purposes, which were acquired by the former without the consent of the State, or over which the latter has not ceded its jurisdiction, only such jurisdiction as they have over other parts of the State wherein they possess no proprietary interests. (1873) 14 Op. Atty. Gen. 558.

The mere ownership of the land does not put the United States in a different position as regards the matter of jurisdiction over it than they occupied previous to its acquisition; nor is the situation of the State, with reference to the same matter, in any degree altered thereby. Id.

Strictly speaking, therefore, where the United States own land situated within the limits of a State, but over which the State has not parted with its jurisdiction, they can not be taken to have exclusive jurisdiction over such land. Id.

The declaration that Congress may exercise exclusive legislation over all territory purchased, etc., does not preclude the exercise of jurisdiction by the State of Kansas over criminal offenses committed on the military reservation at Fort Leavenworth, for the reason that such reservation was not purchased with the consent of the State, or for the erection of forts and other buildings, but was purchased before the formation of the State as a part of the Territory of Louisiana, and for the further reason that no attempt was made by Congress in the act admitting the State to the Union to reserve control by exacting guaranties or otherwise against exercising jurisdiction. Clay v. State (1864), 4 Kan. 49.

The jurisdiction over land purchased by the United States, lying within the limits of a State, remains in the State, unless the consent of the State be given, according to this clause. Commonwealth v. Young (Pa. 1869), 1 Jour. Juris. 47.

Where the United States merely buys or condemns land within a State for its own use, the State retains jurisdiction over the land, subject to the limitation that it can not interfere with the full, free, and perfect use by the United States of the land for the purpose for which it was acquired. Divine v. Unaka Nat. Bank (Tenn. 1911), 140 S. W. 747.

Conditions or reservations by State.—Cession by the legislature of a State of exclusive jurisdiction over places needed by the General Government in the execution of its powers, may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended. Fort Leavenworth R. Co. v. Lowe (1885), 5 Sup. Ct. 995, 114 U. S. 525, 29 L. Ed. 264; Chicago, R. I. & P. R. Co. v. McGlinn (1885), 5 Sup. Ct. 1005, 114 U. S. 542, 29 L. Ed. 587.

A State may, in ceding jurisdiction over a place purchased, without consent, for a navy yard and naval hospital, impose the condition that such jurisdiction shall be retained by the United States only so long as the place is used for those purposes. Palmer v. Barrett (1896), 16 Sup. Ct. 837, 838, 162 U. S. 399, 40 L. Ed. 1015, following Fort Leavenworth R. Co. v. Lowe (1885), 5 Sup. Ct. 995, 114 U. S. 525, 29 L. Ed. 264.

Where a State grants land to the General Government, reserving concurrent jurisdiction in executing process therein for offenses committed out of it, the Federal courts have exclusive jurisdiction of offenses committed within such territory. U. S. v. Travers (C. C. 1814), Fed. Cas. No. 16,537.

Where the United States has purchased of a State certain lands for the erection of forts, etc., and other needful buildings, a reservation, on a cession by the State of "concurrent jurisdiction" to serve State process civil and criminal in a ceded place, does not exclude the exclusive legislation or exclusive jurisdiction of the United States over such place. It merely operates as a condition of the grant. U. S. v. Davis (C. C. 1829), Fed. Cas. No. 14,930.

A reservation on a cession of "concurrent jurisdiction" to serve State process, civil and criminal, in the ceded place, does not exclude the exclusive legislation or ex

clusive jurisdiction of the United States over the ceded place. Id.

Where land has been sold to the United States Government, and jurisdiction over the same has been ceded to it by the State legislature, reserving the right to serve personal process thereon, no process issuing out of a State court upon a judgment lien to which the land was subject at the time of sale can affect the title thereto. Martin v. House (C. C. 1888), 39 Fed. 694.

An act of the legislature of a State ceding to the United States the jurisdiction of the State over a tract of land used as a military reservation, upon condition that such jurisdiction shall continue only so long as the United States shall own and occupy such reservation; that the State shall have the right, within the reservation, to serve civil process, and to execute criminal process against persons charged with crime committed within the State; and that roads may be opened and kept in repair within such reservation—cedes to the United States the entire political jurisdiction of the State over the place in question, including judicial and legislative jurisdiction, except as to service of process and opening roads, and the same can not be affected or further limited, without the consent of the United States, by a subsequent act of the State legislature attempting to impose additional restrictions on the jurisdiction ceded. In re Ladd (C. C. 1896), 74 Fed. 31.

Congress has exclusive legislative power over a place ceded by a State for a military post, though the State reserves a right to send process therein. U. S. *v.* Knapp (D. C. 1849), Fed. Cas. No. 15,538.

Phrases in legislative acts of the States retaining concurrent jurisdiction for certain purposes do not impair the Federal jurisdiction conferred by the Constitution. (1856), 7 Op. Atty. Gen. 628.

Consent of a State to the purchase of land within it conveys in general jurisdiction to the United States, but not when all jurisdiction is expressly reserved by the State. (1856) 8 Op. Atty. Gen. 31.

If the legislative act of the State wherein the land lies amounts to a consent to the purchase by the United States, any exceptions, reservations, or qualifications contained in the act are void. (1861) 10 Op. Atty. Gen. 35.

The act of the Virginia Legislature of Jan. 14, 1871, providing for a cession of jurisdiction over the bridge across Mill Creek, at Old Point Comfort, Va., owned by the Government, proposed in effect that the United States shall have exclusive jurisdiction over the bridge and its abutment (with concurrent jurisdiction in the State for the *execution* of process) so long as the bridge was kept up and maintained by the Government for military purposes, and the public were permitted to pass over the same free of charge, and no longer, and the Attorney General advised that there would be no impropriety in accepting the grant of jurisdiction executed by the governor of the State in pursuance of said act, upon the terms proposed. (1871) 13 Op. Atty. Gen. 419.

By St. Mass. 1800, ch. 26, giving the consent of this Commonwealth to the purchase, by the United States, of a tract of land in Charlestown, for a navy yard, it was provided that the Commonwealth should retain concurrent jurisdiction over it, so far as that all civil and such criminal processes as might issue under the authority of this Commonwealth against persons charged with crimes committed without that tract of land, might be executed therein. It was held that, under St. Mass. 1822, ch. 103, requiring vessels employed in transporting stone within this Commonwealth to be weighed and marked, no penalty was incurred by the employment of a vessel not weighed or marked, in transporting stone from the State of Maine to such navy yard, because such vessel was not employed in transporting stone "within this Commonwealth" in the sense of the statute, and because no offense was committed within the jurisdiction of the Commonwealth. Mitchell *v.* Tibbetts (1835), 34 Mass. (17 Pick.) 298.

Rev. Laws Mass. ch. 1, sec. 2, provides that "the jurisdiction of the Commonwealth extends, to all places within the boundaries, subject to the concurrent jurisdiction granted over places ceded to the United States." Sec. 6, relative to the title of lands acquired by the United States for public uses, retains concurrent jurisdiction with the United States to the extent that all civil and criminal process of the Commonwealth may be executed thereon the same as if the jurisdiction had not been ceded, and revests exclusive jurisdiction in the Commonwealth if such tract ceases to be used by the United States for such public purposes. Held, that a State court has jurisdiction over a writ of entry by the heirs of a grantor to recover possession of property deeded to the United States for a specific purpose, which was to revert to the grantor or his heirs if such land was not used for the purpose specified. Fay *v.* Locke (1909), 87 N. E. 753, 201 Mass. 387.

A writ of habeas corpus, issuing under the authority of New Hampshire, may be executed within the limits of the land ceded by the State to the United States for the purpose of a fort and lighthouse, by virtue of the proviso in the act of cession.

State v. Dimick (1841), 12 N. H. 194, 37 Am. Dec. 197.

Laws N. Y. 1853, ch. 355, sec. 1, cedes to the United States jurisdiction over certain lands "for the uses and purposes of a navy yard and naval hospital," and sec. 4 reserves to the State jurisdiction of the premises if they are not used for these purposes. The United States leased these lands to the city of Brooklyn for market purposes. Held, that the State courts have jurisdiction of actions growing out of disputes between the city's lessees. Barrett v. Palmer (1891) 16 N. Y. Supp. 94, affirmed (1892) 31 N. E. 1017, 135 N. Y. 336, 31 Am. St. Rep. 835.

Laws N. Y. 1853, chap. 355, cedes to the United States the jurisdiction of the State over the land in the City of Brooklyn occupied as a navy yard, and provides that the jurisdiction so ceded shall not impede the service or execution of the legal process of the State. At the time of the cession, Laws. N. Y. 1847, ch. 450, giving a right of action for death by wrongful act, was in force. Held, that while by the cession the United States acquired power to legislate in regard to the ceded territory, yet the State laws in force, at the time of the cession, such as the one above mentioned, remain in force until repealed by the United States. McCarth v. R. G. Packard Co. (1905), 75 N. E. 1130, 182 N. Y. 555, affirming judgment (1905), 94 N. Y. S. 203, 105 App. Div. 436, 34 Civ. Proc. R. 321.

A deed of cession of land from a State to the United States contained a proviso "that nothing shall be construed so as to impede or prevent the execution of any civil or criminal process under the authority of the State." Held, that this would authorize the coroner to hold an inquest within such premises. Allegheny County v. McCung (1866), 53 Pa. St. (3 P. F. Smith), 482.

The legislative power over a place purchased by the United States with the consent of the legislature of the State is transferred from the State to the Federal Government, except as restrained by some qualification in the expression of State consent. Allegheny County v. McCung (1867), 53 Pa. (3 P. F. Smith), 482.

Where land within a State is acquired by the United States with the consent of the State, the jurisdiction of the United States over it is supreme, and a reservation by the State of the right to serve civil or criminal process within the land ceded is limited to actions arising outside of the ceded territory; but the laws of the State for the enforcement of municipal or private rights of individu residing therein continue unless the United States provides legislation for the territory, and where jurisdiction is not given by a Federal law to Federal courts to assert and protect private rights, such rights may be enforced in the State courts. Divine v. Unaka Nat. Bank (Tenn. 1911), 140 S. W. 747.

Where land on which a customhouse stood had been ceded to the United States with the proviso that the cession should not interfere with "the service or execution of any legal process," it held that a sheriff's sale of mortgaged property was within the meaning of this proviso, and could be legally made in the customhouse. Sauer v. Steinbauw (1861), 14 Wis. 70.

Operation of State laws in general.—At the time of the cession the State of Kansas to the United States of exclusive jurisdiction over the Fort Leavenworth military reservation, then owned by the United States, there was a railroad running through the territory included in the cession. Held, that a law of the State, making a railroad company whose road was not inclosed by a lawful fence liable to the owner of cattle killed or unfenced by its engines or cars for the full value of the animals killed and the full damage to those wounded, whether the killing or wounding was caused by negligence or not, continued in force in the reservation after the cession. Chicago, R. I. & P. R. Co. v. McGlinn (1885), 5 Sup. Ct. 1005, 114 U. S. 542, 25 L. Ed. 587.

The public laws of New Jersey are in force in the littoral waters of Sandy Hook peninsula below low-water mark, whether enacted prior or subsequently to the cession to the United States, by act N. J. Mar. 12, 1846, of jurisdiction over a portion of that peninsula for military purposes. Hamburg-American S. S. Co. v. Grube (1905), 25 Sup. Ct. 352, 196 U. S. 407, 49 L. Ed. 529.

Exclusive legislative power which Congress possesses over the Norfolk Navy Yard excludes giving any operation or effect, within limits of such navy yard, to the provisions of Code Va. 1904, sec. 1294h, subds. 5, 6, imposing a penalty upon telegraph companies for failure to deliver a message to the addressee. Western Union Telegraph Co. v. Chiles (1909), 29 Sup. Ct. 613, 614, 214 U. S. 274, 53 L. Ed. 994, reversing judgment (1907) 57 S. E. 587, 107 Va. 60.

Lands of the United States not within the limit of a State, or over which jurisdiction has been ceded, and which are used for constitutional purposes, are, in case of conflict, subject only to the laws of the United States. U. S. v. Ames (C. C. 1845), Fed. Cas. No. 14,441.

The general laws of Virginia, other than criminal, which do not conflict with those

of the United States relating to forts, and which do not interfere with the military control, discipline, and use of Fortress Monroe as a military post, are in force at Old Point Comfort, which was acquired by an act of cession directly from the State. Crook, Horner & Co. *v.* Old Point Comfort Hotel Co. (C. C. 1893), 54 Fed. 604.

Lands of the United States within the limits of a State are not subject to State laws, except there be in the act of its legislature, under which jurisdiction was ceded to the United States, a reservation of concurrent jurisdiction to the State. (1894) 21 Op. Atty. Gen. 18.

Assuming that title to land on which a dry dock is built, and the exclusive jurisdiction over it, are in the United States, the mechanic's lien laws of South Carolina do not operate thereon, and claims under such laws may be ignored in settlements with contractors. (1898) 22 Op. Atty. Gen. 18.

The statute of Kansas of Feb. 27, 1874, entitled "An act relating to killing or wounding stock by railroads," is operative within the Fort Leavenworth military reservation, notwithstanding the cession to the United States by act Kans. Feb. 22, 1875. Chicago, R. I. & P. Ry. Co. *v.* McGlinn (1882), 28 Kans. 274.

Jurisdiction of State courts in general.—No action can be maintained in a State court for a tort committed in the Brooklyn Navy Yard, as the State has ceded the exclusive jurisdiction of that place to the United States. Armstrong *v.* Foote (N. Y. 1860), 19 How. Prac. 237.

Where lands in a State have been purchased by the United States with the consent of the State, the State courts have no jurisdiction of an action of ejectment to recover dower in such land, where the land was purchased by the United States from the husband of the claimant, and ceded by the State while he was living and the right of dower of the wife was inchoate. Dibble *v.* Clapp (N. Y. 1866), 31 How. Prac. 420, 1 Sheld. 123.

The fact that the State has ceded land in the city of Brooklyn, and political jurisdiction over it, to the United States, for the purpose of a navy yard, does not oust the State courts of jurisdiction as to private rights and remedies within such territory, at least so long as Congress makes no new regulations touching the administration of justice in civil actions arising therein. Barrett *v.* Palmer (1892), 135 N. Y. 336, 31 N. E. 1017, 31 Am St. Rep. 835, 17 L. R. A. 720, affirming (1891) 16 N. Y. Supp. 94.

State courts have jurisdiction of summary proceedings by a lessee to recover from his sublessee possession of the leased premises, though they are lands of the United States as part of the Brooklyn Navy Yard, leased by it to plaintiff lessee. Lotterie *v.* Murphy (1893), 67 Hun, 76, 21 N. Y. Supp. 1120.

This clause does not deprive the State courts of jurisdiction to try actions arising from civil wrongs committed by private persons in such places, since Congress has not given any method of redressing such wrongs. Madden *v.* Arnold (1900), 57 N. E. 1116, 162 N. Y. 638, affirming judgment (1897), 47 N. Y. S. 757, 22 App. Div. 240, 5 N. Y. Ann. Cas. 26.

Criminal offense in places acquired.—This clause confers no jurisdiction upon the Federal courts to try a person for a petty larceny committed in the National Cemetery on the Arlington estate, which was purchased by the United States at a tax sale, without the consent of the State of Virginia. U. S. *v.* Penn (C. C. 1880), 48 Fed. 669.

Under this clause, places, when acquired, would be places over which the United States has exclusive jurisdiction, and would fall within the field of operation of the Edmunds-Tucker Act. The fact that Utah is a State is in no way inconsistent with the operation of the law in such places. U. S. *v.* Baum (C. C. 1896), 74 Fed. 43, 47.

To give a Federal court jurisdicton to try a person for a criminal offense, on the ground that it was committed within a fort or military reservation, such fort or reservation must have been established by law, as contemplated by this clause, either by purchase with the consent of the legislature of the State or by reservation of public lands therefor by compact with the State at the time of its admission, and exclusive jurisdiction over the same must have been reserved to the United States, either by express words or by necessary implication. U. S. *v.* Tully (C. C. 1905), 140 Fed. 899.

A State retains complete and exclusive political jurisdiction over land within its limits purchased by the United States as a site for a public building, unless such purchase was with the consent of its legislature, or jurisdiction has been otherwise ceded to the United States, and any offense against its laws committed thereon is punishable in its courts. Id.

Under this clause the power of Congress to exercise exclusive legislation extends to land purchased by the United States, by consent of the legislature of the State, and used for the public governmental purpose of maintaining thereon locks and dams for the improvement of the navigation of a river, and the United States has exclusive jurisdiction to prescribe and punish

criminal offenses committed thereon; and the fact that the legislative consent was granted after the purchase is immaterial so far as relates to offenses committed thereafter. U. S. v. Tucker (D. C. 1903), 122 Fed. 518.

The exclusive jurisdiction of the United States to prescribe and punish criminal offenses committed on land or in a "place" occupied for governmental purposes may be derived either from this clause, where the place was purchased by consent of the State legislature, or from an express cession of such jurisdiction by the legislature. Id.

Where an assault was committed on land purchased by the United States with the consent of the State of New Jersey, and jurisdiction of the State over such lands was vested in the United States by an act of the legislature and thereafter Congress passed an act for the punishment of such offense, it was the exercise of power conferred by this clause, and is exclusive, and the State courts have no jurisdiction to try or punish such offense. State v. Morris (N. J. 1908), 68 A. 1103.

The power of Congress to exercise exclusive legislation over all places purchased is limited to places the title to which is vested in the United States with consent of the legislature; and even as to such places the jurisdiction of the State to enforce its laws and punish crimes continues until Congress has, by some further legislative act, extinguished the State authority, and vested exclusive jurisdiction over such places in the Federal court. In re O'Connor (1875), 37 Wis. 379, 19 Am. Rep. 765.

An action for personal injuries suffered on a reservation under exclusive jurisdiction of the United States, being transitory, may be maintained in a State court which has personal jurisdiction of the defendant. Ohio River Contract Co. v. Gordon (1917), 244 U. S. 68, affirming 170 Ky. 412.

While municipal laws regulating private rights will, if not in conflict with the law of the new sovereignty or the purpose for which the land is acquired, remain in force in territory ceded to the United States by a State which has given its consent to exclusive Federal jurisdiction, until changed by the United States, the laws of the ceding State, upon such cession, became laws of the new sovereignty. The laws of negligence in force in territory in the State of Washington thus acquired for a Federal penitentiary became laws of the United States, and an action for negligence arising under said laws was therefore removable to a Federal court. Steele v. Halligan (D. C. 1916), 229 Fed. 1011.

Execution of civil or criminal process.—Writs issued by the courts of Minnesota run into and on the military reservation of Fort Snelling, in that State. (1881) 17 Op. Atty. Gen. 1.

Act Ga., Dec. 22, 1808, provided that from and after its passage Congress shall have and maintain jurisdiction in and over all the lands they have acquired, or may hereafter acquire, for the purpose of erecting forts and fortifications in that State. In 1875 the United States acquired by purchase from a citizen the lands upon which is now located the military reservation on Tybee Island, in that State. Held, that under the provisions of the act of 1808, the United States acquired and retains exclusive jurisdiction over that reservation, and the sheriff of the county within which it is situated has no power to go and serve thereon any process whatsoever issued by a court of that State. (1900) 23 Op. Atty. Gen. 254.

A habeas corpus issued by a State court of New York runs within the territory ceded by the State to the United States at West Point, the exercise of this common-law jurisdiction not having been forbidden by any act of Congress or of the State. In re Carlton (N.Y. 1827), 7 Cow. 471.

Soldiers' homes.—Where oleomargarine was furnished by the Federal Government to be served as food to the inmates of a national home for Federal soldiers, the governor of such institution is not amenable to the laws of the State in which it is located regulating the use and sale thereof, since the legislature of the State has no constitutional power to interfere with the internal management of Federal institutions located within its limits. Ohio v. Thomas (1899), 19 Sup. Ct. 453, 455, 173 U. S. 276, 43 L. Ed. 699, affirming order In re Thomas (1898), 87 Fed. 453, 31 C. C. A. 80.

The acts of Congress establishing the National Home for Disabled Volunteer Soldiers, and creating a corporation authorized to take and hold lands for the purposes of such homes, containing no declaration of the necessity of exclusive jurisdiction in the General Government over such lands, do not vest such exclusive jurisdiction in the United States, upon the consent of the State being given to the acquisition of such lands. In re Kelly (C. C. 1895), 71 Fed. 545.

A cession to the General Government, in the act giving the consent of the State to the purchase of land for a soldiers' home, of "jurisdiction," does not confer exclusive jurisdiction, the purpose of the act not requiring it, but such jurisdiction only, concurrent with that of the State, as Congress may find necessary for the objects of the cession. Id.

Intoxicating liquors found in transit to the National Soldiers' Home, Togus, at which place alone they were intended for sale by the home storekeeper, are not liable to seizure, under Rev. St. Me. ch. 27, sec. 39 et seq., rendering liable to seizure liquors kept and deposited in the State intended for sale in violation of law; the territory of the home having been ceded to the United States, and the State court having no jurisdiction thereof. State v. Intoxicating Liquors (1886), 78 Me. 401, 6 Atl. 4.

An asylum for disabled volunteer soldiers is among the needful buildings for the erection of which the Government of the United States may purchase and hold territory, and territory so purchased, by the consent of the legislature of the State in which the same is located, is under the exclusive jurisdiction of the General Government in all cases whatsoever. Sinks v. Reese (1869), 19 Ohio St. 306, 2 Am. Rep. 397.

Where an inmate of a national home for disabled soldiers, located on land ceded by the State to the Federal Government, subject to the reservation of the right to serve civil and criminal process within the territory ceded, dies, the State court has probate jurisdiction of his estate, and an administrator appointed by a State probate court has authority to compel the officers of the home to deliver to him property of decedent. Divine v. Unaka Nat. Bank (Tenn. 1911), 140 S. W. 747.

The land on which "The National Home for Disabled Volunteer Soldiers," a Federal corporation, has its buildings, was purchased by the United States with the consent of the legislature, and is under the exclusive jurisdiction of the Federal Government. Its officers are disbursing officers of the United States, and the funds in their hands as such can not be attached or garnisheed under process from a State court. Foley v. Shriver (1886), 81 Va. 568.

The title to the premises occupied by the "National Home for Disabled Volunteer Soldiers" in this State is not in the United States, but in a corporation created by Congress, and though the legislature of this State attempted to cede to the United States jurisdiction over such premises (Priv. & Loc. Laws Wis. 1867, ch. 275), the jurisdiction of the proper State courts over them remains unimpaired. In re O'Connor (1875), 37 Wis. 379, 19 Am. Rep. 765.

Right of suffrage of residents.—Since the State of New York has ceded to the United States the territory comprising the West Point reservation, reserving nothing except the right to serve process therein, such territory has ceased to be subject to State jurisdiction, or to be a part of the State; and persons having no other qualifications as residents than a residence in such territory are not residents of the State, and have no right to vote. In re Town of Highlands (1892), 22 N. Y. Supp. 137.

The inmates of an asylum for disabled soldiers, erected upon territory purchased for that purpose by the Government of the United States from the State of Ohio, being within the exclusive jurisdiction of the General Government, are not residents of the State, within the meaning of Const. Ohio, art. 5, sec. 1, conferring the elective franchise upon residents of the State. Sinks v. Reese (1869), 19 Ohio St. 306, 2 Am. Rep. 397.

Act of Jan. 21, 1871, ceding jurisdiction over the National Soldiers' Home back to the State of Ohio, qualified inmates of the home, residing there for one year and upward, to vote in Ohio at the next election, though it occurred less than a year from the date of cession. Renner v. Bennett (1871), 21 Ohio St. 431.

A person, though not in the Army or Navy, can not, by long and continuous residence within the boundaries of a reservation, the jurisdiction whereof is ceded to the United States (Const. S. D. art. 26, sec. 18), acquire the right to vote at a State election held in the county wherein such reservation is situated. McMahon v. Polk (1897), 73 N. W. 77, 10 S. D. 296, 47 L. R. A. 830.

Judicial notice as to military post.—The court will take judicial notice that land is held by the United States as a military post by private purchase, but can not take judicial notice of the precise metes and bounds of the property by its field notes as run out on the ground. Baker v. State (1904), 83 S. W. 1122, 47 Tex. Cr. R. 482.

Improper construction on post.—A railroad company which built a track on a military reservation, knowing that it would be used for the transportation of troops, and that it was so poorly constructed as to be dangerous, was liable for injuries to soldiers caused by such negligent construction, though the Government had accepted the track and was operating the train on which the soldiers were riding. Bryson v. Hines (C. C. A. 1920), 268 Fed. 290.

1075. Administration of military parks.—Hereafter vacancies occurring by death or resignation in the membership of the several commissions in charge

of national military parks shall not be filled, and the duties of the offices thus vacated shall devolve upon the remaining commissioners or commissioner for each of said parks: *Provided*, That as vacancies occur hereunder the Secretary of War shall become ex officio a member of the commission effected with full authority to act with the remaining commissioners or commissioner, and in case of the vacation of all the offices of commissioner in any one park hereunder the duties of such commission shall thereafter be performed under the direction of the Secretary of War. *Act of Aug. 24, 1912 (37 Stat. 442), making appropriations for sundry civil expenses.*

1076. Permits for roads and passage across military reservations.—The Secretary of War shall have authority, in his discretion, to permit the extension of State, county, and Territorial roads across military reservations; to permit the landing of ferries, the erection of bridges thereon; and permit cattle, sheep or other stock animals to be driven across such reservation, whenever in his judgment the same can be done without injury to the reservation or inconvenience to the military forces stationed thereon. *Sec. 6, act of July 5, 1884 (23 Stat. 104).*

Railroad companies are authorized by the act of May 25, 1920 (41 Stat. 621), to transfer to any State, county, or municipality any portion of their rights of way through public lands.

See also notes to 1033, ante.

Notes of Decisions.

License to occupy military reservation.—From this act it may be regarded as certain that it was the view of Congress that an explicit authority was necessary for even a transient occupation of a military reservation for other than its special purpose. (1897) 21 Op. Atty. Gen. 537.

1077. Entrance upon and passage through military parks in Alaska.—That this act shall not apply to any lands within the limits of any military, park, Indian, or other reservation unless such right of way shall be provided for by Act of Congress. *Sec. 7, act of May 14, 1898 (30 Stat. 412).*

This act provided for homestead settlements in Alaska, also rights of way for highways, railroads, etc.

Notes of Decisions.

Military reservations.—Entry of a public military reservation can not be made under the land laws of the United States. Crawford v. Burr (1903), 2 Alaska, 33; Gavigan v. Crary (1905), 2 Alaska, 370.

1078. Easements for public utilities on public lands.—That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams and reservoirs used to promote irrigation or mining or quarrying, or the manufacture or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and

telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. *Act of Feb. 15, 1901 (31 Stat. 790).*

The Secretary of War was authorized to grant to the City of Philadelphia a right of way across the Fort Mifflin Military Reservation by act of Aug. 23, 1916 (39 Stat. 531).

Right of way was granted to Salt Lake City across the Fort Douglas Military Reservation by act of Feb. 11, 1920 (41 Stat. 449).

Notes of Decisions.

Effect of statute.—This act refers to the granting of a mere license revocable at any time of the right to construct canals, telephone, and telegraph lines, etc., over the public lands, which may be used for parks and reservations, and is not inconsistent with the right of way act of 1891. U. S. *v.* Lee (1910), 110 P. 607, 15 N. M. 382.

The power to regulate the use of the lands of the United States, and to prescribe the conditions upon which rights in them may be acquired by others, is vested exclusively in Congress. Utah Power & Light Co. *v.* U. S. (1916), 243 U. S. 389.

Repeal of grant.—The grant of rights of way for canals and ditches for the use of water for mining, etc., was not repealed by this act. U. S. *v.* Utah Power & Light Co. (D. C. 1913), 208 Fed. 821. See, also, Id. (1913), 209 Fed. 554, 562, 126 C. C. A. 376.

A license granted plaintiff under this act held not revoked by the granting of a patent under act of June 21, 1906 (34 Stat. 335). Washington Water Power Co. *v.* Harbaugh (D. C. 1918), 253 Fed. 681.

Permits to use land and charges therefor.—The Secretary of Agriculture is authorized by this act to make the granting of permits for the use of lands or resources within the national forest reserves for the purposes contemplated by the act, which include irrigation, mining, and quarrying, etc., dependent upon the payment of such charges as he may deem reasonable. (1905) 26 Op. Atty. Gen. 421.

Whether charges based upon the grounds specifically enumerated by the Secretary of Agriculture, to wit, the use of the ground and rights of way without regard to their special value for the particular purposes contemplated by the permit, and for "conservation," being the special value of the land for the particular purpose contemplated in excess of its value for general purposes, would or would not be reasonable, is not a question which can properly be determined by the Attorney General. Id.

While the act does not indicate the burdens that may be imposed for the use of the permit or the character of the exactions that the Secretary of the Interior may require, and clearly does not contemplate full compensation for the privilege to be enjoyed, yet the Secretary may exact such sum as is necessary for the protection of the Government's interest, but not an exaction graduated on the amount of electrical energy produced. U. S. *v.* Colo. Power Co. (D. C. 1916), 240 Fed. 217.

Permission from the Secretary of the Interior, under this act, to construct a plant on the public domain for the generation of electricity, is no more than a revocable permit. Id.

1079. Rights of way for electrical power, telephone and telegraph lines.—That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed

by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this Act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute. *Act of Mar. 4, 1911 (36 Stat. 1253), making appropriations for the Department of Agriculture.*

Notes of Decisions.

Authority of Secretary of Agriculture.—The authority to grant easements for rights of way for electrical, telephone, and telegraph purposes, as contemplated by this act, is vested in the Secretary of Agriculture when and in so far as the lands to be affected constitute portions of the national forests. (1912) 29 Op. Atty. Gen. 303. See, also, U. S. v. Utah Power & Light Co. (1913), 209 Fed. 554, 562, 126 C. C. A. 376.

1080. Rights of way for pipe lines.—That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipe line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by

the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding. *Sec. 28, act of Feb. 25, 1920 (41 Stat. 449).*

1081. Lease of public lands containing deposits of coal, phosphate, oil, gas, etc.—That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, * * * in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further*, That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act. *Sec. 1, act of Feb. 25, 1920 (41 Stat. 437–438).*

1082. Assignment of leases of public lands.—That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: *Provided*, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated. *Sec. 30, act of Feb. 25, 1920 (41 Stat. 449–450).*

1083. Removal of sand and gravel.—That the Secretary of War is hereby authorized to grant revocable licenses for the removal of sand and gravel from the Fort Douglas Military Reservation, Utah, to persons and corporations

within said State, to be used for industrial and manufacturing purposes, at such reasonable prices as may be fixed by the Secretary of War. *Joint Res. 40, May 5, 1920 (41 Stat. 588).*

1084. Abandoned military reservations transferred to the Interior Department.—That whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof. *Sec. 1, act of July 5, 1884 (23 Stat. 103).*

This was the first section of an act providing for the disposal of abandoned and useless military reservations.

Sec. 2 provides for the survey or subdivision of such reservations, appraisal and sale, rights of settlers; sec. 4 for appraisal and sale of buildings thereon. Sec. 4 repealed act of Aug. 18, 1856 (11 Stat. 87), and sec. 6 act of June 12, 1858 (11 Stat. 336).

Sec. 6 provided for the extension of State, county, and territorial roads across military reservations.

Entry on agricultural lands in the military reservations in Nevada under homestead laws only, act of Oct. 1, 1890 (26 Stat. 561), amended by act of Aug. 21, 1916 (39 Stat. 518), making homestead and desert laws applicable to military reservations in Nevada.

Grants of not to exceed 20 acres of abandoned military reservations to municipal corporations, sec. 1, act of Mar. 3, 1893 (27 Stat. 593).

The lands already placed in the custody of the Secretary of the Interior under the provisions of this act, the disposal of which had not been provided for by a subsequent act of Congress, which exceeded 5,000 acres in area, except such as had Government improvements thereon or had been reserved for some public use, were opened for settlement under the public-land laws, and a preference right of entry was given to certain bona fide settlers thereon without interfering in any manner with the operation of this act upon lands thereafter placed under control of the Secretary of the Interior, by act of Aug. 23, 1894 (28 Stat. 491); and the provisions of said act of Aug. 23, 1894, were extended to all lands placed under the control of the Secretary of the Interior under any law in force prior to this act by sec. 1, act of Feb. 15, 1895 (28 Stat. 664).

An appropriation for expenses of survey, appraisal, and sale of abandoned military reservations transferred to the control of the Secretary of the Interior under the provisions of this act and any law prior thereto is made by recent sundry civil appropriation acts. The provision for the fiscal year 1920 was by act of July 19, 1919 (39 Stat. 196).

Notes of Decisions.

Transfer to another department.—This act, aside from special acts for the disposition of particular military posts, is the only general act providing for the disposition of useless military reservations; but, independently of this statute, lands reserved for military purposes can not be transferred by the President to any other department without an act of Congress. (1910) 28 Op. Atty. Gen. 143.

Property subject to sale.—Dragoon Barracks lot, in St. Augustine, Fla., and the buildings thereon, was property to be appraised and disposed of in the manner provided by this section. (1887) 18 Op. Atty. Gen. 543.

Government buildings within a patented private claim belong to the Government, when its right of ownership is reserved in the patent. (1893) 20 Op. Atty. Gen. 603.

Preference right of entry or purchase.—There is nothing in this act offering or granting to settlers or occupants, entering into possession subsequent to the date of the act and the Executive order of withdrawal, any preference right of entry or purchase. Subsequent adverse claims to lots or lands in such tract must be determined by the law of possession. Walsh v Ford (1901), 1 Alaska, 146. And see Johnson v. Drew (1894), 34 Fla. 130, 15 South. 780, 43 Am. St. Rep. 172; State v. Tanner (1905), 102 N. W. 235, 73 Neb. 104; Same v. McCright (1905), 102 N. W. 241, 73 Neb. 123; Same v. Bednar (1905), 102 N. W. 241, 73 Neb. 122; Same v. Brimmer (1905), 102 N. W. 242, 73 Neb. 121.

This act recognized only the right of an individual settler in the actual occupation of a portion of the military reservation,

prior to the location of the reservation, or prior to Jan. 1, 1884, in good faith, for the purpose of securing a home. State *v.* Tanner (1905), 102 N. W. 235, 73 Neb. 104; Same *v.* McCright (1905), 102 N. W. 241, 73 Neb. 123; Same *v.* Bednar (1905), 102 N. W. 241, 73 Neb. 122; Same *v.* Brimmer (1905), 102 N. W. 242, 73 Neb. 121.

1085. Use of national military parks for maneuvers.—That in order to obtain practical benefits of great value to the country from the establishment of national military parks, said parks and their approaches are hereby declared to be national fields for military maneuvers for the Regular Army of the United States and the National Guard or Militia of the States: *Provided*, That the said parks shall be opened for such purposes only in the discretion of the Secretary of War, and under such regulations as he may prescribe. *Sec. 1, act of May 15, 1896 (29 Stat. 120).*

That the Secretary of War is hereby authorized, within the limits of appropriations which may from time to time be available for such purpose, to assemble, at his discretion, in camp at such season of the year and for such period as he may designate, at such field of military maneuvers, such portions of the military forces of the United States as he may think best, to receive military instruction there. The Secretary of War is further authorized to make and publish regulations governing the assembling of the National Guard or Militia of the several States upon the maneuvering grounds, and he may detail instructors from the Regular Army for such forces during their exercises. *Sec. 2, act of May 15, 1896 (29 Stat. 121).*

The Chickamauga and Chattanooga National Military Park was established by act of Aug. 19, 1890 (26 Stat. 333); the Shiloh National Military Park, by act of Dec. 27, 1894 (28 Stat. 597); the Gettysburg National Military Park, by act of Feb. 11, 1895 (28 Stat. 651); the Vicksburg National Military Park, by act of Feb. 21, 1899 (30 Stat. 841).

Each of these acts provided that the parks thereby created should be under the control of the Secretary of War, who should make rules and regulations for its care. The acts also provided for the leasing of the lands within the various parks to former owners and others, and for the placing of monuments by the various States or other organizations to mark the lines of battle, position of troops, etc.

Many of the acts also contained provisions applying only to the particular park thereby created.

The lands acquired by the United States for locating and marking the location of each command of the Regular Army engaged in the Battle of Antietam were placed under the control of the Secretary of War, by act of Aug. 30, 1890 (26 Stat. 401).

Fort McHenry and the Government grounds connected therewith were to remain a Government reservation, in the control of the War Department, by act of Aug. 16, 1912 (37 Stat. 311).

Provision for the maintenance of national military parks is made annually in sundry civil appropriation acts. Provision for the fiscal year 1921 appears in act of June 5, 1920 (41 Stat. 897).

1086. Roads, walks, wharves, and drainage.—For the construction and repair by the Quartermaster Corps of roads, walks, and wharves; for the pay of employees; for the disposal of drainage; for dredging channels; and for care and improvement of grounds at military posts and stations, $3,000,000: *Provided*, That not to exceed $100 may be used for the purchase of land near terminal of bridge at Deer Island, Boston Harbor, Mass.: *Provided further*, That none of the funds appropriated or made available under this Act shall be used for the permanent construction or repair of any roads, walks, or wharves connected with any of the National Army cantonments or National Guard camps. *Act of June 5, 1920 (41 Stat. 964), making appropriations for the support of the Army: Quartermaster Corps.*

Similar provisions appear in previous appropriation acts.

1087. Roads, bridges, and trails in Alaska.—For the construction, repair, and maintenance of military and post roads, bridges, and trails, Territory of Alaska, to be immediately available, $350,000. *Act of June 5, 1920 (41 Stat. 970), making appropriations for the support of the Army: Engineer Department.*

1088. Maintenance of national military parks.—Chickamauga and Chattanooga National Military Park: For continuing the establishment of the park; compensation and expenses of civilian commissioner, maps, surveys, clerical and other assistance, including $300 for necessary clerical labor under direction of the chairman of the commission; maintenance, repair, and operation of one motor-propelled and one horse-drawn passenger-carrying vehicle; office and all other necessary expenses; foundations for State monuments; mowing; historical tablets, iron and bronze; iron gun carriages; roads and their maintenance; purchase of small tracts of lands heretofore authorized by law, $45,000.

Gettysburg National Military Park: For continuing the establishment of the park; acquisition of lands, surveys, and maps; constructing, improving, and maintaining avenues, roads, and bridges thereon; fences and gates; marking the lines of battle with tablets and guns, each tablet bearing a brief legend giving historic facts and compiled without censure and without praise; preserving the features of the battle field and the monuments thereon; compensation of civilian commissioner, clerical and other services, expenses, and labor; purchase and preparation of tablets and gun carriages and placing them in position; maintenance, repair, and operation of a motor-propelled passenger-carrying vehicle, and all other expenses incident to the foregoing, $50,000.

Guilford Courthouse National Military Park: For continuing the establishment of a national military park at the battle field of Guilford Courthouse, in accordance with the Act entitled "An Act to establish a national military park at the battle field of Guilford Courthouse," approved March 2, 1917, $9,200.

Shiloh National Military Park: For continuing the establishment of the park; compensation of secretary and superintendent; clerical and other services; labor; historical tablets; maps and surveys; roads; purchase and transportation of supplies, implements, and materials; foundations for monuments; office and other necessary expenses, including maintenance, repair, and operation of a motor-propelled passenger-carrying vehicle, $19,435: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding $3,000 per annum.

Vicksburg National Military Park: For continuing the establishment of the park; compensation of civilian commissioners; clerical and other services, labor, iron gun carriages, mounting of siege guns, memorials, monuments, markers, and historical tablets giving historical facts, compiled without praise and without censure; maps, surveys, roads, bridges, restoration of earth works, purchase of lands, purchase and transportation of supplies and materials; and other necessary expenses, $27,500. *Act of Mar. 4, 1921 (41 Stat. 1387–1388), making appropriations for sundry civil expenses: National military parks.*

See notes to 1085.

1089. Acquisition of lands for cemeteries.—The Secretary of War shall purchase from the owners thereof, at such price as may be mutually agreed upon between the Secretary and such owners, such real estate as in his judgment is suitable and necessary for the purpose of carrying into effect the provisions for national cemeteries, and obtain from such owners the title in fee simple

for the same. And in case the Secretary of War is not able to agree with any owner upon the price to be paid for any real estate needed for such purpose, or to obtain from such owner title in fee-simple for the same, the Secretary is hereby authorized to enter upon and appropriate any real estate which, in his judgment, is suitable and necessary for such purposes. *R. S. 4870.*

Provisions for the acceptance by the United States Government of the Confederate cemetery at Springfield, Mo., and for the care, etc., thereof, by the keeper of the national cemetery which it adjoins, with a proviso that organized bodies of ex-Confederates or individuals should have free and unrestricted entry to the cemetery for the purpose of burying ex-Confederates, etc., were made by act of Mar. 3, 1911 (36 Stat. 1077).

Provisions for the acceptance by the United States Government of the Confederate cemetery at Little Rock, Ark., and for the care, etc., thereof by the keeper of the national cemetery which it adjoins with a proviso that organized bodies of ex-Confederates or individuals should have free and unrestricted entry to the cemetery for the purpose of burying ex-Confederates, etc., were made by sec. 1, act of Feb. 7, 1913 (37 Stat. 663).

1090. Valuation of sites for cemeteries.—The Secretary of War or the owners of any real estate thus entered upon and appropriated, are authorized to make application for an appraisement of real estate thus entered upon and appropriated, to any circuit or district court within any State or district where such real estate is situated; and such courts shall, upon such application, and in such mode and under such rules and regulations as it may adopt, make a just and equitable appraisement of the cash value of the several interests of each and every owner of such real estate and improvements thereon. *R. S. 4871.*

1091. Purchase of lands for cemeteries.—When appraisement of the real estate thus entered upon and appropriated has been made under the order and direction of the court, the fee-simple thereof shall, upon payment to the owner of the appraised value, or in case such owner refuses or neglects for thirty days after the appraisement of the cash value of the real estate or improvements as aforesaid, to demand the same from the Secretary of War, upon depositing the appraised value in the court making such appraisement, to the credit of such owner, be vested in the United States, and its jurisdiction over such real estate shall be exclusive and the same as its jurisdiction over real estate purchased, ceded, or appropriated for the purposes of navy-yards, forts, and arsenals. The Secretary of War is authorized and required to pay to the several owner or owners, respectively, the appraised value of the several pieces or parcels of real estate, as specified in the appraisement of any of such courts, or to pay into any of such courts by deposit, as hereinbefore provided, the appraised value; and the sum necessary for such purpose may be taken from any moneys appropriated for the purposes of national cemeteries. *R. S. 4872.*

1092. Jurisdiction over national cemeteries.—From the time any State legislature shall have given, or shall hereafter give, the consent of such State to the purchase by the United States of any national cemetery, the jurisdiction and power of legislation of the United States over such cemetery shall in all courts and places be held to be the same as is granted by section eight, article one, of the Constitution of the United States; and all provisions relating to national cemeteries shall be applicable to the same. *R. S. 4882.*

Notes of Decisions.

Necessity of consent of State.—Congress can not acquire or assert exclusive jurisdiction over any part of the territory of a State without the consent of the State legislature; and hence, before such jurisdiction over a national cemetery can become vested in the United States, the consent of the legislature of the State in which the cemetery

is situated must be obtained, notwithstanding the provision of sec. 6, act of Feb. 22, 1867 (1869), 13 Op. Atty. Gen. 131.

Where compensation has been paid for land acquired under that act for a national cemetery, without having obtained the consent of the State legislature to the acquisition, the proper course to be taken is for the Secretary of War to apply to such legislature for its consent. Id.

To authorize payment for land appropriated for the purpose of a national cemetery under act of Feb. 22, 1867, the consent of the legislature of the State in which the land lies is not necessary; nor, in such case, is the opinion of the Attorney General as to the validity of the title required, though, as a prudential measure for the security of the Government, it would seem to be highly expedient to obtain his opinion. Id.

Citizenship duties of superintendent.—The superintendent of a national cemetery, over which the State has ceded jurisdiction to the United States, and within the limits of which he resides, is exempt from the duty devolved by the State upon all male persons between certain ages to work on the public roads; otherwise, if the State has not ceded jurisdiction, or if the superintendent resides elsewhere within its jurisdiction. (1880) 16 Op. Atty. Gen. 468.

1093. Maintenance of national cemeteries.— * * * *Provided*, The Secretary of War shall provide for the care and maintenance of the National Military cemeteries and for this purpose shall submit an estimate with his annual estimates to Congress and section four thousand eight hundred and seventy-six of the Revised Statutes is hereby repealed. *Act of July 24, 1876 (19 Stat. 99), making appropriations for the support of the Army.*

Appropriations for maintaining and improving national cemeteries, etc., are made in the annual sundry civil appropriation acts. The provision for the fiscal year ending June 30, 1922, was by act of Mar. 4, 1921 (41 Stat. 1385).

By R. S. 4876 an annual inspection of national cemeteries was required.

1094. Porters' lodges and superintendents of cemeteries.—The Secretary of War shall cause to be erected at the principal entrance of each national cemetery a suitable building to be occupied as a porter's lodge; and shall appoint a meritorious and trustworthy superintendent to reside therein, for the purpose of guarding and protecting the cemetery and giving information to parties visiting the same. *R. S. §873*

Notes of Decisions.

Court-martial jurisdiction.—Superintendents of national cemeteries appointed under this and the following section are not amenable to court-martial jurisdiction. (1878) 16 Op. Atty. Gen. 13.

1095. Inclosures, headstones, and registers for national cemeteries.- In the arrangement of the national cemeteries established for the burial of deceased soldiers and sailors the Secretary of War is hereby directed to have the same inclosed with a good and substantial stone or iron fence; and to cause each grave to be marked with a small headstone or block, which shall be of durable stone, and of such design and weight as shall keep it in place when set, and shall bear the name of the soldier and the name of his State inscribed thereon, when the same are known, and also with the number of the grave inscribed thereon, corresponding with the number opposite to the name of the party in a register of burials to be kept at each cemetery and at the office of the Quartermaster-General, which shall set forth the name, rank, company, regiment, and date of death of the officer or soldier; or if these are unknown, it shall be so recorded. *R. S. §877.*

For provision for maintenance of cemeteries see 1093, ante.
For provision for headstones see 1829-1831, post.

1096. Roadways to national cemeteries. -For repairs to roadways to national cemeteries which have been constructed by special authority of Congress, $12,000: * * * *Provided further*, That no part of this sum shall be used for

repairing any roadway not owned by the United States within the corporate limits of any city, town, or village.

No part of any appropriation for national cemeteries or the repair of roadways thereto shall be expended in the maintenance of more than a single approach to any national cemetery. *Act of Mar. 4, 1921 (41 Stat. 1386), making appropriations for sundry civil expenses: National cemeteries.*

Similar provisions appear in previous appropriation acts.

1097. Cemetery near the city of Mexico.—The President is authorized to provide, out of the ordinary annual appropriations for establishing and maintaining United States military cemeteries, for the proper care and preservation and maintenance of the cemetery or burial ground near the city of Mexico, in which are interred the remains of officers and soldiers of the United States, and of citizens of the United States, who fell in battle, or died in and around said city. *R. S. 4879.*

The cemetery in Mexico shall be subject to the rules and regulations affecting United States national military cemeteries within the limits of the United States, so far as they may, in the opinion of the President, be applicable thereto. *R. S. 4880.*

1098. Depredations upon cemeteries.—Every person who willfully destroys, mutilates, defaces, injures, or removes any monument, grave-stone, or other structure, or who willfully destroys, cuts, breaks, injures, or removes any tree, shrub, or plant within the limits of any national cemetery, shall be deemed guilty of a misdemeanor, punishable by a fine of not less than twenty-five dollars, and not more than one hundred, or by imprisonment for not less than fifteen days, and not more than sixty. The superintendent in charge of any national cemetery is authorized to arrest forthwith any person engaged in committing any misdemeanor herein prohibited, and to bring such person before any United States commissioner or judge of any district or circuit court of the United States within any State or district where any of the cemeteries are situated, for the purpose of holding such person to answer for such misdemeanor, and then and there shall make complaint in due form. *R. S. 4881.*

1099. Establishment of military posts.— * * * *Provided further*, That hereafter no military post within the United States shall be established without the express authority of Congress. *Act of Mar. 2, 1905 (33 Stat. 836), making appropriations for the support of the Army: Barracks and quarters.*

Notes of Decisions.

Post traders.—Buildings erected by post traders on a military reserve, under authority from the Secretary of War, are erected for the mutual benefit of the Government and the trader. They are not to be regarded as such buildings would be if erected by trespassers (as a part of the realty), being erected under a license from the Government, and for the mutual benefit of both parties. A trader, when he removes from his post at a military reserve, has a right to remove the buildings which were erected thereon by him under such license, and is at liberty to dispose of the materials thereof as his own property. But the license to erect such buildings being purely personal to the trader, does not carry with it any right to lease or convey the same to others for their occupation and use, without the permission of the military authorities. His rights are confined solely to that of removing the buildings from the premises. (1872), 14 Op. Atty. Gen. 126.

Particular uses.—The Secretary of War had no authority to grant permission for the erection of a bethel, reading room, and library within the Army reservation on Ship Island. (1897), 21 Op. Atty. Gen. 565, following Id. 537.

Sale of buildings.—When a military post located upon lands belonging to the United States is abandoned, the Secretary of War has no power, in the absence of authority from Congress, to order a sale of the buildings, and such a sale is void. Lear v. U. S. (D. C. 1892), 50 Fed. 65.

Abandoned military reservations. See 1084, ante, and notes thereunder.

1100. Sites for fortifications and coast defenses.— * * * and hereafter the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement, by condemnation, of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided*, That when the owner of such land or rights pertaining thereto shall fix a price for the same, which, in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: *Provided further*, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of lands or rights pertaining thereto required for the above-mentioned purposes: *And provided further*, That nothing herein contained shall be construed to authorize an expenditure, or to involve the Government in any contract or contracts for the future payment of money, in excess of the sums appropriated therefor. *Act of Aug. 18, 1890 (26 Stat. 316), making appropriations for fortifications, etc.*

See notes to sec. 1, act of Aug. 1, 1888, ante, 1022.

In acquiring sites for fortifications sufficient land for necessary barracks and quarters for the Artillery troops required in connection with each of such fortifications was to be purchased or otherwise procured at the same time by a provision of sec. 1, act of Apr. 28, 1904, post, 1101.

Notes of Decisions

Adoption of practice.—See notes under 1022, ante.

The provision that the proceedings shall be prosecuted in accordance with the laws of the State can not be construed literally so as to oust the Federal court of jurisdiction, where the State statute designates a special tribunal for such proceedings, but only requires a general conformity to the State practice as a whole. U. S. v. Certain Land in Town of New Castle, Rockingham County (C. C. 1908), 165 Fed. 753. But the practice should be in substantial conformity with the practice pursued in the courts of the State when similar proceedings are there instituted. U. S. v. Engeman (D. C. 1891), 45 Fed. 846.

Taking as grounds for compensation.—That the erection and use of a fortification by the United States interferes with the purpose a neighboring landowner had in view in purchasing and improving his property, or even impairs its value, does not constitute a taking which entitles him to compensation. U. S. v. Certain Lands in Town of Jamestown, R. I. (C. C. 1899), 112 Fed. 622; judgment affirmed, Wharton v. U. S. (1907), 153 Fed. 876, 83 C. C. A. 58.

Semble, the rule of law that merely incidental injury to property arising from the occupation and use of the property of another by the State or United States for public purposes does not constitute a "taking" of the property so incidentally injured, which entitles the owner to compensation, can not be avoided by private covenants, so as to impose an additional burden upon the public in the exercise of the right of eminent domain. Id.

Where the proprietor of a tract of land, which was subdivided and sold to different purchasers, dedicated certain portions for the common use of all owners of other parts of the tract, such owners have an easement in the land so dedicated, which entitles them to compensation on its condemnation for a use which is inconsistent with the continuance of such easement. Id.

When lots were conveyed by deeds containing a condition prohibiting their use for the erection and maintenance of any slaughterhouse, smith shop, steam engine, or distillery, brewery, or saloon, etc., and providing that such condition might be enforced by action by the owner of any other lot on the tract, and certain lots were condemned for a seacoast fortification, the possibility that the Government might in the future erect and maintain a smith shop or steam engine or other like structure on the property did not constitute a present invasion of any rights of other lot owners, whose property was not taken, which entitled them to compensation. U. S. v. Certain Lands in Town of Jamestown, R. I. (C. C. 1899), 112 Fed. 622; judgment affirmed, Wharton v. U. S.

(1907), 153 Fed. 876, 83 C. C. A. 58. And it was also held that the restrictive conditions did not create a true easement as known to the common law in favor of other lot owners, nor were they intended to apply to public works, but merely to restrict what might be done by persons or business corporations in their own interest, and that, under the circumstances the owners of lots not taken had no interest for which they were entitled to compensation. Wharton *v.* U. C. (1907), 153 Fed. 876, 83 C. C. A. 58, affirming judgment U. S. *v.* Certain Lands in Town of Jamestown, R. I. (C. C. 1899), 112 Fed. 622.

Where deeds describe the property conveyed as parts of a platted tract and refer to streets thereon, the description is with reference to the plat, and, under the rule of law established by decision in Rhode Island, the grantees acquire as appurtenant to their lands a right of passage over all part of such streets, and are entitled to damages whenever any part of the same is condemned for another public use which deprives them of such right. U. S. *v.* Certain Lands in Town of Jamestown (C. C. 1905), 140 Fed. 463.

Amount of compensation.—See notes under 1022, ante.

In determining whether condemnation will inflict legal injury upon other property owners, such as to entitle them to compensation, it must be assumed that the lands taken will be applied to the use for which they are condemned. U. S. *v.* Certain Lands in Town of Jamestown, R. I. (C. C. 1899), 112 Fed. 622; judgment affirmed, Wharton *v.* U. S. (1907), 153 Fed. 876, 83 C. C. A. 58.

Interest.—After the commissioners have reported the value of land condemned under this section, the owner is entitled to interest on the amount reported, from the time when the right of the Government to take the same attaches to the time when payment is made. U. S. *v.* Engeman (D. C. 1891), 46 Fed. 808.

Jurisdiction of State and Federal courts.—This section and section 1022, ante, are in pari materia, and on application by the Secretary of War under this section the Attorney General may at his election institute proceedings in State or Federal courts to condemn land for military purposes. Chappell *v.* U. S. (1897), 81 Fed. 764, 26 C. C. A. 600.

The provision requiring proceedings to be prosecuted "in accordance with the laws" of the States does not require such proceedings to be brought in the State courts. U. S. *v.* Engeman (D. C. 1891), 45 Fed. 546.

The Federal jurisdiction resulting from the cession by the State under the constitutional provision is exclusive of State authority and completely ousts the State's jurisdiction; a provision in the act of cession as to service of process not retaining a concurrent jurisdiction but merely being intended to prevent the lands becoming a sanctuary for fugitives from justice. Steele *v.* Halligan (D. C. 1916), 229 Fed. 1011.

Legislative cession of jurisdiction after the Federal Government has purchased the lands has the same effect as if made before. Id.

Evidence as to compensation.—See notes under 1022, ante.

Setting aside verdict and new trial.—See notes under 1022, ante.

The statutes of Washington which prescribe a special procedure for the condemnation of land by the State for public use (Ballinger's Ann. Codes & St. tit. 31, ch. 5, sec. 5616 et seq.), to which the general practice in civil actions is not applicable, do not authorize the trial court to set aside the verdict of a jury awarding damages to the landowner, but provide that the amount of the award shall be subject to review by the Supreme Court on appeal; and under this section and preceding sections a district court has no power to set aside a verdict and grant a new trial on the ground that the amount awarded a landowner is excessive. U. S. *v.* Tennant (D. C. 1899), 93 Fed. 613; Same *v.* Freeman (D. C. 1902), 113 Fed. 370. And where the jury impaneled to assess the damages were taken to view the land, the fact alone that they were also conducted over adjoining property was not ground for setting aside their verdict, where it did not appear that they were misinformed as to the identity of the land, or that there was any intentional misconduct on the part of the engineer accompanying them. U. S. *v.* Freeman (D. C. 1902), 113 Fed. 370.

Awards by commissioners.—That a petition for condemnation of land states that it is to be used for "erecting fortifications and other purposes incidental thereto and connected therewith" does not preclude commissioners, in awarding damages, from considering the land in connection with adjoining land already owned by the Government. U. S. *v.* Bartlett (D. C. 1909), 172 Fed. 683.

Confirmation or setting aside award.—See notes under 1022, ante.

Awards of damages by commissioners for lands condemned by the United States for fortification purposes confirmed. U. S. *v.* Bartlett (D. C. 1909), 172 Fed. 683.

1101. Sites for barracks, etc., for Artillery troops.— * * * *Provided*, That hereafter in acquiring sites for fortifications it shall be the duty of the Secretary of War, in every case of such acquirement, to purchase or otherwise procure at the same time, under this and future appropriations for this purpose, sufficient land for necessary barracks and quarters for the artillery troops required in connection with each of such fortifications; but no part of the money appropriated for military posts shall be used for the purchase of any land except as herein specifically provided. *Act of Apr. 28, 1904 (33 Stat. 497), making appropriations for sundry civil expenses: Military posts.*

Provisions for the acquisition of sites for fortifications, by condemnation or otherwise, were made by sec. 1, act of Aug. 18, 1890, ante, 1100.

1102. Sites for camps, cantonments, etc.— * * * for grounds for cantonments, camp sites, and other military purposes, * * * *Act of June 5, 1920 (41 Stat. 963), making appropriations for the support of the Army: Barracks and quarters.*

Similar provision appears in previous appropriation acts.

1103. Purchase of sites of camps, etc., restricted.—That no part of any of the appropriations made herein nor any of the unexpended balances of appropriations heretofore made for the support and maintenance of the Army or the Military Establishment shall be expended for the purchase of real estate or for the construction of Army camps or cantonments except in such cases at National Army or National Guard camps or cantonments which were in use prior to November 11, 1918, where it has been or may be found more economical to the Government for the purpose of salvaging such camps or cantonments to buy real estate than to continue to pay rentals or claims for damages thereon, and except where industrial plants have been constructed or taken over by the Government for war purposes and the purchase of land is necessary in order to protect the interest of the Government. *Act of July 11, 1919 (41 Stat. 128), making appropriations for the support of the Army.*

* * * That the foregoing provision of said Act shall not be construed to prevent the payment from the unexpended balances of said appropriations of bills lawfully incurred for construction work actually performed or construction material actually purchased and actually produced under the terms of the contract prior to the approval of said Act. *Joint Res. 8, Aug. 12, 1919 (41 Stat. 278).*

By proviso added by sec. 2, act of Feb. 28, 1920 (41 Stat. 453), exceptions were specified allowing for the purchase of land and construction work as listed.

Notes of Decisions.

Effect. This provision does not repeal by implication the power given the Secretary of War by the act of July 2, 1917, ante 1023, to cause proceedings to be instituted for the condemnation of land needed for fortifications, coast defenses, military training camps, etc., and hence a petition by the Secretary, filed June 24, 1919, to condemn land for a military camp, can not be denied on the ground that he was without authority in the premises. In re Military Training Camp (D. C. 1919), 260 Fed. 986.

1104. Lease of site for a military post in Hawaii.— * * * *Provided*, That the Secretary of War is authorized to acquire leases in such lands in Hawaii as have been set aside for purposes of a military post. *Act of June 28, 1902 (32 Stat. 464), making appropriations for sundry civil expenses: Military posts.*

1105. Report as to permanent military posts.—The Secretary of War is authorized and directed to report to Congress on or before January first, nineteen hundred and eighteen, as to the most desirable method for quartering officers and enlisted men of the Army, and to submit detailed plans and estimates of cost for the carrying out of any proposed scheme or schemes, together with locations desired and in particular what existing posts shall be retained, enlarged, or discontinued. *Act of June 12, 1917 (40 Stat. 129).*

1106. Sale of intoxicants prohibited.—The sale of or dealing in beer, wine, or any intoxicating liquors by any person in any post exchange or canteen or Army transport or upon any premises used for military purposes by the United States, is hereby prohibited. The Secretary of War is hereby directed to carry the provisions of this section into full force and effect. *Sec. 38, act of Feb. 2, 1901 (31 Stat. 758).*

The sale or supply to enlisted men of alcoholic liquors, beer, or wine, in any canteen, etc., at any garrison or military post, in any State or Territory in which the sale of such liquors, etc., is prohibited by law, was forbidden by a proviso of act of June 13, 1890 (26 Stat. 154); and provisions similar to those of this section, but less comprehensive, were contained in section 17, act of Mar. 2, 1899 (30 Stat. 981). These provisions may be regarded as superseded by this section.

Notes of Decisions.

Decisions under prior statutes.—Under sec. 17, act of Mar. 2, 1899 (30 Stat. 981), it was held no officer or private soldier could be detailed in the canteen section of post exchanges to sell intoxicating drinks, either directly or indirectly, nor could a license or permission be given by the commanding officer to a private person to sell liquors in any encampment, fort, or premises used for military purposes by the United States, but that said section did not prevent the continuance of the sale of intoxicating drinks through the canteen section of the post exchanges as heretofore organized, by civilians employed for that purpose. (1899) 22 Op. Atty. Gen. 426.

1107. Regulation by the President of the sale of intoxicants to the Army.—That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: *Provided*, That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this Act, * * * *Sec. 12, act of May 18, 1917 (40 Stat. 82).*

1108. Sale of intoxicants for medicinal purposes.— * * * but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. * * * *Sec. 12 act of May 18, 1917 (40 Stat. 82).*

1109.—Sale of intoxicants to officers or enlisted men while in uniform.— * * * It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. * * * *Sec. 12, act of May 18, 1917 (40 Stat. 82).*

1110. Punishment for selling intoxicants.—* * * Any person, corporation, partnership, or association violating the provisions of this section of the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both. *Sec. 12, act of May 18, 1917 (40 Stat. 82).*

Secs. 1107–1110 comprise sec. 12 of the selective-service act.

Notes of Decisions.

Constitutionality.—This section is constitutional; under the authority to raise and support armies Congress may make rules and regulations to protect the health and welfare of the men composing them. McKinley v. U. S. (1919), 249 U. S. 397.

Effective date.—This section prohibits the sale of liquor to soldiers in uniform from the date of its enactment, irrespective of the regulations subsequently made by the President or of the place of sale. Bailey v. U. S. (C. C. A. 1920), 267 Fed. 559.

Information.—A prosecution for violation of this section may be instituted by information. U. S. v. Nelson (D. C. 1918), 254 Fed. 889. Robertson v. U. S. (C. C. A. 1919), 262 Fed. 948.

Information charging sale of "alcoholic liquor" held sufficient; whether the article sold was within the prohibition being a matter of proof. U. S. v. Kinsel (D. C. 1918), 263 Fed. 141.

"Intoxicating liquor."—In matters of military inquiry, the Judge Advocate General of the Army advises that the War Department regards a beverage containing 1.4 per cent of alcohol as intoxicating liquor, within the meaning of this section; but in the prosecution of civilians it is a question for the civil courts. Jacob Ruppert v. Caffey (1920), 251 U. S. 264, 298 (citing Ing. Ops. J. A. G. 250.1, Dec. 4, 1918, p. 381; id Mar. 3, 1919, p. 134).

The terms "alcoholic liquor," "intoxicating or spirituous liquors," and "intoxicating liquor, including beer, ale, or wine," are used in this section as synonymous terms. U. S. v. Kinsel (D. C. 1918), 263 Fed. 141.

Intent.—The exclusion of testimony of defendant, who did not take personally the order, that he was told by the person who took the order that the liquor was ordered by, and was for, a woman, to whom he charged it, held error, on a trial for selling liquor to a seaman in uniform. Fetters v. U. S. (C. C. A. 1919), 260 Fed. 142.

Distance.—The distance designated by presidential regulation is to be measured from the nearest point of one place to the nearest point of the other. Evans v. U. S. (C. C. A. 1919), 261 Fed. 902.

The presidential regulation, differentiating between incorporated cities or towns and other places, as to the width of the zone, upheld. Id.

Transportation.—A provision of the presidential regulation, prohibiting "transportation" of liquor within the military camp zones, held within the authority given by this section. Robertson v. U. S. (C. C. A. 1919), 262 Fed. 948.

A defendant who brought liquor into the District of Columbia for use in his home is not guilty of a violation of the presidential regulation of July 3, 1918, issued under this act, creating a 5-mile zone around military camps because within the proviso excepting use in private homes and transportation thereto. Leitch v. U. S. (Ct. App. D. C. 1919), 261 Fed. 450.

Negative allegations.—An indictment need not negative the exceptions the Secretary of War is authorized to prescribe under 1109, ante.

An information need not allege that the defendant is not punishable under the Articles of War. Robertson v. U. S. (C. C. A. 1919), 262 Fed. 948.

Duration of section.—The provisions of this section are not limited to the continuance of the emergency or state of war in existence at the time of its enactment but continue in force after the cessation of active hostilities. Laughter v. U. S. (C. C. A. 1919), 261 Fed. 68.

Similar section.—For decisions on the provision of the selective service act prohibiting prostitution near camps, etc., see 1111, post.

1111. Prohibition of vice.—That during the present emergency it shall be unlawful, within such reasonable distance of any military camp, station, fort, post, cantonment, training or mobilization place as the Secretary of War shall determine to be needful to the efficiency and welfare of the Army, and shall designate and publish in general orders or bulletins, to engage in prostitution or to aid or abet prostitution or to procure or solicit for purposes of prostitution, or to keep or set up a house of ill fame, brothel, or bawdy house, or to receive any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or to permit any person to remain for purposes of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building, and any person, corporation, partnership, or association violating the provisions of this chapter shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or by imprisonment for not

more than one year, or by both such fine and imprisonment, and any person subject to military law violating this chapter shall be punished as provided by the Articles of War; and the Secretary of War is hereby authorized, empowered, and directed to do everything by him deemed necessary to suppress and prevent violation thereof. *Sec. 13, act of May 18, 1917 (40 Stat. 83), as amended by chap. XIV, act of July 9, 1918 (40 Stat. 885).*

For joint resolution providing that certain statutes the operation of which is contingent upon the existence of a state of war shall be construed as if the World War had ended on Mar. 3, 1921, see 2835, post.

Notes of Decisions.

Constitutionality.—Congress, under the authority to raise and support armies, may make rules and regulations to protect the health and welfare of the men composing them against the evils of prostitution, and may leave the details of such regulations to the Secretary of War. McKinley *v.* U. S. (1918), 249 Fed. 397.

This section is constitutional, under the power to raise and support armies. Grancourt *v.* U. S. (C. C. A. 1919), 258 Fed. 25; U. S. *v.* Casey (D. C. 1918), 247 Fed. 362.

It is not an exercise of the police power of the State, but of the constitutional authority of the United States. Id; Pappens *v.* U. S. (C. C. A. 1918), 252 Fed. 55; Blanc *v.* U. S. (C. C. A. 1919), 258 Fed. 921; U. S. *v.* Casey (D. C. 1918), 247 Fed. 362.

Nor does this section delegate legislative power to the Secretary of War. U. S. *v.* Scott (D. C. 1918), 248 Fed. 361; U. S. *v.* Casey (D. C. 1918), 247 Fed. 362.

Except in time of war or other great public peril, suppressing disorderly houses would come within the police power of the State, under the 10th Amendment. U. S. *v.* Hicks (D. C. 1919), 256 Fed. 707.

Information.—A prosecution for violation of this section may be instituted by information. Goublin *v.* U. S. (C. C. A. 1919), 261 Fed. 5; Pollard *v.* U. S. (C. C. A. 1919), 261 Fed. 336; De Four *v.* U. S. (C. C. A. 1919), 260 Fed. 596; Brown *v.* U. S. (C. C. A. 1919), 260 Fed. 752.

Acts constituting offense.—Where defendant received immoral women into a house for purposes of prostitution, he was guilty of a violation of this section, though he was not the owner of or in control of the premises, provided he knowingly aided in maintaining the place of ill-fame. Pollard *v.* U. S. (C. C. A. 1919), 261 Fed. 336; Thaler *v.* U. S. (C. C. A. 1919), 261 Fed. 746.

Definitions.—In general popular acceptation, "bawdyhouse," "brothel," and "house of ill-fame" are synonymous. Thaler *v.* U. S. (C. C. A. 1919), 261 Fed. 746; U. S. *v.* Casey (D. C. 1918), 247 Fed. 362.

Evidence.—Evidence of having previously conducted houses of ill-fame held admissible. De Four *v.* U. S. (C. C. A. 1919), 260 Fed. 596.

Evidence of reputation as a house of ill-fame held admissible. Anzine *v.* U. S. (C. C. A. 1919), 260 Fed. 827.

Evidence of diseased condition of women found in a house alleged to be a house of ill-fame held admissible. Id; Nakano *v.* U. S. (C. C. A. 1920), 262 Fed. 761.

Judicial notice.—The regulations made by the Secretary of War hereunder need not be set forth in the indictment because the court will take judicial notice of them. U. S. *v.* Casey (D. C. 1918), 247 Fed. 362.

Negative allegations.—An indictment need not allege that the defendant was not punishable under the Articles of War. U. S. *v* Scott (D. C. 1918), 248 Fed. 361.

Duration of section.—This section was still in force on September 7, 1919, the date of an offense charged in an indictment. U. S. *v.* Meyers (D. C. 1920), 265 Fed. 329.

1112. Proving grounds for ordnance material.—For increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose, and also the salaries and expenses of any agents appointed to assist in the procurement of said land or damages resulting from its taking, $7,000,000: *Provided*, That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing appropriation, can not be procured by purchase, then the President is hereby authorized and empowered to take *over for* the United States the immediate possession and title, including all

easements, rights of way, riparian and other rights appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said land and appurtenances and improvements shall be taken over as aforesaid the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property by the President as aforesaid the title to all such property so taken over shall immediately vest in the United States: *Provided further*, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder. *Act of Oct. 6, 1917 (40 Stat. 352), making appropriations to supply deficiencies: War Department.*

For R. S. 355, see 1029, ante.

Aberdeen proving ground, Maryland, was established under this act. Sandy Hook proving ground was established as a result of the act of Mar. 2, 1889 (25 Stat. 833), and abandoned as a proving ground, Oct. 1, 1919.

1113. Exchange of land at Aberdeen Proving Ground.—That the Secretary of War be, and he hereby is, authorized to exchange a strip of land of about two hundred feet in width, within the Aberdeen Proving Ground, and extending from Bush River to Magnolia, Maryland, and adjoining the right of way of the Pennsylvania Railroad Company, for a tract of land situated inside the limits of the Aberdeen Proving Ground, and having an area of about eight acres, upon the payment to the United States of such consideration, in addition to said tract of land, as the Secretary of War shall deem equitable. *Chap. II, act of July 9, 1918 (40 Stat. 878), making appropriations for the support of the Army.*

1114. Maintenance, etc., of proving grounds.—For current expenses of the ordnance proving grounds, comprising the maintenance of rail and water transportation, repairs, alterations, accessories, and service of employees incidental to testing and proving ordnance and ordnance matériel, hire of assistants for the Ordnance Board, purchase of instruments and articles required for testing and experimental work, building and repairing butts and targets, clearing and grading ranges, $300,000. *Act of Mar. 3, 1921 (41 Stat. 1349), making appropriations for fortifications, etc.: Proving grounds.*

Similar provisions appear in previous acts.

1115. Annual estimates for rifle ranges.—The Secretary of War shall annually submit to Congress recommendations and estimates for the establishment and maintenance of indoor and outdoor rifle ranges, under such a comprehensive plan as will ultimately result in providing adequate facilities for rifle practice in all sections of the country. * * * *Sec. 113, act of June 3, 1916 (39 Stat. 211).*

1116. Use of rifle ranges and shooting galleries.— * * * And that all ranges so established and all ranges which may have already been constructed, in whole or in part, with funds provided by Congress shall be open for use by those in any branch of the military or naval service of the United States and

by all able-bodied males capable of bearing arms, under reasonable regulations to be prescribed by the controlling authorities and approved by the Secretary of War. * * * *Sec. 113, act of June 3, 1916 (39 Stat. 211).*

1117. Maintenance of shooting galleries and ranges.—For shelter, grounds, shooting galleries, ranges for small-arms target practice, machine-gun practice, field-artillery practice, repairs, and expenses incident thereto, including flour for paste for marking targets, hire of employees, such ranges and galleries to be open as far as practicable to the National Guard and organized rifle clubs under regulations to be prescribed by the Secretary of War, $100,000. *Act of June 5, 1920 (41 Stat. 965), making appropriations for the support of the Army: Shooting galleries and ranges.*

Somewhat similar provisions appear in previous appropriation acts.
In regard to the maintenance of ranges for instruction of civilians see post, 2636.

1118. Sale of target ranges.— * * * *Provided,* That when any land which has been heretofore or may be hereafter acquired by purchase for a target range for the use of the National Guard of any State, Territory, or the District of Columbia, shall have become useless or shall be found to be unavailable for such purpose, the Secretary of War may cause the same to be sold either in whole or in two or more parts as he may deem best for the interests of the United States. In the disposal of such property, the Secretary of War shall cause the same to be appraised either as a whole or in two or more tracts, having due reference to the requirements of any permanent improvements made thereon; and he shall cause the property to be offered at public or private sale at not less than the appraised value. The expenses for advertising, appraisement, survey, and sale shall be paid from the proceeds of the sale; and the net proceeds thereof shall be placed to the credit of the State, Territory, or District of Columbia, as additional to its allotment under section sixty-seven of the Act of June third, nineteen hundred and sixteen. *Act of May 12, 1917 (40 Stat. 67), making appropriations for the support of the Army.*

1119. Aviation facilities.—The Secretary of War is directed to investigate the suitability of the various military reservations for aviation purposes, and should any of the reservations be found not suitable and not available for aviation, he is authorized, in his discretion, to acquire, by purchase, condemnation, or otherwise, for the United States of America, such land as may be necessary for aviation purposes, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $300,000, or so much thereof as may be necessary, for said purpose. *Act of Aug. 29, 1916 (39 Stat. 622).*

* * * *Provided,* That by order of the President any Government property or unappropriated or reserved public lands may be reserved from entry, designated, and used for such aviation stations or fields for testing and experimental work; * * *. *Act of July 9, 1918 (40 Stat. 848), making appropriations for support of the Army.*

Authority for the acquirement by purchase, donation, or condemnation, or for reservation from entry of needed land sites, improvement of land and waters and necessary buildings and equipment, including factories, was granted by appropriation acts of May 12, 1917 (40 Stat. 42), July 24, 1917 (40 Stat. 245), July 9, 1918 (40 Stat. 848), and June 5, 1920 (41 Stat. 954).
See notes to 1019, ante.

1120. Aviation facilities for seacoast defense.—The Secretary of War is directed to submit to Congress on or before January first, nineteen hundred

and eighteen, a detailed statement of the land, buildings, and other facilities now available and to be required for the accommodation of airships and other aerial machines to be used in connection with the seacoast defenses of the continental United States, the insular possessions, and the Panama Canal. *Act of Feb. 14, 1917 (39 Stat. 910).*

Appropriation for the procurement of eight aviation stations was made in the act of July 8, 1918 (40 Stat. 816), making appropriations for fortifications. The acquisition of the whole of North Island, San Diego, Calif., was authorized by act of July 27, 1917 (40 Stat. 247).

1121. Purchase and maintenance of aviation facilities.— * * * improvement, equipment, maintenance, lease, and operation of aviation stations, balloon schools, plants for testing and experimental work; procuring and introducing water, electric light and power, telephones, telegraphs, and sewerage, including maintenance, operation, and repair of such utilities; for the acquisition of land or interest in land by purchase, lease, or condemnation where necessary to explore for, procure, or reserve helium gas, and also for the purchase, manufacture, construction, maintenance, and operation of plants for the production thereof and experimentation therewith; * * *

For the establishment, enlargement, and improvement of public buildings and facilities at aviation stations, schools, and depots, $245,000. *Act of June 5, 1920 (41 Stat. 953-954), making appropriations for the support of the Army: Air Service.*

1122. Operation of coal fields in Alaska.—That the President of the United States shall designate and reserve from use, location, sale, lease, or disposition not exceeding five thousand one hundred and twenty acres of coal-bearing land in the Bering River field and not exceeding seven thousand six hundred and eighty acres of coal-bearing land in the Matanuska field, and not to exceed one-half of the other coal lands in Alaska: *Provided*, That the coal deposits in such reserved areas may be mined under the direction of the President when, in his opinion, the mining of such coal in such reserved areas, under the direction of the President, becomes necessary, by reason of an insufficient supply of coal at a reasonable price for the requirements of Government works, construction and operation of Government railroads, for the Navy, for national protection, or for relief from monopoly or oppressive conditions. *Sec. 2, act of Oct. 20, 1914 (38 Stat. 742).*

This act provided for opening the Bering River, Matanuska and Nenana coal fields, and areas tributary to settlements and rail and water transportation lines.

A reservation of coal lands is also made in sec. 2, act of Oct. 20, 1914 (38 Stat. 742), providing for leasing certain Alaskan coal fields.

1123. Preference right of the Government to purchase coal mined in Alaska.—That the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this Act as may be necessary for the use of the Army and Navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase. *Sec. 2, act of May 28, 1908 (35 Stat. 424).*

1124. Condemnation of timber, sawmills, etc.—That the Act entitled "An Act to authorize condemnation proceedings of lands for military purposes," approved

July second, nineteen hundred and seventeen, as amended by an Act approved April eleventh, nineteen hundred and eighteen, be, and the same is hereby, amended, and its provisions in all respects together with all its privileges and benefits are hereby extended to the right of condemnation of standing or fallen timber, sawmills, camps, machinery, logging roads, rights of way, equipment, materials, supplies, and any works, property, or appliances suitable for the effectual production of such lumber and timber products, for the Army, Navy, United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation. That the right to institute such condemnation proceedings is hereby conferred upon the Secretary of War, the Secretary of the Navy, and the Chairman of the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, individually or collectively. Such right of condemnation shall be exercised by such officials only for the purpose of obtaining such property when needed for the production, manufacture, or building aircraft, dry-docks, or vessels, their apparel or furniture, for housing of Government employees in connection with the Army, Navy, or the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, and for the procurement of materials and equipment for aircraft, dry-docks and vessels. The jurisdiction of such condemnation proceedings is hereby vested in the District Courts of the United States, where the property which is sought to be condemned or any part thereof is located or situated, regardless of the value of the same. * * * *Sec. 8, chap. XV, act of July 9, 1918 (40 Stat. 888), amending act of July 2, 1917 (40 Stat. 241).*

For act of July 2, 1917, above, see 1023, ante.

1125. Sale of timber land and logs.— * * * And the President is hereby authorized through any department or the United States Shipping Board or said Fleet Corporation to sell and dispose of any lands or interests in real estate acquired for the production of lumber and timber products, and to sell any logs, manufactured or partly manufactured or otherwise procured for the Army, Navy, or United States Shipping Board Emergency Fleet Corporation, or resulting from such manufacture or procurement, either to individuals, corporations or foreign states or governments, at such price as he shall determine acting through his above representatives selling or disposing of the same, and the proceeds of such sale shall be returned to the appropriations which bore the expense of such procurement. *Sec. 8, chap. XV, act of July 9, 1918 (40 Stat. 888).*

1126. Conveyance to the Regents of the University of California of a portion of the military reservation of the Presidio of San Francisco.—That the Secretary of War be, and he is hereby, authorized in his discretion to convey to the regents of the University of California, their successors and assigns, for art, education, and park purposes and for the benefit of the people of the city and county of San Francisco and the public generally, that portion of the military reservation of the Presidio of San Francisco, in the city and county of San Francisco, California, on which the Palace of Fine Arts is located, included within metes and bounds, described as follows, namely:

Commencing at the point on the westerly line of Lyon Street, distant therefrom five and seventeen one-hundredths feet southerly from the northerly line of Bay Street, if extended and produced westerly, and running thence northerly along the westerly line of Lyon Street one thousand one hundred and ninety-six and eighty one-hundredths feet; thence southwesterly on a

curve to the left of six hundred and twelve feet radius, central angle one hundred and fifty-five degrees forty-seven minutes and fifty seconds, tangent to a line deflected one hundred and two degrees six minutes and five seconds to the left from the preceding course a distance of one thousand six hundred and sixty-four and thirteen one-hundredths feet to the westerly line of Lyon Street and the point of commencement, containing nine and ninety-three one-hundredths acres, more or less.

That if at any time in the future, the property so conveyed to said regents shall cease to be used for the purposes for which conveyed, then all right and title thereto herein authorized to be granted to said regents shall revert to the United States.

That in consideration of the said grant, the said regents shall procure from the city and county of San Francisco the consent of said city and county to a judgment being rendered and entered against the said city and county in eminent domain proceedings to be instituted by the United States Government against said city and county for the purpose of acquiring from said city and county all right, title, and interest that said city and county may have in and to any lands situated within the city and county of San Francisco, California, located as the Secretary of War may approve and which he may deem satisfactory and useful in connection with said reservation.

That the said regents or the Secretary of War shall procure to be executed by the said city and county of San Francisco a warranty to the United States Government of perpetual quiet possession to said lands.

That in any such judgment in eminent domain as may be so rendered and entered, there may be reserved to the city and county of San Francisco in such lands to be so acquired, such rights and interests as in the discretion of the Secretary of War should properly be reserved to said city and county of San Francisco, and also a condition that the said lands shall revert to the city and county of San Francisco in the event of the United States Government ceasing to use the lands for the purposes for which they may be so acquired in said eminent domain proceedings.

That the provision in the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes," approved May twelfth, nineteen hundred and seventeen (chapter twelve, page fifty-seven, Fortieth Revised Statutes), authorizing the Secretary of War to convey to the regents of the University of California, for art, educational, and park purposes, that portion of the military reservation of the Presidio, San Francisco, on which the Palace of Fine Arts is located, in consideration of the transfer to the United States of other lands situated within the said city and county, be and is hereby repealed. *Act of July 9, 1918 (40 Stat. 862-3).*

1127. Statue of Liberty, Bedloes Island, N. Y. -The Treasurer of the United States is hereby authorized and directed to receive the sum of thirty-five thousand dollars, more or less, from the executive committee of the Statue of Liberty erected on land belonging to the United States on Bedloes Island, New York Harbor; and the Secretary of War is hereby authorized to keep the said statue in repair, and to pay for the same from the appropriation for "Regular supplies," under the Quartermaster's Department, in the appropriation for the support of the Army for the fiscal year in which such expenses shall be incurred. *Act of Apr. 28, 1904 (33 Stat. 398).*

1128. Care of peach orchard, Aberdeen Proving Ground. * * * *Provided*, That not to exceed $22,500 of this sum be made available for the care of

the peach orchard on Poole Island, Aberdeen Proving Ground, and the grain now growing at this and other reservations and the harvest and disposal of the crops; and such disposal by sale or otherwise shall be made pursuant to such regulations as may be prescribed by the Secretary of War: *Provided further*, That all moneys received by the United States as the proceeds of such sales shall be deposited in the Treasury of the United States as "Miscellaneous Receipts." *Act of July 11, 1919 (41 Stat. 114), making appropriations for the support of the Army: Subsistence of the Army.*

1129. Lands and buildings transferred to Public Health Service.—That the military reservation known as Craney Island, now under the control and jurisdiction of the War Department, lying on the western side of the Elizabeth River in Norfolk County, Virginia, and bounded by the waters of the Elizabeth River, Craney Island Creek, Thoroughfare Creek, and James River, be, and the same hereby is, transferred to and placed under the control and jurisdiction of the Treasury Department for the use of the Public Health Service; and that the sandspit or island called Fishermans Island, or Linen Bar, now under the control and jurisdiction of the Treasury Department, situate, lying, and being in the county of Northampton off the point of Cape Charles, between the Atlantic Ocean and Chesapeake Bay, in the eastern district of Virginia, about twelve miles south of Cape Charles City and about one and one-quarter miles from Cape Charles Light, containing two hundred and twenty-five acres, more or less, above high-water mark, be, and the same hereby is, transferred to and placed under the control and jurisdiction of the War Department for use for military purposes. *Act of Nov. 19, 1919 (41 Stat. 358).*

In carrying out the purposes herein authorized the President is authorized and empowered, in his discretion, to assign for use of the Public Health Service, under the jurisdiction of the Secretary of the Treasury, such lands or buildings now owned or leased by the United States, not including property under the jurisdiction of the National Home for Disabled Volunteer Soldiers, which, in his judgment, can be used more efficiently for the care of patients of the Bureau of War Risk Insurance; and the Secretary of the Treasury is authorized and directed to take over immediately Fort Mackenzie, Wyoming, Fort Walla Walla, Washington, and Fort Logan H. Roots, Arkansas, with all lands, buildings, and equipment belonging thereto for the uses contemplated herein * * * *Act of Mar. 4, 1921 (41 Stat. 1365).*

1130. North Point, Md., acquired by the War Department.—That the following-described tract of land situated at North Point, Maryland, now under the control and jurisdiction of the Department of Commerce, and known as the Lighthouse Reservation, at North Point, Maryland, be, and the same hereby is, transferred to and placed under the control and jurisdiction of the War Department for use for military purposes:

Beginning at a post now set in the ground north, eighty-two degrees east, one and a quarter perches from the center of a stump, and north sixty-five degrees west, fourteen perches from a large black oak tree now marked, and running thence south sixty-five degrees east, fourteen perches to the said black oak, thence still south sixty-five degrees east, twelve and a half perches to a post north, sixty-five and three-quarters degrees east, twelve perches to a post standing southwardly nine feet from a large white oak, thence south forty-seven degrees east, forty-eight perches to a marked sassafras, thence still south forty-seven degrees east, two perches to the water of Chesapeake Bay, thence bounding on the water on said Bay and Patapsco River south, seventy-four

degrees west seven perches, south eighty and a half degrees west ten perches, north seventy-one degrees west fifteen perches, north fifty-seven and a half degrees west twelve perches, north fifty-six and a half degrees west, twelve perches, north forty-six and a half degrees west, forty-four perches and eight-tenths of a perch, until it intersects a line drawn south forty-eight degrees west from the place of beginning, and thence to the beginning, containing seven acres and twenty-two square perches of land more or less. *Act of Nov. 19, 1919 (41 Stat. 357-8).*

1131. Buildings projecting beyond the building line.—This Act shall not affect in any manner the provisions in the Act of March third, eighteen hundred and ninety-one, entitled "An Act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for prior years, and for other purposes," that no permits for projections beyond the building line on the streets and avenues of the city of Washington shall be granted except upon special application and with the concurrence of all said Commissioners and the approval of the Secretary of War; and the operation of said provision is hereby extended to the entire District of Columbia. *Sec. 3, act of July 1, 1898 (30 Stat. 570).*

1132. Custody of public buildings and grounds in the District of Columbia.—That the Chief of Engineers shall have charge of the public buildings and grounds in the District of Columbia, under such regulations as may be prescribed by the President, through the War Department, except those buildings and grounds which are otherwise provided for by law; and when it shall be made to appear to the said Chief of Engineers, or to the officer under his direction having immediate charge of said public buildings and grounds, that any person or persons is in unlawful occupation of any portion of said public lands in the District of Columbia, it shall be the duty of said officer in charge thereof to notify the marshal of the District of Columbia in writing of such unlawful occupation, and the said marshal shall thereupon cause the said trespasser or trespassers to be ejected from said lands, and shall restore possession of the same to the officer charged by law with the custody thereof. *R. S. 1797, as amended by act of April 28, 1902 (32 Stat. 152).*

This section, as enacted in the Revised Statutes, contained only the provision that the Chief of Engineers should have charge of public buildings and grounds ending with the words, "otherwise provided for by law." It was amended by the addition of the provisions beginning with the words, "and when it shall be made to appear," etc., to the end of the section as set forth here, by a provision of the legislative, executive, and judicial appropriaton act for the fiscal year 1903, cited above.

Provision for maintenance is made annually by sundry civil appropriation acts. Provision for the fiscal year 1922 is made in act of Mar. 4, 1921 (41 Stat. 1388).

Notes of Decisions.

Summary eviction from public lands.—The only intent of this section is to empower the United States marshal of the District of Columbia to eject summarily transient or disturbing persons from the public grounds in the District under the direct supervision of the Chief of Engineers, and does not apply to occupants who have been in actual possession, under a claim of right, for a long period of years. In such cases the Government should apply to the courts to obtain possession. (1903) 24 Op. Atty. Gen. 616.

The marshal of the District of Columbia has no discretion in the performance of the duty imposed upon him by this section, and in so doing has the same right to summon assistance that he has in executing other lawful process. (1903) 25 Op. Atty. Gen. 18.

This section authorises summary proceedings against those persons only who are in unlawful occupancy of public buildings or grounds in the District of Columbia. This involves the question of title of the United States to the property in question, and the

officer charged with this duty must determine correctly, at his peril, that the occupant is such trespasser. Id.

This section does not authorize the summary deprivation of a rightful possession without due process of law, and, except in a few rare instances, mere legislation, or ministerial acts under it, would not be due process. Id.

Occupants of lands in the District of Columbia who have been in possession thereof for a number of years under claim of title are not required to establish their right in court, and thereby relieve the Government from the burden of first establishing its own title or right to possession, as it must, if these are contested. Id.

Unlawful use or occupation of public grounds.—See (1904) 25 Op. Atty. Gen. 111.

Franchise in streets.—Neither the Secretary of the Interior nor the Commissioner of Public Buildings has authority to grant consent to the laying of a railway in the streets of Washington. (1862) 10 Op. Atty. Gen. 220.

1133. Reports of the Superintendent of Public Buildings and Grounds.—The Chief of Engineers shall, as Superintendent of Public Buildings and Grounds, and as Superintendent of the Washington Aqueduct, annually submit the following reports to the Secretary of War in time to accompany the annual message of the President to Congress, namely:

First. A report of his operations for the preceding year, with an account of the manner in which all appropriations for public buildings and grounds have been applied, including a statement of the number of public lots sold, or remaining unsold each year, of the condition of the public buildings and grounds, and of the measures necessary to be taken for the care and preservation of all public property under his charge.

Second. A report of the condition, progress, repairs, casualties, and expenditures of the Washington Aqueduct and other public works under his charge. *R. S. 1812.*

1134. Transfers of jurisdiction between the Chief of Engineers and the Commissioners of the District of Columbia.—That when in accordance with law or mutual legal agreement, spaces or portions of public land are transferred from the jurisdiction of the Chief of Engineers of the United States Army, as established by this Act to that of the Commissioners of the District of Columbia, or vice versa, the letters exchanged between them of transfer and acceptance shall be sufficient authority for the necessary change in the official maps and for record when necessary. *Sec. 5, act of July 1, 1898 (30 Stat. 570).*

1135. Regulations for the care of public grounds.—That the said Chief of Engineers and the said Commissioners are hereby authorized to make all needful rules and regulations for the government and proper care of all the public grounds placed by this Act under their respective charge and control; and to annex to such rules and regulations such reasonable penalties as will secure their enforcement. *Sec. 6, act of July 1, 1898 (30 Stat. 571).*

1136. Regulations for sidewalks in the District of Columbia.—That the application of the rules and regulations heretofore prescribed or that may be hereafter prescribed by the Chief of Engineers, United States Army, under the authority granted by section six of an Act of Congress approved July first, eighteen hundred and ninety-eight, for the government and proper care of all public grounds placed by that Act under the charge and control of the said Chief of Engineers, is hereby extended to cover the sidewalks around the public grounds and the carriageways of such streets as lie between and separate the said public grounds. *Act of Mar. 4, 1909 (35 Stat. 994), making appropriations for sundry civil expenses.*

1137. Widening roadways in the District of Columbia.—That when, in the judgment of the Commissioners of the District of Columbia, the public necessity or convenience requires them to enter upon any of the spaces or reservations under the jurisdiction of the Chief of Engineers, for the purpose of widening the roadway of any street or avenue adjacent thereto or to establish sidewalks along the same, the Chief of Engineers, with the approval of the Secretary of War, is authorized to grant the necessary permission upon the application of the Commissioners. *Sec. 4, act of July 1, 1898 (30 Stat. 570).*

1138. Jurisdiction over B Street, Washington, D. C.—The jurisdiction over that portion of B street west of Virginia avenue, now under the control of the Commissioners of the District of Columbia, is hereby transferred to the Chief of Engineers, United States Army. *Act of May 27, 1908 (35 Stat. 356), making appropriations for sundry civil expenses.*

1139. Custody of the park system, District of Columbia.—That the park system of the District of Columbia is hereby placed under the exclusive charge and control of the Chief of Engineers of the United States Army, under such regulations as may be prescribed by the President of the United States, through the Secretary of War.

The said park system shall be held to comprise:

(a) All public spaces laid down as reservations on the map of eighteen hundred and ninety-four accompanying the annual report for eighteen hundred and ninety-four of the officer in charge of public buildings and grounds:

(b) All portions of the space in the streets and avenues of the said District, after the same shall have been set aside by the Commissioners of the District of Columbia for park purposes.

Provided, That no areas less than two hundred and fifty square feet between sidewalk lines shall be included within the said park system, and no improvements shall be made in unimproved public spaces in streets between building lines or building lines prolonged until the outlines of such portions as are to be improved as parks shall have been laid out by the Commissioners of the District of Columbia: *And provided further*, That the Chief of Engineers is authorized temporarily to turn over the care of any of the parking spaces included in Class "B" above, to private owners of adjoining lands under such regulations as he may prescribe and with the condition that the said private owners shall pay special assessments for improvements contiguous to such parking, under the same regulations as are or may be prescribed for private lands: *And provided further*, That where in any portion of a street more than one-half of the front is occupied and used for business purposes, the Commissioners are authorized and directed to denominate such portion of the street as a business street and shall authorize the use for business purposes by abutting property owners of so much of the sidewalk and parking as may not be needed, in the judgment of the said Commissioners, by the general public, under such general regulations as the said Commissioners may prescribe. *Sec. 2, act of July 1, 1898 (30 Stat. 570).*

That the Act of Congress approved July first, eighteen hundred and ninety-eight, entitled "An Act to vest in the Commissioners of the District of Columbia control of street parking in said District," be, and it is hereby, amended by striking out of paragraph five of section two of said Act the words "Class B," and substituting therefor the words "Classes (a) and (b)." *Act of Apr. 14, 1906 (34 Stat. 112), amending sec. 2, act of July 1, 1898 (30 Stat. 570).*

Rock Creek Park was established under the joint control of the Commissioners of the District of Columbia and the Chief of Engineers by the act of Sept. 27, 1890 (26

Stat. 492). Potomac Park was established by the act of Mar. 3, 1897 (29 Stat. 624), and was placed under the control of the Chief of Engineers by the act of Aug. 1, 1914 (38 Stat. 634), making appropriations for sundry civil expenses.

Notes of Decisions.

Special assessments.—The fact that a public park in the District of Columbia is dedicated by act of Congress creating it to the use and enjoyment of the people of the United States does not withdraw it from the rule as to special assessments applicable in cases of streets and highways, but such assessments may be left to aid in the purchase and improvement of the property. Craighill v. Lambert (1898), 18 Sup. Ct. 217, 218, 168 U. S. 611, 42 L. Ed. 599.

1140. Regulation of traffic in the park system, District of Columbia.—Nothing contained in the provision regarding the making and enforcing of regulations governing the speed of motor vehicles in the District of Columbia found in section 1 of the District of Columbia Act approved March 3, 1917, shall be construed to interfere with the exclusive charge and control heretofore committed to the Chief of Engineers over the park system of the District of Columbia, and he is hereby authorized and empowered to make and enforce all regulations for the control of vehicles and traffic, and limiting the speed thereof on roads, highways, and bridges within the public grounds in the District of Columbia, under his control, subject to the penalties prescribed in the Act entitled "An Act regulating the speed of automobiles in the District of Columbia, and for other purposes," approved June 29, 1906. *Act of June 5, 1920 (41 Stat. 898).*

1141. Small parks at the intersections of streets.—For the condemnation of small park areas at the intersections of streets outside the limits of the original city of Washington, * * * The public parks so acquired shall become a part of the park system of the District of Columbia and be under the control of the Chief of Engineers of the United States Army. *Act of March 4, 1913 (37 Stat. 971), as amended by act of Aug. 1, 1914 (38 Stat. 625), making appropriations for sundry civil expenses.*

1142. Transfer of land for a property yard to the District of Columbia.—The Chief of Engineers of the United States Army is hereby authorized and directed to transfer to the Commissioners of the District of Columbia the control and jurisdiction over reservation one hundred and eighty-five, to be used by said District as a property yard: *Provided*, That when in the judgment of the Chief of Engineers of the United States Army the use of said reservation for park purposes is desirable, the Commissioners of the District of Columbia, upon his request, are authorized and directed to retransfer said reservation to his jurisdiction. *Act of May 18, 1910 (36 Stat. 383).*

1143. Superintendence of the Washington Aqueduct and other public improvements.—The Chief of Engineers shall have the immediate superintendence of the Washington aqueduct, together with all rights, appurtenances, and fixtures connected with the same, and belonging to the United States, and of all other public works and improvements in the District of Columbia in which the Government has an interest, and which are not otherwise specially provided for by law. *R. S. 1800.*

He shall obey, in the discharge of the duties mentioned in the preceding section, such regulations, pursuant to law, as may be prescribed by the President, through the Department of War. *R. S. 1801.*

Notes of Decisions.

Conduit Road.—The reservoirs, aqueducts, and other constructions appurtenant to the water supply of the city of Washington, D. C., are to be considered "needful buildings," within the meaning of art. 1, sec. 8, of the Constitution, and since a roadway is an appropriate and necessary appurtenance to such works, the Conduit Road constitutes territory within the exclusive jurisdiction of Congress. (1907) 26 Op. Atty. Gen. 289.

Congress has the right of exclusive jurisdiction over the entire length of the Conduit Road, provided the roadbed is owned in fee by the United States and has been acquired in accordance with the consent of the legislature of the State of Maryland contained in act May 3, 1853 (Laws Md. 1853, ch. 179). Id.

The Conduit Road is not a public highway, but is subject to the control of the Chief of Engineers, and its use by the public may be subjected to such regulations as may be appropriate, obedience to which may be secured the use of such reasonably sufficient force as the Secretary of War may deem advisable. Id.

Superintendent of aqueduct Powers. - The superintendent of the Washington aqueduct is not authorized to withhold a payment which the Secretary of War or the Engineer in Chief has ordered him to make, though he himself may differ with his superior officers in regard to the justice of the debt. (1860) 9 Op. Atty. Gen. 493.

Review of decision.—The Secretary of War has no authority to review and change the decision of the superintendent, made while he was chief engineer of the aqueduct, on a question arising under a contract containing a stipulation which expressly binds both contractor and the United States to abide by the decision of the Chief Engineer as final and conclusive upon all questions arising out of, or connected with, the contract. (1860) 9 Op. Atty. Gen. 493.

1144. Expenditures upon the Washington Aqueduct and other public works. - All moneys appropriated or hereafter appropriated for the Washington Aqueduct, and for the other public works in the District of Columbia, not otherwise expressly provided for by law, shall be expended under the direction of the Secretary of War. *R. S. 1802.*

Further direction as to the discharge of the duties of the Chief of Engineers as Superintendent of the Washington Aqueduct are set forth in R. S. 1802–1812, see ante, 1133.

As to provision for the superintendence and control of the Secretary of War over the Washington Aqueduct, see act of Sept. 1, 1916 (39 Stat. 693).

1145. Regulations of traffic for the protection of Washington Aqueduct and Filtration Plant.—The Chief of Engineers of the War Department is authorized and empowered to enforce the following regulations of traffic for the protection of the Washington Aqueduct and Filtration Plant and their accessories, including Conduit Road: No vehicle shall, on the Conduit Road, exceed a speed of twenty miles per hour within the District of Columbia, and in the State of Maryland the speed laws of that State. No reckless or careless driving shall be permitted, and drivers of all vehicles shall conform to the generally accepted rules for the use of public roads as to passing to the right, signaling desire to pass, and so forth, and all vehicles using this road shall carry and display the lights specified by municipal regulations for vehicles within the District of Columbia, and all such lights shall be so dimmed or masked as to obviate any blinding effect upon travelers on the road, and any violation of the above regulations shall constitute an offense upon conviction for which the party or parties offending shall be punished by a fine of not less than $1 or more than $40: * * * *Act of Sept. 1, 1916 (39 Stat. 693), making appropriations for the District of Columbia.*

A proviso added to this section provides for prosecutions for violation of said regulations in the District of Columbia and Maryland.

1146. Railroad siding to serve Field Medical Supply Depot in Washington, D. C.—That authority is hereby granted the Surgeon General of the United

States Army to construct, maintain, and operate a temporary single-track overhead siding across First Street northeast, between L and M Streets, to the building or buildings in square six hundred and seventy-three, occupied by the Field Medical Supply Depot of the Army: *Provided*, That the siding herein authorized shall not extend westwardly beyond a point five hundred and sixty-nine feet and nine inches east of the present site of Sibley Hospital or any of its buildings; and shall be limited to the use of the Medical Department of the United States Army for the period preceding the declaration of peace and thirty days thereafter; and within six months following the declaration of peace the Surgeon General shall cause said track to be entirely removed from the limits of said street and shall cause the aforesaid street to be restored to its condition prior to the construction of the siding without cost to the District of Columbia.

The Surgeon General of the Army shall provide for the construction, maintenance, and removal of this siding as herein authorized and prescribed, and the costs thereof shall be defrayed from the appropriations for the Medical and Hospital Department of the United States Army: *Provided further*, That said track shall be used only between the hours of six o'clock antemeridian and nine o'clock postmeridian except in cases of extreme emergency, and trains shall be operated with the least possible noise. *Act of Apr. 29, 1918 (40 Stat. 538).*

1147. Purchase of site for the Army Medical School, museum, and library.—Land for hospitals and other purposes: For the purchase of land contiguous to the Walter Reed General Hospital, District of Columbia, twenty-six and nine-tenths acres, more or less, for the final location of the Army Medical Museum, the Surgeon General's Library, and the Army Medical School, and for the improvements now on the land to be purchased, $350,000. *Act of July 11, 1919 (41 Stat. 122), making appropriations for the support of the Army: Medical Department.*

1148. Roads and trails in Alaska.—That there shall be a board of road commissioners in said district, to be composed of an engineer officer of the United States Army to be detailed and appointed by the Secretary of War, and two other officers of that part of the Army stationed in said district and to be designated by the Secretary of War. The said engineer officer shall, during the term of his said detail and appointment, abide in said district. The said board shall have the power, and it shall be their duty, upon their own motion or upon petition, to locate, lay out, construct, and maintain wagon roads and pack trails from any point on the navigable waters of said district to any town, mining or other industrial camp or settlement, or between any such town, camps, or settlements therein, if in their judgment such roads or trails are needed and will be of permanent value for the development of the district; but no such road or trail shall be constructed to any town, camp, or settlement which is wholly transitory or of no substantial value or importance for mining, trade, agricultural, or manufacturing purposes. The said board shall prepare maps, plans, and specifications of every road or trail they may locate and lay out, and whenever more than twenty thousand dollars, in the aggregate, shall have to be expended upon the actual construction of any road or section of road designed to be permanent, contract for the work shall be let by them to the lowest responsible bidder, upon sealed bids, after due notice, under rules and regulations to be prescribed by the Secretary of War. The board may reject any bid if they deem the same unreasonably high or if they find that there is a combination among bidders. In case no responsible and reason-

able bid can be secured, then the work may be carried on with material and men procured and hired by the board. The engineer officer of the board shall in all cases supervise the work of construction and see that the same is properly performed. As soon as any road or trail laid out by the board has been constructed and completed they shall examine the same and make a full and detailed report of the work done on the same to the Secretary of War, and in such report they shall state whether the road or trail has been completed conformably to the maps, plans, and specifications of the same. It shall be the duty of said board, as far as practicable, to keep in proper repair all roads and trails constructed under their supervision, and the same rules as to the manner in which the work of repair shall be done, whether by contract or otherwise, shall govern as in the case of the original construction of the road or trail. The cost and expenses of laying out, constructing, and repairing such roads and trails shall be paid by the Secretary of the Treasury, through the authorized disbursing officer of the board designated by the Secretary of War, out of the road and trail portion of said "Alaska fund" upon vouchers approved and certified by said board. The Secretary of the Treasury shall, at the end of each month, send by mail to each of the members of said board a statement of the amount available of said "Alaska fund" for the construction and repair of roads and trails, and no greater liability for construction or repair shall at any time be incurred by said board than the money available therefor at that time in said fund. The members of said board shall, in addition to their salaries, be reimbursed in the sums actually paid or incurred by them in traveling expenses in the performance of their duties, and shall be entitled to receive their actual expenses of living while serving as members of said board within the limits of the district and not stationed at a military post. *Sec. 2, act of Jan. 27, 1905 (33 Stat. 616), as amended by sec. 2, act of May 14, 1906 (34 Stat. 192).*

Members of the Board of Road Commissioners are entitled to the per diem commutation in lieu of actual living expenses while living with their families, and not stationed at a military post by act Apr. 27, 1914, post, 1813.

1149. Permanent buildings as authorized by Congress.—Permanent barracks or quarters and buildings and structures of a permanent nature shall not be constructed unless detailed estimates shall have been previously submitted to Congress, and approved by a special appropriation for the same, except when constructed by the troops; and no such structures, the cost of which shall exceed twenty thousand dollars, shall be erected unless by special authority of Congress. *R. S. 1136.*

Notes of Decisions.

Construction.—The Quartermaster's Department alone is charged with the duty and responsibility of erecting quarters. Travelers *v.* U. S., 5 Ct. Cls. 329.

1150. Plans and estimates for buildings.— * * * and no money shall be expended upon any public building until after sketch plans showing the tentative design and arrangement of such building, together with outline description and detailed estimates of the cost thereof shall have been made by the Supervising Architect of the Treasury Department (except when otherwise authorized by law) and said sketch plans and estimates shall have been approved by the Secretary of the Treasury and the head of each executive department who will have officials located in such building; but such approval shall not prevent subsequent changes in the design, arrangement, materials, or

methods of construction or cost which may be found necessary or advantageous: *Provided*, That no such changes shall be made involving an expense in excess of the limit of cost fixed or extended by Congress, and all appropriations made for the construction of such building shall be expended within the limit of cost so fixed or extended. *R. S. 3734, as amended by sec. 33, act of June 25, 1910 (36 Stat. 699).*

Notes of Decisions.

Decisions under temporary or local acts.—The rule of the law of agency that when a contract is made by an agent, the principal may maintain an action upon it in his own name, although it was not disclosed to the Government at the time of making the contract, can not be upheld in suits against the Government since acts of June 2, 1862, and July 17, 1862 (12 Stat. 411, 597), which require public contracts to be signed by the contracting parties, and forbid their transfer. Gill *v.* U. S. (1871), 7 Ct. Cl. 522.

The Secretary of State can not lawfully under joint resolution of Feb. 25, 1893 (27 Stat. 756), authorize the construction of a wharf at Wakefield, Va., different in character from that specified in the resolution, even if from a change of circumstances the construction of that sort of wharf with that appropriation has become impracticable. (1893) 20 Op. Atty. Gen. 653.

1151. Expenditures on buildings, grounds, etc., without approval by the Secretary of War.—*Provided further*, That hereafter no expenditure exceeding $5,000 shall be made upon any building or military post or grounds about the same without the approval of the Secretary of War, upon detailed estimates submitted to him. *Act of May 12, 1917 (40 Stat. 74), making appropriations for the support of the Army.*

"Cost-plus" contracts prohibited under certain conditions by sec. 3, act of Feb. 28, 1920 (41 Stat. 456).

The act of Feb. 27, 1893 (27 Stat. 484), limited the expenditures to $500.

Notes of Decisions.

Construction of statute.—A military station is merely synonymous with the term "military post," and means a place where troops are assembled; where military stores, animate and inanimate, are kept and distributed; where military duty is performed or military protection afforded; where something, in short, more or less closely connected with arms or war is kept or is to be done. Phisterer *v.* U. S., 12 Ct. Cls. 98, 107.

1152. Construction and repair of buildings done by contract.— * * * *Provided*, * * * and the erection, construction, and repair of all buildings and other public structures in the Quartermaster's Department shall, as far as may be practicable, be made by contract, after due legal advertisement: * * * *Act of Feb. 27, 1893 (27 Stat. 484), making appropriations for the support of the Army: Barracks and quarters.*

1153. Building contract not to exceed appropriation.—No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose. *R. S. 3733.*

Whoever, being an officer of the United States, shall knowingly contract for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purposes, shall be fined not more than two thousand dollars and imprisoned not more than two years. *Sec. 98, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1106).*

Notes of Decisions.

Contracts affected.—After an appropriation is exhausted, a contract not for the completion of any specific work is at an end, because executive officers are prohibited from continuing the employment of the contractors. (1857) 9 Op. Atty. Gen. 18; 1895 21 Op. Atty. Gen. 244.

Notice to contractor of statutory limit of expenditures.—See notes under 726, ante.

Where a contractor with the Government for excavation at a specified rate per yard was notified that the appropriation was only enough for 60,000 cubic yards, further excavations were at its own risk. San Francisco Bridge Co. v. U. S. (D. C. 1913), 209 Fed. 135.

Where Congress authorizes the Secretary of the Treasury to erect a building, but expressly limits the costs to a fixed amount, and the whole of that amount is paid to one contractor, he can not charge the defendants with any further liability. A contractor doing all the work under such a statute is chargeable with notice of the restriction set upon the cost of the building by Congress, and can not set up a breach of contract which will in effect do away with the restriction. Trenton Locomotive & Machine Mfg. Co. v. U. S. (1876), 12 Ct. Cl. 147.

Contract contemplating future appropriations.—The amount appropriated limits the liability of the Government; but the contract may provide for an extension or continuation of the work if Congress shall subsequently appropriate therefor. Smith v. U. S. (1913), 48 Ct. Cl. 235.

Authority to contract for the completion of an entire structure, the plan of which has been determined on, can not be inferred from the mere fact that an appropriation of a certain sum to be expended on the structure has been made. Hence a contract, though it might be good to the extent of such appropriation, could not be made to affix itself to future appropriations and control their expenditure. A contract of this character would be in violation of the spirit of this section if not of its express terms. (1877) 15 Op. Atty. Gen. 236.

The Secretary of the Navy is without authority, in view of the section, to incur any obligation for work on an uncompleted dry dock after exhaustion of the appropriation, even though immediate action is very important. (1896) 21 Op. Atty. Gen. 288.

Erection of mint—Sheet planking.—Where an act of Congress limits the expenditure for the erection of a mint and its machinery, the limitation does not extend to a contract for planking the street in front of the mint, consequent to the street being regraded after the premises have been conveyed to the Government. Curtis v. U. S. (1866), 2 Ct. Cl. 144.

Object of this and other statutes.—The object of R. S. 3679, 3732, 3503, this compilation, 224, 726, 1153, was to prevent executive officers from involving the Government in expenditures or liabilities beyond those contemplated and authorized by the lawmaking power. (1895) 21 Op. Atty. Gen. 248.

Effect as prohibiting continuing employment of contractors.—Executive officers are prohibited by R. S. 3679, 3732, 3733, 3503 from continuing the employment of the contractors and involving the Government in expenditures or liabilities beyond those contemplated by Congress, or authorized by law. (1895) 21 Op. Atty. Gen. 244.

1154. Water, sewers, fire protection, etc.—For procuring and introducing water to buildings and premises at such military posts and stations as from their situations require it to be brought from a distance; for the installation and extension of plumbing within buildings where the same is not specifically provided for in other appropriations; for the purchase and repair of fire apparatus, including fire-alarm systems; for the disposal of sewage, and expenses incident thereto, for repairs to water and sewer systems and plumbing; for hire of employees, $4,000,000: * * * *Act of June 5, 1920 (41 Stat. 961), making appropriations for the support of the Army: Quartermaster Corps.*

Similar provisions appear in previous appropriation acts.

1155. General provision for barracks, quarters, etc.—For barracks, quarters, stables, storehouses, magazines, administration and office buildings, sheds, shops, and other buildings necessary for the shelter of troops, public animals, and stores, and for administration purposes, except those pertaining to the Coast Artillery; for construction of reclamation plants;

for constructing and repairing public buildings at military posts; for hire of employees; for rental of the authorized allowance of quarters for officers, including members of the Officers' Reserve Corps when ordered to active duty, on duty with the troops at posts and stations where no public quarters are available; of barracks or authorized allowance of quarters for noncommissioned officers and enlisted men, men on duty where public quarters are not available, including enlisted men of the Regular Army Reserve, retired enlisted men, and members of the enlisted Reserve Corps when ordered to active duty; * * * and for buildings or portions of buildings for occupation by troops, for use as stables, storehouses, and offices, and for other military purposes; for the hire of recruiting stations and lodgings for recruits; for such furniture for the public rooms of officers' messes and for officers' quarters at military posts as may be approved by the Secretary of War; for wall lockers in permanent barracks and refrigerators in barracks and quarters; for screen doors, window screens, storm doors and sash, and window shades for barracks, offices, and quarters, and for flooring and framing for tents, and for the National Guard when called or drafted into the service of the United States, $8,500,000; * * * *Act of June 5, 1920 (41 Stat. 962), making appropriations for the support of the Army: Barracks and quarters.*

Similar provision appears in previous appropriation acts.

For provision for incidental expenses for engineer depots, including repairs of, and materials to repair, public buildings, see act of July 11, 1919 (41 Stat. 123), making appropriations for the support of the Army: Engineer Department.

1156. Construction, maintenance, etc., of barracks and quarters for seacoast defenses.—Barracks and quarters, seacoast defenses: For minor structures in connection with the adopted project for seacoast defenses, including the installation therein of plumbing and of heating and lighting apparatus, to be expended as in the judgment of the Secretary of War may be necessary, $40,000. *Act of Mar. 3, 1921 (41 Stat. 1349), making appropriations for fortifications, etc.*

For construction of barracks and quarters for the seacoast artillery in the Hawaiian Islands, including water and sewer systems, and so forth, $225,000: *Provided*, That no part of this sum shall be expended for the construction of officers' quarters to cost in excess of the limits established by the sundry civil appropriation Act approved June 25, 1910. *Act of March 3, 1919 (40 Stat. 1307), making appropriations for fortifications, etc.*

Military Posts, Hawaiian Islands: For completion of quarters for one regiment of Artillery at Schofield Barracks, $520,000. *Act of Mar. 4, 1921 (41 Stat. 1385), making appropriations for sundry civil expenses.*

* * * For the construction of barracks, quarters, and other necessary buildings for Coast Artillery troops at Fort Sherman, including water and sewer systems, roads, walks, and so forth, $140,000;

No part of the two foregoing appropriations shall be expended for the construction of officers' quarters to cost in excess of the limits established by the sundry civil appropriation act, approved June 25, 1910; * * * *Act of Mar. 3, 1919 (40 Stat. 1308), making appropriations for fortifications, etc.: Panama Canal fortifications.*

For continuing the construction of barracks, quarters, storehouses, and other buildings necessary for accommodating the Coast Artillery troops to be stationed in the vicinity of the Panama Canal, including water, sewer, and electrical systems, roads, walks, and so forth, $100,000, * * * *Act of Mar. 3, 1921 (41*

Stat. 1352), making appropriations for fortifications, etc.: Panama Canal fortifications.

Similar provisions have been made in previous appropriation acts.
For act of June 25, 1910, above, limiting cost of quarters, see 1157, post.

1157. Cost of barracks and quarters.— * * * *Provided*, That hereafter no money appropriated for military posts shall be expended for the construction of quarters for officers of the army or for barracks and quarters for the artillery the total cost of which, including the heating and plumbing apparatus, wiring, and fixtures, shall exceed, in the case of quarters of a general officer, the sum of fifteen thousand dollars, of a colonel or an officer above the rank of captain, twelve thousand dollars, and of an officer of and below the rank of captain, nine thousand dollars. *Act of June 25, 1910 (36 Stat. 721), making appropriations for sundry civil expenses: Military posts.*

In each of the sundry civil appropriation acts subsequent to said act of May 27, 1908, the further appropriation for "Barracks and quarters, seacoast defenses," is accompanied by a proviso, "That no part of this sum shall be used for the construction of officers' quarters to cost in excess of the limits established," in said act. The limits fixed thereby were the same as those prescribed by the more permanent provision of this act.

1158. Cost of barracks and quarters for Coast Artillery.— * * * *Provided*, That for the erection of barracks and quarters for artillery in connection with the project adopted for seacoast defense there shall not hereafter be expended at any one point more than one thousand two hundred dollars per man for each man required for one relief to man the guns at the post up to eighty-three men, the present permanent strength of a battery, enlisted and commissioned, and for each man required beyond this number six hundred dollars per man, from any appropriation made by Congress, unless special authority of Congress be granted for a greater expenditure; * * * *Act of June 6, 1900 (31 Stat. 624), making appropriations for sundry civil expenses.*

This was part of a proviso annexed to the appropriation for the erection of the barracks and quarters described therein.
A provision for the same purpose prescribing different limitations was made by the similar act for the fiscal year 1899, sec. 1, act of July 1, 1898 (30 Stat. 629).
The permanent strength of Coast Artillery batteries (or companies) is no longer prescribed. See notes to 2137, post.

1159. Shelter in the Philippine Islands.—For the proper shelter and protection of officers and enlisted men of the Army of the United States lawfully on duty in the Philippine Islands, including the acquisition of title to building sites where necessary, to be expended in the discretion of the President, and to be immediately available, one million five hundred thousand dollars; and the President is directed to report a detailed statement of the expenditure of this sum to each session of Congress until the entire appropriation is expended. *Act of June 30, 1902 (32 Stat. 516), making appropriations for the support of the Army.*

Continuing the work of providing for the proper shelter and protection of officers and enlisted men of the Army of the United States lawfully on duty in the Philippine Islands, including repairs and payment of rents, the acquisition of title to building sites, and such additions to existing military reservations as may be necessary, and including also shelter for the animals and supplies, and all other buildings necessary for post administration purposes and for shelter and repair thereof, * * * $300,000: *Provided*, That no part of said sum shall be expended for the construction of quarters for officers of the Army the total cost of which, including the heating and plumbing apparatus, wiring,

and fixtures, shall exceed in the case of quarters of a general officer the sum of $8,000; of a colonel or officer above the rank of captain, $6,000; and of an officer of and below the rank of captain, $4,000. *Act of June 5, 1920 (41 Stat. 964), making appropriations for the support of the Army: Barracks and quarters, Philippine Islands.*

Similar provisions appear in previous appropriation acts.

1160. Shelter in China.— * * * and rentals for the United States troops in China, * * * *Act of June 5, 1920 (41 Stat. 964), making appropriations for the support of the Army: Barracks and quarters, Philippine Islands.*

1161. Quarters for hospital stewards.— * * * *Provided*, That hereafter the posts at which such quarters shall be constructed shall be designated by the Secretary of War, and such quarters shall be built by contract, after legal advertisement, whenever the same is practicable. *Act of Feb. 27, 1893 (27 Stat. 484), making appropriations for the support of the Army.*

The portion of the provision omitted here specified expenditure for quarters for hospital stewards, which grade has since been discontinued.

A similar provision, without the word "hereafter," was contained in previous appropriation acts.

1162. Construction, repair, etc., of quarters for hospital stewards.—For construction and repair of quarters for hospital stewards at military posts already established and occupied, including the extra duty pay of enlisted men employed on the same, $20,000. *Act of June 5, 1920 (41 Stat. 965), making appropriations for the support of the Army: Quarters for hospital stewards.*

Similar provisions appear in previous appropriation acts. See also 1161, ante, and 1679, post.

1163. Cost of hospitals.— * * * *Provided*, That no building or structure of a permanent nature, the cost of which shall exceed $30,000, shall hereafter be erected for use as an Army hospital unless by special authority of Congress. *Act of May 12, 1917 (40 Stat. 58), making appropriations for the support of the Army: Construction and repair of hospitals.*

1164. Requisition of private property for hospital uses.—The President is authorized, through the Secretary of War, during the existing emergency, from time to time, to requisition or otherwise take over for the United States any lands, including the buildings thereon and their equipment, or any temporary use thereof, required for hospital facilities. He shall ascertain and pay, from the proper appropriation, a just compensation therefor. If the compensation so ascertained be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States in the United States district court for the judicial district where the property is situated to recover such further sum as, added to the seventy-five per centum, will make up such amount as will be just compensation: *Provided*, That hospital facilities shall be so situated as to provide for the care of patients as near the place from which they entered the Army or Navy as practicable, and that the facilities shall be in every case in keeping with the number of men in the service from the different States: *Provided further*, That property shall not be taken over under the foregoing power at an aggregate cost in excess of $15,000,000. *Act of Nov. 4, 1918 (40 Stat. 1029).*

1165. Construction, repair, etc., of hospitals.—For construction and repair of hospitals at military posts already established and occupied, including the extra-duty pay of enlisted men employed on the same, and including also all

expenditures for construction and repairs required at the Army and Navy Hospital at Hot Springs, Arkansas, and for the construction and repair of general hospitals and expenses incident thereto, and for additions needed to meet the requirements of increased garrisons, and for temporary hospitals in standing camps and cantonments; for the alteration of permanent buildings at posts for use as hospitals, construction and repairs of temporary hospital buildings at permanent posts, construction and repair of temporary general hospitals, rental or purchase of grounds, and rental and alteration of buildings for use for hospital purposes in the District of Columbia and elsewhere, including necessary temporary quarters for hospital personnel, outbuildings, heating and laundry apparatus, plumbing, waters and sewers, and electric work, cooking apparatus, and roads and walks for the same, $1,594,000; * * * *Act of June 5, 1920* (*41 Stat. 964*), *making appropriations for the support of the Army: Construction and repair of hospitals.*

Similar provisions appear in previous appropriation acts.
But see 1679, post, as to extra-duty pay.

1166. Post offices at military posts.—Hereafter, at all military posts where post offices have been established, the Secretary of War shall assign proper and suitable room or rooms for post-office purposes. *Act of Aug. 1, 1914* (*38 Stat. 629*), *making appropriations for sundry civil expenses.*

1167. Post gardens or exchanges.— * * * *And provided further*, That hereafter no money appropriated for the support of the Army shall be expended for post gardens or exchanges, but this proviso shall not be construed to prohibit the use, by post exchanges, of public buildings or public transportation when, in the opinion of the Quartermaster-General, not required for other purposes. *Act of July 16, 1892* (*27 Stat. 178*), *making appropriations for the support of the Army.*

For continuing the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school, library, reading, lunch, amusement rooms, and gymnasium, including repairs to buildings erected at private cost, in the operation of the Act approved May 31, 1902, for the rental of films, purchase of slides, supplies for and making repairs to moving-picture outfits, and for similar and other recreational purposes at training and mobilization camps now established, or which may be hereafter established, and for such purposes not enumerated above as the Secretary of War may deem advisable, to be expended in the discretion and under the direction of the Secretary of War, $500,000. *Act of June 5, 1920* (*41 Stat. 963*), *making appropriations for the support of the Army: Military post exchanges.*

Similar provisions appear in previous appropriation acts.

1168. Laundries.— * * * for the construction, operation, and maintenance of laundries at military posts in the United States and its island possessions; * * * *Act of June 5, 1920* (*41 Stat. 958*), *making appropriations for the support of the Army: Regular supplies, Quartermaster Corps.*

1169. Theater defined.— * * * Every edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance money is received, not including halls or armories rented or used occasionally for concerts or theatrical representations, and not including edifices owned by religious, educational or charitable institutions, societies or organizations where all the proceeds from admissions inure exclusively to the benefit of such institutions, societies or organizations or ex-

clusively to the benefit of persons in the military or naval forces of the United States, shall be regarded as a theater: * * * *Sec. 1001 (5), act of Feb. 24, 1919 (40 Stat. 1127).*

1170. Storage and shipping facilities.—For inland and port storage, including all necessary buildings, docks, tracks, handling, and other facilities for Government supplies, including rentals and hire of the necessary employees, $100. *Act of June 5, 1920 (41 Stat. 967), making appropriations for the support of the Army: Inland and port storage and shipping facilities.*

Similar provisions appear in previous appropriation acts.
Provisions of R. S. 355, ante, 1029, are waived by act of June 5, 1920 (41 Stat. 894).

1171. Sale of storage property.—That the President is hereby authorized, through the head of any executive department, upon terms and conditions considered advisable by him or such head of department, to sell or lease real property or any interest therein or appurtenant thereto acquired by the United States of America since April 6, 1917, for storage purposes for the use of the Army, which in the judgment of the President or the head of such department is no longer needed for use by the United States of America, and to execute and deliver in the name of the United States and in its behalf any and all contracts, conveyances, or other instruments necessary to effectuate any such sale or lease.

That all moneys received by the United States as the proceeds of any such sale or lease shall be deposited in the Treasury of the United States to the credit of "Miscellaneous receipts" and a full report of the same shall be submitted annually to Congress. *Chap. II, act of July 11, 1919 (41 Stat. 129), making appropriations for the support of the Army.*

1172. Exchange of Army cold-storage plant, Chicago, Ill.—That the President is hereby authorized, through the Secretary of War, upon terms and conditions considered advisable by the Secretary of War, to dispose of the United States Army cold-storage plant in the city of Chicago, State of Illinois, with machinery and equipment therein contained, and appurtenances thereunto belonging, and to accept in part payment therefor a warehouse adjacent to the Army general supply depot in the city of Chicago, State of Illinois, containing approximately six hundred and fifty thousand square feet of storage space, together with the land comprising the site of same: *Provided*, That such exchange shall be effected without expenditure for this purpose by the United States, except necessary costs of conveyancing not exceeding $500, hereby appropriated for this purpose. The President, through the Secretary of War, is hereby authorized to execute and deliver in the name of the United States of America and in its behalf any and all contracts, conveyances, or other instruments necessary to effect such sale or exchange.

That all moneys received by the United States as the proceeds of such sale or exchange shall be deposited in the Treasury of the United States to the credit of "Miscellaneous receipts," and a full report of the same shall be submitted to Congress. *Chap. II, act of July 11, 1919 (41 Stat. 130), making appropriations for the support of the Army.*

1173. Useless arsenals.—The Secretary of War is authorized to abolish such of the arsenals of the United States as, in his judgment, may be useless or unnecessary. *R. S. 1666.*

The arsenal at Detroit, Mich., was authorized to be sold, by act of Mar. 3, 1875 (18 Stat. 510).

The act of May 25, 1920 (41 Stat. 623), directed that certain buildings at Watertown, N. Y., be turned over to the Postmaster General.

1174. Recuperator shop, Rock Island.—The remaining unexpended balances, not to exceed $450,000, of the appropriation of $2,065,000 for increasing the facilities for the manufacture of field artillery matériel, including the necessary buildings and equipment, and for providing additional storage space and other storage facilities, either by building and equipping new storehouses or by building and equipping shops for manufacturing purposes and equipping as storehouses shops thereby vacated and made available (Act of June 12, 1917) and of the appropriation of $1,295,200 additional for increasing facilities for the manufacture of field artillery matériel, including the necessary buildings and equipment (Act of October 6, 1917) are made available for the erection of a shop building for the manufacture of recuperators at Rock Island Arsenal: *Provided*, That this sum shall not be available until the present plant for the manufacture of recuperators is disposed of. *Act of Nov. 4, 1919 (41 Stat. 333), making appropriatinos to supply deficiencies: War Department, Armories and arsenals.*

For act of June 12, 1917, referred to, see 40 Stat. 127; for act of Oct. 6, 1917, see 40 Stat. 353.

1175. Storage facilities for ordnance.—The Chief of Ordnance, United States Army, is authorized to expend from the unexpended balance of appropriations heretofore made under the title "Armament of fortifications" for the construction of storage facilities, including necessary appurtenances, for ammunition and components thereof, for cannon, small arms, machine guns, and trench warfare, and for other ordnance material, not exceeding $5,000,000, which amount shall remain available during the fiscal year 1921: *Provided*, That the Chief of Ordnance, United States Army, is hereby authorized to expend such part, not exceeding $98,000, of the amount herein authorized as may be necessary for the purchase of land in the vicinity of Ogden, Utah, to be used as a site for an ammunition storage depot: *Provided further*, That no part of the construction work hereunder shall be done on a cost-plus percentage basis: *Provided further*, That no part of the appropriations herein made or made available shall be used for the construction of permanent high explosive storage facilities at or near Sparta, Wisconsin: *Provided further*, That the construction work hereunder shall be done by contract, let to the lowest responsible bidder, and no bid shall be accepted for any building to cost in excess of $2.45 per square foot for an unlined building or $2.90 for a lined building. *Act of Mar. 6, 1920 (41 Stat. 510).*

Act of Mar. 6, 1920 (41 Stat. 510), making appropriations for deficiencies, Ordnance Department, contains a proviso, "That the Chief of Ordnance, United States Army, is hereby authorized to expend such part, not exceeding $98,000, of the amount herein authorized as may be necessary for the purchase of land in the vicinity of Ogden, Utah, to be used as a site for an ammunition storage depot."

1176. Utilities pertaining to a single branch of the Army.— * * * *Provided further*, That utilities pertaining exclusively to any branch of the Army may be operated by such branches. *Sec. 9, act of June 3, 1916 (39 Stat. 170), as amended by sec. 9, act of June 4, 1920 (41 Stat. 766).*

1177. Young Men's Christian Association building.—That authority is hereby given to the Secretary of War, in his discretion, to grant permission by revocable license to the International Committee of Young Men's Christian Associations of North America to erect and maintain, on the military reservations within the United States or its island possessions, such buildings as their work for the promotion of the social, physical, intellectual, and moral welfare

of the garrisons may require, under such regulations as the Secretary of War may impose. *Act of May 31, 1902 (32 Stat. 282).*

Repairs to buildings erected in the operation of this act are provided for in the recent Army appropriation acts.

1178. American National Red Cross warehouses.— * * * Authority is hereby given to the Secretary of War to grant permission, by revocable license, to the American National Red Cross to erect and maintain on any military reservations within the jurisdiction of the United States buildings suitable for the storage of supplies, or to occupy for that purpose buildings erected by the United States, under such regulations as the Secretary of War may prescribe, such supplies to be available for the aid of the civilian population in case of serious national disaster. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 785).*

1179. Authority to erect buildings on public grounds, District of Columbia.— Hereafter there shall not be erected on any reservation, park, or public grounds, of the United States within the District of Columbia, any building or structure without express authority of Congress. *Act of Aug. 24, 1912 (37 Stat. 444).*

Notes of Decisions.

License to construct railroad.—The granting of a revocable license to the Washington & Glen Echo Ry. Co. to lay a single track on the Aqueduct Reservation near Cabin John Bridge does not conflict with act of July 29, 1892 (27 Stat. 326), and act of June 3, 1896 (29 Stat. 246), authorizing the construction of the Washington & Great Falls Ry. and providing that there shall be but one railway parallel to and near the Conduit Road, that provision being merely a restriction upon the latter company. (1898) 22 Op. Atty. Gen. 240.

The license granting the right to construct the road should contain such restrictions or regulations as may be necessary to fix its location and protect Government property. Id.

Long-continued exercise of a power of this kind by the Secretary of War, and the open and notorious use of Government reservations by such licensees without legislative objection from Congress or the adoption of any legislative rule on the subject, implies the tacit assent of Congress to this custom. Id.

The right to issue such a license can not be maintained upon any ground except the benefit to the public interests, and can not be used as a basis for granting, under the guise of a temporary license, a permanent right to maintain a railroad. It confers no contractual right upon the licensee. Id.

1180. Contracts for rental of buildings in the District of Columbia.— * * * and hereafter no contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or any part of building. *Act of March 3, 1877 (19 Stat. 370).*

For rent of buildings and parts of buildings in the District of Columbia for military purposes during the fiscal year 1921, $200,000: *Provided*, That this appropriation shall not be available if space is provided by the Public Buildings Commission in Government-owned buildings. *Act of June 5, 1920 (41 Stat. 965), making appropriations for the support of the Army: Rent of buildings, Quartermaster Corps.*

Similar provisions appear in previous appropriation acts.

Notes of Decisions.

Applicability and construction of statute. The statute does not relate to implied contracts arising from the acts of public officers in the performance of their duties. Semmes v. U. S. (1891), 26 Ct. Cl. 119; Rives v. Same (1893), 28 Ct. Cl. 249.

No contract can be implied from the occupancy of buildings which will involve the Government in a greater liability than that fixed by Congress. Hooe v. U. S. (1908), 43 Ct. Cl. 245.

The hire of a building for use as an office by the officer assigned to the duty of taking charge of the construction of the State, War, and Navy Department building is in violation of this section. (1877) 15 Op. Atty. Gen. 274.

An appropriation for the expenses of the Geological Survey, not in terms providing for the rent of any building in the District of Columbia to be used for the Survey, does not authorize a lease for such building under this act. (1881) 17 Op. Atty. Gen. 87.

This section applies to the renting of vault room in the District of Columbia to store emergency national bank notes until additional vault room can be constructed in the Treasury building. (1909) 27 Op. Atty. Gen. 270.

The Secretary of the Treasury is not authorized by sec. 16 of act of May 30, 1908 (35 Stat. 552), to rent vault room in the District of Columbia for the storage of emergency national bank notes until additional vault room can be constructed in the Treasury building. Id.

1181. Buildings rented instead of those previously rented.— * * * And where buildings are rented for public use in the District of Columbia, the Executive Departments are authorized, whenever it shall be advantageous to the public interest, to rent others in their stead: *Provided*, That no increase in the number of buildings now in use, nor in the amounts paid for rents, shall result therefrom. *Act of Aug. 5, 1882 (22 Stat. 241), making appropriations for legislative, executive and judicial expenses.*

1182. Lease of buildings in the District of Columbia in time of war.— * * * *Provided further*, That in time of war, or when war is imminent, the Secretary of War is hereby authorized, in his discretion, to rent or lease any building or part of building in the District of Columbia that may be required for military purposes. *Act of July 9, 1918 (40 Stat. 861).*

1183. Lease of storage accommodations in the District of Columbia.—The heads of the several executive departments are authorized to enter into contracts for the lease, for periods of not exceeding six years, of modern fireproof storage accommodations within the District of Columbia for their respective departments, at rates per square foot of available floor space not exceeding 25 cents, payable from appropriations that Congress may from time to time make for rent of buildings for their respective departments. *Act of Mar. 2, 1913 (37 Stat. 718), making appropriations for the support of the Army.*

1184. Requisition of buildings in the District of Columbia in time of war.— The Secretary of War is authorized, for the official purposes of the War Department, and within the limits of the appropriations for rent made by this or any other Act making appropriations for the War Department, to requisition the use of, and take possession of, any building or any space in any building, and the appurtenances thereof, in the District of Columbia, other than a dwelling house occupied as such or a building occupied by any other branch of the United States Government, and he shall ascertain and pay just compensation for such use. If the amount of compensation so ascertained be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of such amount and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such

use in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five, of the Judicial Code. *Act of July 8, 1918 (40 Stat. 826).*

1185. State, War, and Navy Department Building.— * * * *Provided,* That the commission in charge, or a majority of the members thereof, may at any time reapportion space among the departments now occupying the State, War, and Navy Department Building if the same can be done with a reduction of the amount of floor space occupied by any branch of the public service in said building, the reduction or avoidance of public expense for rent of office or storage space for the Government, and the reduction of the number of watchmen required for said building from forty to not more than thirty-eight: *Provided further,* That no arrangement of space made hereunder shall involve the ejectment from the building of any department or branch of the public service now occupying the same: *Provided further,* That no rooms vacated under any arrangement of space hereunder shall be used for museum purposes. *Act of May 10, 1916 (39 Stat. 94), making appropriations for legislative, executive and judicial expenses.*

For personnel of above commission see 498, ante. A Public Buildings Commission is now authorized by 1192, post.

1186. Temporary buildings in Potomac Park.—For two three-story temporary office buildings of reinforced concrete with wings sixty feet wide, one for the Navy Department to contain approximately nine hundred and forty thousand square feet and one for the War Department to contain approximately eight hundred and thirty-five thousand square feet, to be erected under the direction of the Secretary of the Navy in Potomac Park west of Seventeenth Street and south of B Street, beginning with the Navy Department Building at a point not less than two hundred and thirty-five feet west of the westerly curb line of Seventeenth Street and fifty feet south from the southerly curb line of B Street and extending southerly not more than six hundred and twenty feet from the said B street curb line and westerly to a point not beyond the easterly building line of Twenty-first Street, including electrical equipment and a temporary heating plant for both buildings, to be located south of D Street and west of Twenty-fifth Street, with necessary connecting mains, $5,775,000: *Provided,* That the Secretary of the Navy is authorized to contract for the heating of the buildings authorized in this paragraph in lieu of the erection and operation of a heating plant authorized therefor, if in his discretion the contracting for said heating is more economical and to the best interests of the Government. *Act of Mar. 28, 1918 (40 Stat. 483), making appropriations to supply urgent deficiencies.*

1187. Temporary building between Virginia Avenue and B Street NW.—The maintenance and protection of the temporary office building erected by the War Department between Eighteenth and Nineteenth Streets and B Street and Virginia Avenue northwest shall be under the supervision of the superintendent of the State, War, and Navy Department Building. *Act of June 4, 1918 (40 Stat. 598).*

Funds to build the above building, which was erected in the fall of 1917, were advanced out of the President's fund for national security and defense.

1188. Temporary office buildings in Henry Park and Seaton Park.—For temporary office buildings, including heating and lighting, for the use of the War and Navy Departments, to contain approximately one million and fifty-five thousand square feet, to be erected under the direction of the Secretary of War

in Henry Park, reservation numbered four, Sixth and B Streets, $2,000,000. Space in said building shall be allotted by the officer in charge of Public Buildings and Grounds upon the joint order of the Secretary of War and the Secretary of the Navy: *Provided*, That within two years after the conclusion of the existing war, the land above referred to shall again be reserved for the erection of the George Washington Memorial Hall. *Act of Oct. 6, 1917 (40 Stat. 368), making appropriations to supply urgent deficiencies.*

For two three-story temporary office buildings of the type erected in Henry Park, one to be located in Seaton Park (north) between Four-and-a-half and Sixth Streets and south of Missouri Avenue and to contain approximately three hundred and seventy thousand square feet and one to be located on the Mall between Seventh and Ninth Streets and B Street north and B Street south and to contain approximately three hundred thousand square feet, and for a three-story temporary office building of reinforced concrete to be located in Seaton Park (south) between Four-and-a-half and Sixth Streets and north of Maine Avenue and to contain approximately two hundred and seventy thousand square feet, including heating and lighting and the necessary connections, to be erected under the direction of the Secretary of War for the use of the War Department, $2,377,500.

The maintenance and protection of all of the foregoing temporary buildings when completed shall be under the supervision and direction of the superintendent of the State, War, and Navy Department Buildings. *Act of Mar. 28, 1918 (40 Stat. 483), making appropriations to supply urgent deficiencies.*

1189. Temporary building in Smithsonian Grounds.—That authority be, and is hereby, given to the Board of Regents of the Smithsonian Institution to grant permission, under such conditions and restrictions as they may deem necessary, to the Secretary of War to erect for the use of the War Department a temporary structure or structures in the Smithsonian Grounds in the city of Washington: *Provided*, That the Secretary of War shall have such building or buildings removed from the said ground and the site or sites thereof placed in as good condition as at present within three years from the date of the approval of this resolution. *Joint Res. 5, June 9, 1917 (40 Stat. 102).*

To enable the Regents of the Smithsonian to heat, and to fit up for an exhibition of the aircraft and accessories produced by this Government since the declaration of war, the temporary metal structure erected in the Smithsonian Grounds by the War Department under the authority of public resolution Numbered 5, approved June 9, 1917, $14,000: *Provided*, That the Secretary of War is hereby authorized to transfer the custody and control of the said building to the Regents of the Smithsonian Institution. *Act of Nov. 4, 1919 (41 Stat. 328), making appropriations to supply deficiencies.*

1190. Removal of temporary office buildings.—Where any of the buildings named herein have been erected on private land and the consent of the owners can not be obtained to a continuance of the leases thereon or the occupancy thereof by the United States, the commission in charge of the State, War, and Navy Department buildings is authorized to remove such buildings, upon approval of the President, either by sale or otherwise, as may be to the best interests of the United States. *Act of May 29, 1920 (41 Stat. 663).*

The commission in charge of the State, War, and Navy Department buildings is authorized to remove, by sale or otherwise as may be to the best interests of the United States, units A and B of the Mall group of temporary office buildings and the Council of National Defense Building, located on D Street between

Seventeenth and Eighteenth Streets northwest, and the Corcoran Court Building, located on New York Avenue between Seventeenth and Eighteenth Streets northwest. *Act of Mar. 3, 1921 (41 Stat. 1282), making appropriations for legislative, executive and judicial expenses.*

1191. Telephone switchboard building of the War Department.—Authority is given the Secretary of War to erect a telephone switchboard building on lots numbered five and six, block one hundred and sixty-nine, situated between Seventeenth and Eighteenth and F and G Streets northwest, Washington, District of Columbia. *Act of Mar. 28, 1918 (40 Stat. 473).*

1192. Public Buildings Commission.—With a view to the control and allotment of space in owned or leased Government buildings in the District of Columbia, a Public Buildings Commission is hereby created to be composed of two Senators to be appointed by the President of the Senate and two Members of the House of Representatives to be appointed by the Speaker, who shall serve thereon only so long as they are Members of Congress, and the Superintendent of the Capitol Building and Grounds, the officer in charge of public buildings and grounds, and the Supervising Architect or the Acting Supervising Architect of the Treasury during any vacancy in said office. Said commission shall elect one of its members as chairman of the commission and is authorized to employ such expert clerical or other services as it may deem necessary.

Any vacancies in said commission shall be filled in the same manner as the original appointments were made.

Said commission shall have the absolute control of and the allotment of all space in the several public buildings owned or buildings leased by the United States in the District of Columbia, with the exception of the Executive Mansion and office of the President, Capitol Building, the Senate and House Office Buildings, the Capitol power plant, the buildings under the jurisdiction of the Regents of the Smithsonian Institution, and the Congressional Library Building, and shall from time to time assign and allot, for the use of the several activities of the Government, all such space.

For expenses of said commission, $10,000, to be immediately available and remain available until expended and to be paid out on vouchers signed by the chairman of said commission. *Sec. 10, act of Mar. 1, 1919 (40 Stat. 2169–70).*

Prior to the enactment of the above statute, the Secretaries of State, War, and Navy were constituted a commission over the State, War, and Navy Building by act of Mar. 3, 1883 (22 Stat. 553), post, 498.

1193. Zoning Commission, District of Columbia.- That to protect the public health, secure the public safety, and to protect property in the District of Columbia there is hereby created a Zoning Commission, which shall consist of the Commissioners of the District of Columbia, the officer in charge of public buildings and grounds of the District of Columbia, and the Superintendent of the United States Capitol Building and Grounds, which said commission shall have all the powers and perform all the duties hereinafter specified and shall serve without additional compensation. Such employees of the government of the District of Columbia as may be necessary to carry out the purposes of this Act shall be assigned to such duty by the Commissioners of the District of Columbia without additional compensation. * * * *Sec. 1, act of Mar. 1, 1920 (41 Stat. 500).*

1194. Schools for children of employees.—Ordnance reservations, civilian schools: For the maintenance and operation of schools for children on ordnance

reservations, $28,000. *Act of Mar. 4, 1921 (41 Stat. 1385), making appropriations for sundry civil expenses: Armories and arsenals.*

Similar provisions occur in previous appropriation acts. Such schools were established by authority of the deficiency act of Nov. 4, 1919 (41 Stat. 233).

1195. Housing for industrial workers, etc.—That the President, for the purposes of providing housing, local transportation and other general community utilities for such industrial workers as are engaged in arsenals and navy yards of the United States and in industries connected with and essential to the national defense, and their families, and also employees of the United States whose duties require them to reside in the District of Columbia, and whose services are essential to war needs, and their families, only during the continuation of the existing war, is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To purchase, acquire by lease, construct, requisition, or acquire by condemnation or by gift such houses, buildings, furnishings, improvements, local transportation and other general community utilities and parts thereof as he may determine to be necessary for the proper conduct of the existing war.

(b) To purchase, lease, requisition, or acquire by condemnation or by gift any improved or unimproved land, or any right, title, or interest therein on which such houses, buildings, improvements, local transportation and other general community utilities and parts thereof have been or may be constructed: *Provided*, That colleges, museums, libraries, State or municipal buildings, and the furnishings in private dwellings shall not be acquired except by contract, nor shall any occupied dwelling or place of abode be taken under the powers in this Act given except by contract unless the necessity thereof shall be determined by a judge of the circuit or district court of the United States exercising jurisdiction in the locality on petition setting forth the reason and necessity for such taking; the hearing on such petition shall be upon notice to the owner and occupant of such dwelling, and the determination of such judge shall be final, but in no event shall any occupied private dwelling house be taken except by contract unless such dwelling be upon lands desired for the construction of a Government structure: *Provided further*, That no existing limitation upon the right of any person to make a contract with the United States shall apply to owners whose property the President determines is necessary for Government purposes and desires to either lease or purchase by contract under this or any other Act authorizing the President to acquire property by lease or purchase.

(c) To equip, manage, maintain, alter, rent, lease, exchange, sell, and convey such lands, or any right, title, or interest therein, houses, buildings, improvements, local transportation and other general community utilities, parts thereof, and equipment upon such terms and conditions as he may determine: *Provided*, That no sale and conveyance shall be made hereunder on credit without reserving a first lien on such property for the unpaid purchase money: *Provided further*, That in no case shall any property hereby acquired be given away, nor shall rents be furnished free, but the rental charges shall be reasonable and just as between the employees and the Government.

(d) To aid in providing, equipping, managing, and maintaining houses, buildings, improvements, local transportation and other general community utilities by loan or otherwise to such person or persons and upon such terms and conditions as he may determine: *Provided*, That no loan shall be made at a less rate of interest than five per centum per annum, and such loan shall be properly

secured by lien, mortgage, or otherwise: *And provided further*, That no loan shall be made and no house or money given under this Act to any person not an American citizen.

(e) To take possession of, alter, repair, improve, and suitably arrange for living purposes to be used under the terms of this Act all houses on square six hundred and thirty-three except the Maltby Building, owned by the United States, together with any other houses in the District of Columbia owned by the Government and not now occupied. The President shall, in the construction of buildings in the District of Columbia, make use of any lands owned by the Government of the United States deemed by him to be suitable for the purpose and which have not heretofore been dedicated by Act of Congress for specific building. *Sec. 1, act of May 16, 1918 (40 Stat. 550).*

The United States Housing Corporation was formed under authority of the act of June 4, 1918 (40 Stat. 595), to handle the matter of housing.

1196. Disposition of housing facilities after the war.—That the power and authority granted herein shall cease with the termination of the present war as formally proclaimed by the President, except the power and authority to care for, rent, operate, and sell such property as remains undisposed of; to conclude and execute contracts or other obligations made or incurred during the war or in carrying out the provisions of this section; to collect the principal and interest of loans made or other sums due under obligations entered into under this Act; and to take such other steps as are necessary to protect the interests of the Government and to fulfill the obligations duly incurred in carrying out the powers granted by said Act. All property shall be sold at its fair market value as soon as can be advantageously done, and a reasonable effort shall be made to sell the houses direct to prospective individual home owners for their own occupancy before they are offered for sale in bulk or to speculative investors. Full power and authority is hereby given to sell and convey all such property remaining undisposed of after the termination of the present war. All deeds, contracts, or other instruments of conveyance executed by the United States Housing Corporation by its duly authorized officer or officers where the legal title to the property in question is in the name of said corporation, and by the United States of America by the Secretary of Labor where the title to the property in question is in the name of the United States of America, shall be conclusive evidence of the transfer of title to the property in question according to the purport of such deeds, contracts, or other instruments of conveyance, and in no case shall any purchaser or grantee thereunder be required to see to the application of any purchase money: *Provided, however*, That no sale or conveyance shall be made hereunder on credit without reserving a first lien on such property for the unpaid purchase money: *Provided further*, That in no case shall any such property be given away; nor shall rents be furnished free, but the rental charges shall be reasonable and just as between the tenants and the Government. The United States Housing Corporation (a corporation organized by authority of the President of the United States, pursuant to the provisions of an Act approved May 16, 1918, entitled "An Act to authorize the President to provide housing for war needs," and an Act approved June 4, 1918, entitled "An Act making appropriations to supply additional urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, on account of war expenses, and for other purposes") shall wind up its affairs and dissolve as soon as it has disposed of said property and performed the duties and obligations herein set forth: *Provided*, That the corporation shall

report to Congress on December 31, 1919, and on June 30, 1920, all sales made and the amounts received therefrom together with a detailed statement of receipts and expenditures on account of the other activities authorized by law, *Sec. 5, act of May 16, 1918 (40 Stat. 552), as amended by act of July 19, 1919 (41 Stat. 224),* [illegible]

* * * *Provided*, That the United States Housing Corporation is hereby authorized to allow as an offset any equitable claim in any collection made against any State or any political subdivision thereof. *Act of Mar. 4, 1921 (41 Stat. 1426), making appropriations for sundry civil expenses; United States Housing Corporation.*

1197. Zones of prohibition about plants, mines, etc.— * * * *Provided*, That the President of the United States be, and hereby is, authorized and empowered, at any time after the passage of this Act, to establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and that he is hereby authorized and empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones, and that any violation of the President's regulations in this regard shall be punished by imprisonment for not more than one year, or by fine of not more than $1,000, or by both such fine and imprisonment: *Provided further*, That nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the food-control Act, approved August tenth, nineteen hundred and seventeen. *Par. 4, sec. 1, act of Nov. 21, 1918 (40 Stat. 1047).*

Joint resolution of Sept. 12, 1918 (40 Stat. 958), embodies a similar provision, excepting the proviso contained in the last three lines above.

1198. Nitrate plants, etc.—The President of the United States is hereby authorized and empowered to make, or cause to be made, such investigation as in his judgment is necessary to determine the best, cheapest, and most available means for the production of nitrates and other products for munitions of war and useful in the manufacture of fertilizers and other useful products by water power or any other power as in his judgment is the best and cheapest to use; and is also hereby authorized and empowered to designate for the exclusive use of the United States, if in his judgment such means is best and cheapest, such site or sites, upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act; and is further authorized to construct, maintain, and operate, at or on any site or sites so designated, dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products.

The President is authorized to lease, purchase, or acquire, by condemnation, gift, grant, or devise, such lands and rights of way as may be necessary for the construction and operation of such plants, and to take from any lands of the United States, or to purchase or acquire by condemnation materials, minerals, and processes, patented or otherwise, necessary for the construction and operation of such plants and for the manufacture of such products. * * *

The President is hereby authorized and empowered to employ such officers, agents, or agencies as may in his discretion be necessary to enable him to carry out the purposes herein specified, and to authorize and require such officers, agents, or agencies to perform any and all of the duties imposed upon him by the provisions hereof.

The sum of $20,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended, to enable the President of the United States to carry out the purposes herein provided for.

The plant or plants provided for under this Act shall be constructed and operated solely by the Government and not in conjunction with any other industry or enterprise carried on by private capital. * * * *Sec. 124, act of June 3, 1916 (39 Stat. 215).*

Sec. 124, supra, also provided that the funds for these nitrate plants should be raised by the sale of Panama Canal bonds.

1199. Disposition of products of nitrate plants, etc.— * * * The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe. * * * *Sec. 124, act of June 3, 1916 (39 Stat. 215).*

1200. Sale of nitrate of soda to the public.—That in order to meet the existing emergency in the shortage of fertilizers the Secretary of War is hereby authorized to sell for cash at the prevailing market price, at the time of the sale thereof, to such distributors or users thereof, in the United States, as shall request the same, and in such quantity to each, not less than one ton nor more than one hundred tons to any purchaser, as he shall see fit, not to exceed in the aggregate one hundred thousand tons of nitrate of soda, now held as a reserve supply of the War Department, the proceeds of such sale to be repaid to the proper item of the current appropriations originally made for such purposes: *Provided*, That the Secretary of War shall report to Congress not later than December 6, 1920, the names of all purchasers of said nitrate of soda, together with the prices for which sold. *Joint Res. 39, April 23, 1920 (41 Stat. 573-574).*

1201. Requisition of munitions plants, etc.— * * * and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or

organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just. * * * *Sec. 120, act of June 3, 1916 (39 Stat. 213).*

The first portion of sec. 120, supra, authorizes the Government to place compulsory orders for the products of factories in time of war.

1202. List of private arms and ammunition plants.— * * * The Secretary of War shall also make, or cause to be made, a complete list of all privately owned plants in the United States equipped to manufacture arms or ammunition, or the component parts thereof. He shall obtain full and complete information regarding the kind of arms or ammunition, or the component parts thereof, manufactured or that can be manufactured by each such plant, the equipment in each plant, and the maximum capacity thereof. He shall also prepare, or cause to be prepared, a list of privately owned manufacturing plants in the United States capable of being readily transformed into ammunition factories, where the capacity of the plant is sufficient to warrant transforming such plant or plants into ammunition factories in time of war or when war shall be imminent; and as to all such plants the Secretary of War shall obtain full and complete information as to the equipment of each such plant, and he shall prepare comprehensive plans for transforming each such plant into an ammunition factory, or a factory in which to manufacture such parts of ammunition as in the opinion of the Secretary of War such plant is best adapted. * * * *Sec. 120, act of June 3, 1916 (39 Stat. 214).*

1203. Board of Mobilization of Industries Essential for Military Preparedness. * * * The President is hereby authorized, in his discretion, to appoint a Board of Mobilization of Industries Essential for Military Preparedness, nonpartisan in character, and to take all necessary steps to provide for such clerical assistance as he may deem necessary to organize and coordinate the work hereinbefore described. *Sec. 120, act of June 3, 1916 (39 Stat. 214).*

1204. Board to investigate Government manufacture of arms, munitions, and equipment.—The Secretary of War is hereby authorized to appoint a board of five citizens, two of whom shall be civilians and three of whom shall be officers of the Army, to investigate and report to him the feasibility, desirability, and practicability of the Government manufacturing arms, munitions, and equipment, showing in said report the comparative prices of the arms, munitions, and equipment manufactured in Government plants and those manufactured in private plants, the amount of money necessary to build and operate Government plants for the manufacture of arms, munitions, and equipment; showing also what the Government plants and arsenals are now doing in the way of manufacturing arms, munitions, and equipment, and what saving has accrued to the Goverment by reason of its having manufactured a large part of its own arms, munitions, and equipment for the last four years. And the Secretary of War is hereby directed to transmit said report to Congress on or before January first, nineteen hundred and seventeen. *Sec. 121, act of June 3, 1916 (39 Stat. 214).*

1205. Composition of the Council of National Defense.—That a Council of National Defense is hereby established, for the coordination of industries and resources for the national security and welfare, to consist of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor. * * * *Sec. 2, act of Aug. 29, 1916 (39 Stat. 649).*

1206. Duties of the Council of National Defense.— * * * That it shall be the duty of the Council of National Defense to supervise and direct investigations and make recommendations to the President and the heads of executive departments as to the location of railroads with reference to the frontier of the United States so as to render possible expeditious concentration of troops and supplies to points of defense; the coordination of military, industrial, and commercial purposes in the location of extensive highways and branch lines of railroad; the utilization of waterways; the mobilization of military and naval resources for defense; the increase of domestic production of articles and materials essential to the support of armies and of the people during the interruption of foreign commerce; the development of seagoing transportation; data as to amounts, location, method and means of production, and availability of military supplies; the giving of information to producers and manufacturers as to the class of supplies needed by the military and other services of the Government, the requirements relating thereto, and the creation of relations which will render possible in time of need the immediate concentration and utilization of the resources of the Nation. * * * *Sec. 2, act of Aug. 29, 1916 (39 Stat. 649).*

* * * *Provided further,* That in the expenditure of said moneys the existence of a state of war shall not be construed as enlarging the powers or duties of the Council of National Defense, but that such powers and duties shall remain as prescribed by the Act creating said council, approved August twenty-ninth, nineteen hundred and sixteen. *Act of June 15, 1917 (40 Stat. 182).*

1207. Rules and Regulations of the Council of National Defense.— * * * That the Council of National Defense shall adopt rules and regulations for the conduct of its work, which rules and regulations shall be subject to the approval of the President, and shall provide for the work of the advisory commission to the end that the special knowledge of such commission may be developed by suitable investigation, research, and inquiry and made available in conference and report for the use of the council; * * * *Sec. 2, act of Aug. 29, 1916 (39 Stat. 650).*

1208. Subordinate bodies of the Council of National Defense.— * * * and the council may organize subordinate bodies for its assistance in special investigations, either by the employment of experts or by the creation of committees of specially qualified persons to serve without compensation, but to direct the investigations of experts so employed. * * * *Sec. 2, act of Aug. 29, 1916 (39 Stat. 650).*

1209. Advisory commission, Council of National Defense.— * * * That the Council of National Defense shall nominate to the President, and the President shall appoint, an advisory commission, consisting of not more than seven persons, each of whom shall have special knowledge of some industry, public utility, or the development of some natural resource, or be otherwise specially qualified, in the opinion of the council, for the performance of the duties hereinafter provided. The members of the advisory commission shall

serve without compensation, but shall be allowed actual expenses of travel and subsistence when attending meetings of the commission or engaged in investigations pertaining to its activities. The advisory commission shall hold such meetings as shall be called by the council or be provided by the rules and regulations adopted by the council for the conduct of its work. * * * *Sec. 2, act of Aug. 29, 1916 (39 Stat. 649).*

1210. **Reports of the Council of National Defense, etc.**— * * * Reports shall be submitted by all subordinate bodies and by the advisory commission to the council, and from time to time the council shall report to the President or to the heads of executive departments upon special inquiries or subjects appropriate thereto, and an annual report to the Congress shall be submitted through the President, including as full a statement of the activities of the council and the agencies subordinate to it as is consistent with the public interest, including an itemized account of the expenditures made by the council or authorized by it, in as full detail as the public interest will permit: *Provided, however,* That when deemed proper the President may authorize, in amounts stipulated by him, unvouchered expenditures and report the gross sums so authorized not itemized. *Sec. 2, act of Aug. 29, 1916 (39 Stat. 650).*

The moneys here referred to are the appropriations for experimental work, etc., by the Council of National Defense. Subsequent appropriations for such work were regularly made. The provision for the fiscal year 1920 was by act of July 19, 1919 (41 Stat. 177).

CHAPTER 23.

TRANSPORTATION.

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1211. Supervision by the Secretary of War.—The transportation of troops, munitions of war, equipments, military property, and stores throughout the United States shall be under the immediate control and supervision of the Secretary of War and such agents as he may appoint. *R. S. 220.*

The transportation of organized bodies or detachments of troops under orders from competent authority directing travel to be performed is regulated by the requirements of this section as modified from time to time by the provisions of the annual acts of appropriation for the support of the Army. See pars. 1135–1139, A. R., 1913, for transportation of baggage on change of station, retirement, etc. See pars. 1128–1134, A. R., 1913, for parlor and sleeping-car accommodations to which officers traveling with troops, noncommissioned officers, Army nurses, civilian employees in the military service, etc., are entitled when traveling under orders.

1212. Transportation of the property of another executive department handled by the Quartermaster Corps.— * * * *Provided also*, That hereafter the Quartermaster-General and his officers, under his instructions, wherever stationed, shall receive, transport, and be responsible for all property turned over to them, or any one of them, by the officers or agents of any Government survey, for the National Museum, or for the civil or naval departments of the Government, in Washington or elsewhere, under the regulations governing the transportation of Army supplies, the amount paid for such transportation to be refunded or paid by the Bureau to which such property or stores pertain. *Act of July 5, 1884 (23 Stat. 111), making appropriations for the support of the Army: Transportation of the Army.*

Notes of Decisions.

Presumption as to condition of stores.—When a contract provides that upon the arrival of a train the Quartermaster's Department shall examine the stores, and, if found to be in good condition and delivered in proper time, shall so indorse the bill of lading, upon which payment shall be made, it will be presumed that such a certificate was made and given when it appears that the contract was fully performed. Curtis *v.* U. S., 34 Ct. Cls. 5.

1212½. Transportation of high explosives.—It shall be unlawful to transport, carry, or convey, within the limits of the jurisdiction of the United States, any high explosive, such as, and including, dynamite, blasting caps, detonating fuzes, black powder, gunpowder, or other like explosive, on any vessel, car, or vehicle of any description operated in the transportation of passengers by a common carrier engaged in interstate or foreign commerce, which vessel, car, or vehicle is carrying passengers for hire: *Provided*, That it shall be lawful to transport on any such vessel, car, or vehicle smokeless powder, primers, fuses, not including detonating fuzes, fireworks, or other similar explosives, and properly packed and marked samples of explosives for laboratory examination, not exceeding a net weight of one-half pound each, and not exceeding twenty samples at one time in a single vessel, car, or vehicle; but such explosives shall not be carried in that part of a vessel, car, or vehicle which is being used for the transportation

of passengers for hire: *Provided further*, That it shall be lawful to transport on any such vessel, car, or vehicle small-arms ammunition in any quantity, and such fuses, torpedoes, rockets, or other signal devices as may be essential to promote safety in operation: *And provided further*, That nothing in this section shall be construed to prevent the transportation of military or naval forces with their accompanying munitions of war on passenger-equipment vessels, cars, or vehicles.

The words 'detonating fuzes,' as used in this section shall be interpreted to mean fuzes used in naval or military service to detonate the high explosive bursting charges of projectiles, mines, bombs, or torpedoes. The word 'fuses' as used herein shall be interpreted to mean devices used in igniting the bursting charges of projectiles. The word 'primers' as used herein shall be interpreted to mean devices used in igniting the propelling powder charges of ammunition. The word 'fuses' as used herein shall be interpreted to mean the slow-burning fuses used commercially and intended to convey fire to an explosive or combustible mass slowly or without danger to the person lighting. The word 'fuzes' as used herein shall be interpreted to mean the fuzes ordinarily used on steamboats and railroads as night signals. *Sec. 232, Criminal Code, Act of Mar. 4, 1909 (35 Stat. 1134–1135), as amended by act of Mar. 4, 1921 (41 Stat. 1444).*

It shall be unlawful to transport, carry, or convey within the limits of the jurisdiction of the United States, liquid nitroglycerin, fulminate in bulk in dry condition, or other like explosive, on any vessel, car, or vehicle of any description operated in the transportation of passengers or property by land or water by a common carrier engaged in interstate or foreign commerce. *Sec. 234, Criminal Code, Act of Mar. 4, 1909 (35 Stat. 1135), as amended by act of Mar. 4, 1921 (41 Stat. 1445).*

Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered, to any common carrier engaged in interstate or foreign commerce by land or water, or to carry upon any vessel, car, or vehicle operated by any common carrier engaged in interstate or foreign commerce by land or water any explosive, or other dangerous article, as specified in section 233 of this Act, under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier in writing of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than $2,000 or imprisoned not more than eighteen months, or both. *Sec. 235, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1135), as amended by act of Mar. 4, 1921 (41 Stat. 1445).*

When the death or bodily injury of any person results from the violation of any of the four sections last preceding, or any regulation made by the Interstate Commerce Commission in pursuance thereof, the person or persons who shall have so knowingly violated, or caused to be violated, such provision or regulation, shall be fined not more than $10,000, or imprisoned not more than ten years, or both. *Sec. 236, Criminal Code, act of March 4, 1909 (35 Stat. 1136), as amended by act of Mar. 4, 1921 (41 Stat. 1445).*

The Interstate Commerce Commission is authorized to formulate regulations for safe transportation of the above dangerous articles, and to enforce the same with the assistance of any department, commission, or board of the Government, by sec. 233, criminal code, as amended by act of Mar. 4, 1921 (41 Stat. 1445).

1213. Transportation contracts with private parties.— * * * and that all transportation of stores by private parties for the Army shall be done by contract, after due legal advertisement, except in cases of emergency, which must be at once reported to the Secretary of War for his approval. * * * *Act of July 5, 1884 (23 Stat. 109), making appropriations for the support of the Army: Transportation of the Army.*

Notes of Decisions.

Construction of advertised contract.— Where a statute requires that all transportation service shall be advertised for, it is unreasonable to suppose that contracting parties intended to contract for only a portion, leaving part wholly unprovided for. Otis *v.* U. S. (1884), 19 Ct. Cl. 467.

Delay of transportation of Army stores by Government.—Where by the terms of a contract for the transportation of supplies to the Army a schedule of prices for the carriage of the goods was established varying according to the season of the year, but by the literal terms of the instrument the time of starting was indicated as the date to which reference must be made in ascertaining the rate of compensation for any single trip, it was held, that for trips in which the trains that started in the summer were detained by the Government's agents so long as to be forced to perform the greater part of the journey in the time of the year when the difficulties of transportation were at their worst, the contractors were entitled to such compensation as would have been payable if the trains had started at a time which, without delay, would have compelled them to travel in the inclement season. (1860), 9 Op. Atty Gen. 444.

By the terms of a contract with B., for the transportation of military supplies from Fort Leavenworth to Salt Lake City, it was agreed that in case any of the trains of the contractor were stopped at any time or place en route over two days, by any act of the Government, he should be allowed demurrage at a certain rate; and that all orders from officers of the Government to halt trains should be in writing, etc. Held, that for the stoppage of a train made by order of an officer of the Government, issued at the request or solicitation of, or in pursuance of an agreement with, a servant of the contractor in charge of the train, the United States would incur no liability under the contract, but that mere acquiescence, without protest, on the part of the servant, in an order given by such officer to stop the train, would not prejudice the rights of the contractor. (1869), 13 Op. Atty. Gen. 92.

1214. Rates.— * * * *Provided*, That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large, and shall be accepted as in full for all demands for such service: * * * *Act of June 5, 1920 (41 Stat. 960), making appropriations for the support of the Army.*

Similar provisions appear in previous appropriation acts.

1215. Routing of freight.— * * * No provision of this Act shall be construed to prevent the routing of freight by a shipper or consignee over any inland canal or coastwise waterway, or a part way over such waterway and a part way by rail. In case the shipper or consignee shall so route the freight, no provision of this Act shall be construed as giving power to change the routing. *Sec. 7, act of Mar. 2, 1919 (40 Stat. 1290), amending sec. 6, act of Mar. 21, 1918 (40 Stat. 455).*

1216. Preference to transportation of troops and material of war.— * * * That in time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned. *Act of Aug. 29, 1916 (39 Stat. 604), amending sec. 6, Feb. 4, 1887 (24 Stat. 380).*

1217. Control of carriers in time of war by Federal authority.—The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable. *Act of Aug. 29, 1916 (39 Stat. 645), making appropriations for the support of the Army.*

Notes of Decisions.

Implied powers.—In his proclamation of Dec. 26, 1917, issued pursuant to this section, the President declared that, except with the prior written consent of the Director General of Railroads, no attachment by mesne process or on execution should be levied against the property used by any of the transportation systems taken over in the conduct of their business as common carriers. *Held*, this power in the President was to be implied from the statute. Dooley *v.* Penn. R. Co. (D. C. 1918), 250 Fed. 142.

The act of Mar. 21, 1918, providing for Federal control of railroads during the World War and authorizing the President to make regulations therefor, assuming that it authorized the fixing by such regulations of the venue of actions in Federal courts against the railroad companies, is within the war powers, and constitutional. Wainwright *v.* Penn. R. Co. (D. C. 1918), 253 Fed. 459.

1218. Obstructing commerce during the war with Germany.—That section one * * * as heretofore amended, be further amended by adding thereto the following:

"That on and after the approval of this Act any person or persons who shall, during the war in which the United States is now engaged, knowingly and willfully, by physical force or intimidation by threats of physical force obstruct or retard, or aid in obstructing or retarding, the orderly conduct or movement in the United States of interstate or foreign commerce, or the orderly make-up or movement or disposition of any train, or the movement or disposition of any locomotive, car, or other vehicle on any railroad or elsewhere in the United States engaged in interstate or foreign commerce shall be deemed guilty of a misdemeanor, and for every such offense shall be punishable by a fine of not exceeding $100 or by imprisonment for not exceeding six months, or by both such fine and imprisonment; and the President of the United States is hereby authorized, whenever in his judgment the public interest requires, to employ the armed forces of the United States to prevent any such obstruction or retardation of the passage of the mail, or of the orderly conduct or movement of interstate or foreign commerce in any part of the United States, or of any train, locomotive, car, or other vehicle upon any railroad or elsewhere in the United States engaged in interstate or foreign commerce: *Provided*, That nothing in this section shall be construed to repeal, modify, or affect either section six or section twenty of an Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October fifteenth, nineteen hundred and fourteen. * * *" *Act of Aug. 10, 1917 (40 Stat. 272), amending sec. 1, act of Feb. 4, 1887 (24 Stat. 379).*

1219. Priority in transportation of commodities essential to defense during the war with Germany. That section one * * * as heretofore amended, be further amended by adding thereto the following:

* * * * * * *

"That during the continuance of the war in which the United States is now engaged the President is authorized, if he finds it necessary for the

national defense and security, to direct that such traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, water, or otherwise. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them and for any such purpose he is hereby authorized to issue orders direct, or through such person or persons as he may designate for the purpose or through the Interstate Commerce Commission. Officials of the United States, when so designated, shall receive no compensation for their services rendered hereunder. Persons not in the employ of the United States so designated shall receive such compensation as the President may fix. Suitable offices may be rented and all necessary expenses, including compensation of persons so designated shall be paid as directed by the President out of funds which may have been or may be provided to meet expenditures for the national security and defense. The common carriers subject to the Act to regulate commerce or as many of them as desire so to do are hereby authorized without responsibility or liability on the part of the United States, financial or otherwise, to establish and maintain in the city of Washington during the period of the war an agency empowered by such carriers as join in the arrangement to receive on behalf of them all notice and service of such orders and directions as may be issued in accordance with this Act, and service upon such agency shall be good service as to all the carriers joining in the establishment thereof. * * *" *Act of Aug. 10, 1917 (40 Stat. 272–3), amending sec. 1, act of Feb. 4, 1887 (24 Stat. 379).*

1220. Punishment for noncompliance with priority requirements during the war with Germany.—That section one * * * as heretofore amended, be further amended by adding thereto the following:

"* * * And it shall be the duty of any and all the officers, agents, or employees of such carriers by railroad or water or otherwise to obey strictly and conform promptly to such orders, and failure knowingly and willfully to comply therewith, or to do or perform whatever is necessary to the prompt execution of such order, shall render such officers, agents, or employees guilty of a misdemeanor, and any such officer, agent, or employee shall, upon conviction, be fined not more than $5,000, or imprisoned not more than one year, or both, in the discretion of the court. * * *" *Act of Aug. 10, 1917 (40 Stat. 273), amending sec. 1, act of Feb. 4, 1887 (24 Stat. 379).*

1221. Exemption of carriers from preferential or priority provisions in existing law during the war with Germany.—That section one * * * as heretofore amended, be further amended by adding thereto the following:

"* * * Any carrier complying with any such order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil or criminal pains, penalties, obligations, or liabilities upon carriers by reason of giving preference or priority in compliance with such order or direction." *Act of Aug. 10 1917 (40 Stat. 273), amending sec. 1, act of Feb. 4, 1887 (24 Stat. 380).*

1222. Rate fixing for transportation during the war with Germany.—That section one * * * as heretofore amended, be further amended by adding thereto the following:

"* * * For the transportation of persons or property in carrying out the orders and directions of the President, just and reasonable rates shall be fixed by the Interstate Commerce Commission; and if the transportation be for

the Government of the United States, it shall be paid for currently or monthly by the Secretary of the Treasury out of any funds not otherwise appropriated. * * *" *Act of Aug. 10, 1917 (40 Stat. 273), amending sec. 1, act of Feb. 4, 1887 (24 Stat. 380).*

1223. Freight charges, etc., payable from funds of the Quartermaster Corps.— For transportation of the Army and its supplies, * * * of clothing and equipage and other quartermaster stores from Army depots or places of purchase or delivery to the several posts and Army depots and from those depots to the troops in the field; of horse equipment; of ordnance and ordnance stores, and small arms from the foundries and armories to the arsenals, fortifications, frontier posts, and Army depots; for payment of wharfage, tolls, and ferriages; for transportation of funds of the Army; * * * for drayage and cartage at the several depots; * * *" *Act of June 5, 1920 (41 Stat. 959–960), making appropriations for the support of the Army: Quartermaster Corps.*

Similar provisions appear in previous appropriation acts.

Sec. 4 of the act of Mar. 15, 1920 (41 Stat. 531), provided that freight charges upon transferred vehicles should not be defrayed by the War Department. See 1234, post.

For provision for transportation of supplies for the National Guard see act of July 11, 1919 (41 Stat. 126), making appropriations for the support of the Army: National Guard.

Transportation of supplies for the National Guard is regularly included in the provisions for arming and equipping the National Guard which appear in acts making appropriations for the support of the Army.

1224. Expresses to frontier posts and armies in the field. * * * for expenses of expresses to and from frontier posts and armies in the field; * * * *Act of June 5, 1920 (41 Stat. 959), making appropriations for the support of the Army: Quartermaster Corps, Incidental expenses.*

Similar provision appears in previous appropriation acts.

1225. Payment of freight charges from Medical Department funds.— * * * for the payment of express companies and local transfers employed directly by the Medical Department for the transportation of medical and hospital supplies, including bidders' samples and water for analysis; * * * *Act of June 5, 1920 (41 Stat. 968), making appropriations for the support of the Army: Medical Department.*

Similar provision appears in previous appropriation acts.

1226. Payment of freight charges from Ordnance Department funds.— * * * *Provided*, That hereafter no part of the appropriations made for the Ordnance Department shall be used in payment of freight charges on ordnance or ordnance stores issued by said Department. *Act of June 30, 1902 (32 Stat. 520), making appropriations for the support of the Army.*

1227. Purchase, operation, etc., of vehicles by the Quartermaster Corps.— * * * for the purchase, hire, operation, maintenance, and repair of such harness, wagons, carts, drays, other vehicles, and horse-drawn passenger-carrying vehicles as are required for the transportation of troops and supplies and for official, military, and garrison purposes; * * * *And provided further*, That none of the funds appropriated or made available under this Act or any of the unexpended balances of any other Act shall be used for the purchase of motor-propelled passenger or freight carrying vehicles for the Army except those that are purchased solely for experimental purposes. *Act of June 5, 1920 (41 Stat. 960-961), making appropriations for the support of the Army: Transportation.*

Similar provision appears in previous appropriation acts.

Authority for the maintenance, repair, etc., of passenger-carrying vehicles appears in the same statute where appropriations are made for the Engineer Department and

the Ordnance Department. The provision for the Coast Artillery School includes motor trucks.

Appropriations for contingent expenses of the War Department provide for one passenger-carrying motor-propelled vehicle, beside motor trucks and motor cycles.

1228. Purchase of vehicles by the Signal Corps.—Purchase, equipment, operation and repair of * * * motor cycles, motor-driven and other vehicles for technical and official purposes in connection with the construction, operation, and maintenance of communication or signaling systems, and supplies for their operation and maintenance; * * * *Act of June 5, 1920 (41 Stat. 952). making appropriations for the support of the Army: Signal Service.*

Similar provisions appear in previous appropriation acts.

1229. Purchase, hire, maintenance, etc., of passenger-carrying vehicles.—No appropriation made in this or any other Act shall be available for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for the service of any of the executive departments or other Government establishments, or any branch of the Government service, unless specific authority is given therefor, and after the close of the fiscal year nineteen hundred and fifteen there shall not be expended out of any appropriation made by Congress any sum for purchase, maintenance, repair, or operation of motor-propelled or horse-drawn passenger-carrying vehicles for any branch of the public service of the United States unless the same is specifically authorized by law, and in the estimates for the fiscal year nineteen hundred and sixteen and subsequent fiscal years there shall be submitted in detail estimates for such necessary appropriations as are intended to be used for purchase, maintenance, repair, or operation of all motor-propelled or horse-drawn passenger-carrying vehicles, specifying the sums required, the public purposes for which said vehicles are intended, and the officials or employees by whom the same are to be used. *Sec. 5, act of July 16, 1914 (38 Stat. 508).*

* * * *Provided further,* That no money herein appropriated shall be expended for the hire, operation, maintenance, or repair of any motor-propelled vehicle, which shall be employed wholly or in part for personal, social, or similar use, except such use as is prescribed by order for the transportation of Army personnel in connection with the recreational activities of the Army: * * * *Act of June 5, 1920 (41 Stat. 960), making appropriations for the support of the Army: Transportation.*

* * * *Provided,* That no money appropriated herein shall be expended for maintenance, repair or operation of any motor-propelled passenger-carrying vehicle employed wholly or in part for personal, social or other similar use or for any use except for military and official business: * * * *Act of June 5, 1920 (41 Stat. 970), making appropriations for the support of the Army: Ordnance Service.*

Similar provisions appear in previous appropriation acts.

1230. Purchase, hire, maintenance, etc., of vehicles at Washington, D. C.—No part of any money appropriated by this or any other Act shall be used for purchasing, maintaining, driving, or operating any carriage or vehicle (other than those for the use of the President of the United States, the heads of the Executive Departments, and the Secretary to the President, and other than those used for transportation of property belonging to or in the custody of the United States), for the personal or official use of any officer or employee of any of the Executive Departments or other Government establishments at Washington, District of Columbia, unless the same shall be specifically authorized by law

or provided for in terms by appropriation of money, and all such carriages and vehicles so procured and used for official purposes shall have conspicuously painted thereon at all times the full name of the Executive Department or other branch of the public service to which the same belong and in the service of which the same are used. *Sec. 4, act of Feb. 3, 1905 (33 Stat. 687).*

Nothing in this act or any other act was to be construed so as to deprive officers of the Army of forage, bedding, shoeing, or shelter for their authorized number of horses, or of any means of transportation or maintenance therefor for which provision is made by the Army appropriation act for the same fiscal year, act of Mar. 2, 1905 (33 Stat. 834), by a provision of that act, repeated in subsequent Army appropriation acts.

1231. Ambulances.— * * * *Provided*, That the Secretary of War may, in his discretion, select types and makes of motor ambulances for the Army and authorize their purchase without regard to the laws prescribing advertisement for proposals for supplies and materials for the Army; * * * *Act of June 5, 1920 (41 Stat. 967), making appropriations for the support of the Army: Medical Department.*

Similar provisions appear in previous appropriation acts.

1232. Sale of vehicles to an executive department.—The Secretary of War is authorized to transfer any unused and surplus motor-propelled vehicles and motor equipment of any kind, the payment for same to be made as provided herein, to any branch of the Government service having appropriations available for the purchase of said vehicles and equipment: *Provided*, That in case of the transfers herein authorized a reasonable price not to exceed actual cost, and if the same have been used, at a reasonable price based upon length of usage, shall be determined upon and an equivalent amount of each appropriation available for said purchase shall be covered into the Treasury as a miscellaneous receipt, and the appropriation in each case reduced accordingly: *Provided further*, That it shall be the duty of each official of the Government having such purchases in charge to procure the same from any such unused or surplus stock if possible. * * * *Sec. 5, act of July 19, 1919 (41 Stat. 234).*

Subsequent appropriation acts have provided for such purchases.

1233. Transfer of vehicles.— * * * *Provided further*, That hereafter no transfer of motor-propelled vehicles and motor equipment, unless specifically authorized by law, shall be made free of charge to any branch of the Government service. *Sec. 5, act of July 19, 1919 (41 Stat. 233).*

1234. Transfer of motor vehicles, etc., to the Post Office Department, the Department of Agriculture, and the Treasury Department.—That the Secretary of War be, and he is hereby, authorized and directed to transfer such motor-propelled vehicles and motor equipment, including spare parts, pertaining to the Military Establishment as are or may hereafter be found to be surplus and no longer required for military purposes, to (a) the Department of Agriculture, for use in the improvement of highways and roads under the provisions of section 7 of the Act approved February 28, 1919, entitled "An Act making appropriations for the service of the Post Office Department, for the fiscal year 1920, and for other purposes": *Provided, however*, That no more motor-propelled vehicles, motor equipment, and other war material, equipment, and supplies, the transfer of which is authorized in this Act, shall be transferred to the Department of Agriculture for the purposes named in section 7 of said Act than said Department of Agriculture shall certify can be efficiently used for such purposes within a reasonable time after such transfer; (b) the Post Office Department for use in the transmission of

mails; and (c) the Treasury Department, for the use of the Public Health Service under the provisions of section 3 of the Act approved March 3, 1919, entitled "An Act to authorize the Secretary of the Treasury to provide hospital and sanatorium facilities for discharged sick and disabled soldiers, sailors, and marines." *Sec. 1, act of Mar. 15, 1920 (41 Stat. 530).*

That the Secretary of War is authorized hereafter, in his discretion, to deliver and turn over to the Postmaster General, without charge therefor, from time to time, such motor vehicles, aeroplanes, and parts thereof, and machinery and tools to repair and maintain the same, as may be suitable for use in the Postal Service; and the Postmaster General is authorized to use the same in the transportation of the mails and to pay the necessary expenses thereof, including the replacement, maintenance, exchange, and repair of such equipment, out of any appropriation available for the service in which such vehicles or aeroplanes are used. *Sec. 3, act of April 24, 1920 (41 Stat. 583).*

Subsequent appropriation acts have provided for transfers of motor vehicles from the War Department to the above and other departments of the Government, as specified in each case.

1235. Use of means of transportation by officers of the Army.— * * * *Provided further,* That hereafter in the performance of their official and military duties officers of the Army are authorized, under such regulations as may be established by the Secretary of War, to use means for transportation herein provided for: * * * *Act of Mar. 3, 1911 (36 Stat. 1051), making appropriations for the support of the Army: Transportation of the Army.*

1236. Right of way upon an approach to a national cemetery denied to a railroad.— * * * *Provided,* That no railroads shall be permitted upon the right of way which may have been acquired by the United States to a national cemetery, or to encroach upon any roads or walks constructed thereon and maintained by the United States: * * * *Act of Mar. 4, 1921 (41 Stat. 1336), making appropriations for sundry civil expenses: National cemeteries.*

1237. Transportation of the Army over land-grant railroads.— * * * for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts), but in no case shall more than 50 per cent of full amount of service be paid: * * * *Provided further,* That in expending the money appropriated by this Act a railroad company which has not received aid in bonds of the United States and which obtained a grant of public land to aid in the construction of its railroad on conditions that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval, and other Government services, and also subject to such regulations as Congress may impose restricting the charge for such Government transportation, having claims against the United States for transportation of troops and munitions of war and military supplies and property over such aided railroads, shall be paid out of the moneys appropriated by the foregoing provisions only on the basis of such rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed 50 per centum of the compensation of such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service: *Provided further,*

That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deduction provided for in the land-grant Acts: * * * *Act of June 5, 1920 (41 Stat. 960), making appropriations for the support of the Army: Transportation of the Army.*

Similar provisions appear in previous appropriation acts.

During the World War nearly all the railroads in the United States were operated under Government control, as provided by the act of Mar. 21, 1918 (40 Stat. 451). Sec. 9 of said act provided that the provisions of the current Army appropriation act should remain in force and effect.

Act. of Oct. 6, 1917 (40 Stat. 361), provided that land-grant railroads organized under the act of July 28, 1906, ch. 309, shall receive the same compensation for transportation during the existing war emergency of property and troops of the United States as may be paid to land-grant railroads, organized under the land-grant act of Mar. 3, 1863, and the act of July 27, 1866, ch. 278, for such transportation during said emergency: *Provided*, That this paragraph shall not be construed as changing in any other way or for any other period of time the rights and duties of the land-grant railroads first above mentioned.

1238. Restriction of charges by land-grant railroads.— * * * *Provided*, That no money shall hereafter be paid to any railroad company for the transportation of any property or troops of the United States over any railroad which in whole or in part was constructed by the aid of a grant of public land on the condition that such railroad should be a public highway for the use of the Government of the United States free from toll or other charge, or upon any other conditions for the use of such road, for such transportation, nor shall any allowance be made for the transportation of officers of the Army over any such road when on duty and under orders as military officers of the United States. * * * *And provided further*, That the foregoing provision shall not apply for the current fiscal year, nor thereafter, to roads where the sole condition of transportation is that the company shall not charge the Government higher rates than they do individuals for like transportation, and when the Quartermaster-General shall be satisfied that this condition has been faithfully complied with. *Act of Mar. 3, 1875 (18 Stat. 453), making appropriations for the support of the Army: Transportation of the Army.*

Notes of Decisions.

Transportation of "troops."—The term "troops of the United States," as used in land-grant acts, and in the agreement of the Union Pacific Co., in relation to transportation for the Government, *held* not to embrace any of the following classes of persons, when traveling separately and not as part of a moving body or detachment of soldiers, viz: Discharged soldiers, discharged military prisoners, and rejected applicants for enlistment; applicants for enlistment, provisionally accepted, but subject to final examination and not sworn in; retired enlisted men; and furloughed soldiers en route back to their stations. U. S. *v* Union Pacific Railroad Co. (1918), 249 U. S. 354, affirming 52 Ct. Cl. 226.

The National Guard of a State may become "troops of the United States" within the meaning of the land-grant act, but it is not the potentiality, but the actuality, of being in the service contemplated by the Constitution which fixes their status as such "troops." Ala. Gt. Southern R. R. *v.* U. S. (1914), 49 Ct. Cl. 522.

Transportation of excess baggage. Where a railroad having contested with the accounting officers as to the application of land grant rates to the excess of baggage over regulation all waiver and at the same time made no question as to the regulation allowance itself, and accepted payment for the latter without question or protest, it is assumed to have acquiesced therein and is estopped from the assertion of a claim for further compensation. B. & O. R. R. Co. *v.* U. S. (1917), 52 Ct. Cl. 468.

Transportation of personal effects of officers. The personal effects of an Army officer are not the property of the United

States, and therefore, when transported for the Government over land-grant railroads, are not entitled to land-grant deductions, but are subject to commercial or regular tariff rates. Oregon-Washington R. & N. Co. *v.* U. S. (Sup. Ct. U. S. 1921), 65 L. Ed. 427. But reduced rates may be granted by a carrier for the transportation of such effects, upon change of station, in view of the provisions of the interstate commerce act of Feb. 4, 1887 (24 Stat. 387), permitting reduced rates to the United States, and of a conference ruling of sec. 22 of the Interstate Commerce Commission, making such section applicable to property transported for the United States. Western Pac. R. Co. *v.* U. S. (Sup. Ct. U. S. 1921), 65 L. Ed. 430.

Presentation; settlement.—Where a claim is presented to the accounting officers for less than the total amount thereof and it is allowed and accepted, plaintiff can not thereafter secure an additional allowance upon the items composing his claim as presented and allowed, unless there be a valid excuse for not presenting the whole account, as in case of fraud or mistake. Id.

The right of a land-grant railroad to recover from the United States the difference between its commercial or general tariff rates charged and the land-grant rates charged and accepted by it for the transportation for the Government of the personal effects of Army officers is lost by the carrier's long acquiescence in the Government's explicit assertion that the land-grant rates were the proper ones for such service. Oregon-Washington R. & N. Co. *v.* U. S. (Sup. Ct. U. S. 1921), 65 L. Ed. 427; Western Pac. R. Co. *v.* U. S., id. 430.

1239. Preference to American vessels.—Vessels of the United States, or belonging to the United States, and no others, shall be employed in the transportation by sea of coal, provisions, fodder, or supplies of any description, purchased pursuant to law, for the use of the Army or Navy unless the President shall find that the rates of freight charges by said vessels are excessive and unreasonable, in which case contracts shall be made under the law as it now exists: *Provided*, That no greater charges be made by such vessels for transportation of articles for the use of the said Army and Navy than are made by such vessels for transportation of like goods for private parties or companies. *Sec. 1, act of Apr. 28, 1904 (33 Stat. 518).*

1240. Purchase and operation of ships by the Quartermaster Corps.— * * * for the purchase and repair of ships, boats, and other vessels required for the transportation of troops and supplies and for official, military, and garrison purposes; for expenses of sailing public transports and other vessels on the various rivers, the Gulf of Mexico, and the Atlantic and Pacific Oceans, * * * *Act of June 5, 1920 (41 Stat. 960), making appropriations for the support of the Army: Transportation of the Army.*

Similar provisions appear in previous appropriation acts.

1241. Transports available to persons not in the Army.— * * * *Provided*, That no part of this appropriation shall be applied to the payment of the expenses of using transports in any other Government work than the transportation of the Army, its supplies and employees; and when, in the opinion of the Secretary of War, accommodations are available, transportation may be provided for the officers, enlisted men, employees, and supplies of the Navy, the Marine Corps, and for members and employees of the Philippine and Hawaiian governments, officers of the War Department, Members of Congress, other officers of the Government while traveling on official business, and without expense to the United States, for the families of those persons herein authorized to be transported, and when accommodations are available, transportation may be provided for general passengers to the island of Guam, rates and regulations therefor to be prescribed by the Secretary of War: * * * *Act of Mar. 2, 1907 (34 Stat. 1170), making appropriations for the support of the Army: Transportation of the Army.*

* * * *Provided*, That hereafter when, in the opinion of the Secretary of War, accommodations are available, transportation on vessels of the

Army transport service may be furnished the officers, employees, and enlisted men of the Revenue-Cutter Service, and their families, without expense to the United States, and also secretaries and supplies of the Army and Navy department of the Young Men's Christian Association: * * * *Act of Mar. 3, 1911 (36 Stat. 1051), making appropriations for the support of the Army: Transportation of the Army.*

* * * *Provided further*, That hereafter, when, in the opinion of the Secretary of War, accommodations are available, transportation on Army transports may be provided for members and employees of the Porto Rican Government and their families without expense to the United States: *Provided further*, That in the joint discretion of the Secretary of War and chairman of the Shipping Board, and when space is available, civilian passengers and shipments of commercial cargo may be transported on Army transports in the trans-Atlantic service, at such times as space is not available on commercial lines, at rates not less than those charged by commercial steamship companies, between the same ports, for the same class of accommodations, the receipts from which shall be covered into the Treasury of the United States to the credit of miscellaneous receipts: * * * *Act of June 5, 1920 (41 Stat. 960-961), making appropriations for the support of the Army: Transportation.*

Similar provisions appear in previous appropriation acts.

Notes of Decisions.

Transportation of men of Revenue Cutter Service.—Enlisted men are never called officers in any branch of the Government service except where they are appointed as noncommissioned or petty officers in the Army or Navy. The terms "officers" and "enlisted men" are used in contradistinction, neither referring to the other. Hence enlisted men of the Revenue Cutter Service are not "officers of the Government" within the meaning of this section. (1910), 28 Op. Atty. Gen. 320.

1242. Transports available for representatives in competitions.—That authority be, and is hereby, given to the Secretary of War, under such rules and regulations as he may prescribe, to use such Army transports as may be available for the transportation of teams, individuals, and their equipment representing the United States in Olympic games and other international competitions during the present year. *Joint Res. 47, June 2, 1920 (41 Stat. 738).*

1243. Merchandise conveyed to Guam by transports.— * * * *Provided further*, That hereafter when there is cargo space available without displacing military supplies, transportation may be provided for merchandise of American production consigned to residents and mercantile firms of the island of Guam, rates and regulations therefor to be prescribed by the Secretary of War: * * * *Act of Mar. 3, 1911 (36 Stat. 1051), making appropriations for the support of the Army: Transportation of the Army.*

1244. Transports equipped with lifeboats and rafts.—That the sum of three hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of equipping all Army transports with all lifeboats and rafts, including such number of steel self-righting, self-bailing motor lifeboats for each vessel as the Secretary of War may deem advisable, necessary to accommodate every person for whom transportation facilities are now provided on said transports, and the crew of said transports; said sum to be expended under the direction of the Secretary of War, who is hereby directed to make to Congress an itemized statement showing how the sum aforesaid has been expended. *Act of June 14, 1912 (37 Stat. 133).*

1245. Transports not to be sold without the consent of Congress.— * * * and hereafter no steamship in the transport service of the United States shall be sold or disposed of without the consent of Congress having been first had or obtained; * * * *Act of Mar. 2, 1907 (34 Stat. 1170), making appropriations for the support of the Army: Transportation of the Army.*

Similar provisions, without the word "hereafter," were made by the appropriation acts for the years immediately preceding. And the provision was repeated, in the language set forth here, in the appropriation acts for subsequent years, act of June 12, 1906 (34 Stat. 253), and act of Mar. 2, 1907 (34 Stat. 1170).

By act of Aug. 29, 1916 (39 Stat. 634), authority was granted the Secretary of War to sell or otherwise dispose of, in accordance with law and regulations, the United States Army transports *Meade* and *Crook*. Also by Act of June 5, 1920 (41 Stat. 961), to dispose of the *Sherman, Sheridan, Thomas, Logan, Buford, Kilpatrick, Crook,* and *Warren.*

1246. Transport service not to be discontinued without action of Congress.— * * * *Provided,* That no action looking to the discontinuance of the transport service shall be taken without further action of Congress. *Act of Mar. 2, 1903 (32 Stat. 939), making appropriations for the support of the Army: Transportation of the Army.*

1247. Transfer of vessels, etc., of the Navy and the Coast and Geodetic Survey to the War Department in time of war.—That the President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to transfer to the service and jurisdiction of the War Department, or of the Navy Department, such vessels, equipment, stations, and personnel of the Coast and Geodetic Survey as he may deem to the best interest of the country, and after such transfer all expenses connected therewith shall be defrayed out of the appropriations for the department to which transfer is made: *Provided,* That such vessels, equipment, stations, and personnel shall be returned to the Coast and Geodetic Survey when such national emergency ceases, in the opinion of the President, and nothing in this Act shall be construed as transferring the Coast and Geodetic Survey or any of its functions from the Department of Commerce except in time of national emergency and to the extent herein provided: * * * *Sec. 16, act of May 22, 1917 (40 Stat. 87).*

1248. Transfer of vessels, etc., of the Lighthouse Service to the War Department in an emergency.—The President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to transfer to the service and jurisdiction of the Navy Department, or of the War Department, such vessels, equipment, stations, and personnel of the Lighthouse Service as he may deem to the best interests of the country, and after such transfer all expenses connected therewith shall be defrayed out of the appropriations for the department to which transfer is made: *Provided,* That such vessels, equipment, stations, and personnel shall be returned to the Lighthouse Service when such national emergency ceases in the opinion of the President, and nothing in this Act shall be construed as transferring the Lighthouse Service or any of its functions from the Department of Commerce except in time of national emergency and to the extent herein provided: * * * *Act of Aug. 29, 1916 (39 Stat. 602).*

1249. Requisition of certain passenger boats in time of war.—That any steamships so registered under the provisions of this act may be taken and used by the United States as cruisers or transports upon payment to the owners of the fair actual value of the same at the time of the taking, and if there shall be a disagreement as to the fair actual value at the time of taking between the United States and the owners, then the same shall be determined by two impar-

tial appraisers, one to be appointed by each of said parties, who, in case of disagreement, shall select a third, the award of any two of the three so chosen to be final and conclusive. *Sec. 4, act of May 10, 1892 (27 Stat. 28).*

The foregoing has reference to certain steamships, built abroad, which, under the act cited, were granted American registry. The act is quite specific in describing the vessels, and it is doubtful if the act has any future application. The S. S. *New York* and *Paris* would appear to have been the only vessels coming within the terms of the law.

See 737, ante, contracts and purchases, for act of July 5, 1884, providing that the purchase of ships and other seagoing vessels, etc., shall be made by contract, after due legal advertisement, except in cases of extreme emergency.

1250. Requisition of vessels during the World War.—That the President shall have power to requisition for military purposes, or for any other national purpose connected with or arising out of the present war, the temporary possession of any vessel, or, without taking actual possession, to requisition the services of any vessel and to require the person entitled to the possession thereof to issue to the master such instructions as may be necessary to place the vessel at the service of the United States.

Upon requisitioning such possession or services, or as soon thereafter as the exigencies of the situation may permit, the President shall transmit to the person entitled to the possession of such vessel a charter setting forth the terms which, in his judgment, should govern the relations between the United States and such person and a statement of the rental or rate of hire which, in his judgment, will be just compensation for the use of such vessel and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rental or rate of hire, the President shall pay to such person a sum equal to seventy-five per centum of such rental or rate of hire as the same may from time to time be due under the terms of the charter, and such person shall be entitled to sue the United States to recover such further sum as added to such seventy-five per centum will make up such amount as will be just compensation for the use of the vessel and for the services required. In the event of loss of or damage to such vessel, due to the operation of a risk assumed by the United States under the terms of such charter (in the event that no valuation of such vessel or mode of compensation has been agreed to), the United States shall pay just compensation for such loss or damage, to be determined by the President; and if the amount so determined is not satisfactory to the person entitled to receive just compensation, the President shall pay to such person seventy-five per centum of the amount so determined, and such person shall be entitled to sue the United States to recover such further sum as added to such seventy-five per centum will make up such amount as will be just compensation. *Sec. 11, act of July 15, 1918 (40 Stat. 915).*

1251. Regulations for protecting shipping from war perils during the World War.—That the President shall have power to make such rules, regulations, and orders regarding voyages, courses, the use of protective devices, and any other matters affecting the navigation, equipment, fueling, painting, or arming of vessels of the United States as may, in his judgment, be conducive to the protection of such vessels from submarines, mines, or other war perils, any expense so incurred to be allowed for in determining freight and charter rates under this Act. If in his judgment any vessel or class of vessels on account of size, speed, structure, method of propulsion, or for any other reason is unfit for service in any waters which he may declare to be a danger zone, he may, by order, exclude such vessel or vessels from such danger zone. It shall be

unlawful to violate any order, rule, or regulation made under this section. Rules, regulations, or orders issued under this section may, in the discretion of the President, be issued confidentially, in which event they shall be binding only on such persons as have notice thereof. *Sec. 9, act of July 18, 1918 (40 Stat. 914).*

1252. Approval of charters by the President during the World War.—That the President may, by proclamation, require that vessels of the United States of any specified class or description, or in any specified trade or trades, shall not be chartered unless the instrument in which such charter is embodied, and the rates, terms, and conditions thereof are first approved by him. Whenever any vessel is comprised in any such proclamation, it shall be unlawful to make any charter thereof, or comply with or perform any of the rates, terms, or conditions of any charter thereof, or to operate such vessel under any charter, without first obtaining the approval thereof by the President.

Whenever any charter of such vessel is approved, it shall be unlawful, without the approval of the President first obtained, to make any alterations in such charter, or additions thereto or deletions therefrom, or to make or receive any payment or do any act with respect to such vessel, except in accordance with such charter. *Sec. 5, act of July 18, 1918 (40 Stat. 913).*

1253. Freight rates prescribed by the President during the World War.—That the President shall have power to determine, prescribe, and enforce reasonable freight rates and the terms and conditions of affreightment which shall govern the transportation of goods on vessels of the United States, which shall be filed with the United States Shipping Board and open to public inspection. It shall be unlawful to charge or collect any compensation for the transportation of goods on any such vessel, or to enforce or attempt to enforce any terms or conditions of affreightment, or to make or receive any payment or do any act with respect to such transportation, not in accordance with the rates, terms, and conditions so prescribed, anything in any contract, whether heretofore or hereafter made, to the contrary nothwithstanding. *Sec. 6, act of July 18, 1918 (40 Stat. 914).*

1254. Priority of carriage on ships during the World War.—That the President shall have power to prescribe the order of priority in which goods shall be carried or other services performed by any vessel of the United States and to specify goods which shall be carried or to direct the voyage or employment of any such vessel and to make such rules, regulations, and orders, with respect to any such vessel, relating to the loading, discharging, lighterage, or storage of goods, or the procurement of bunker fuel, or any other matter relating to the receiving, handling, transporting, storing, or delivering of goods, as may in his judgment be necessary and proper for the efficient utilization of transportation facilities and the effective conduct of the war. *Sec. 7, act of July 18, 1918 (40 Stat. 914).*

1255. Foreign vessels controlled by the President during the World War.—That the President may by proclamation extend the provisions of sections five, six, and seven, or any of them, to any vessel of foreign nationality under charter to a citizen of the United States or other person subject to the jurisdiction thereof. *Sec. 8, act of July 18, 1918 (40 Stat. 914).*

1256. Approval of charters of foreign vessels by the President during the World War.—That the President may by proclamation require that no citizen of the United States, or other person subject to the jurisdiction thereof, shall charter any vessel of foreign nationality unless the instrument in which such

charter is embodied and the rates, terms, and conditions thereof are first approved by the President. After the making of such proclamation it shall be unlawful for any such citizen or person to make any charter of any such vessel, or comply with or perform any of the rates, terms, or conditions of any charter thereof, or to operate any such vessel under any charter, without first obtaining the approval thereof by the President.

Whenever any such charter is approved it shall be unlawful, without the approval of the President first obtained, to make any alterations in such charter or additions thereto or deletions therefrom, or to make or receive any payment or do any act with respect to such vessel, except in accordance with such charter. *Sec. 10, act of July 18, 1918 (40 Stat. 914–915).*

1257. Priority of service at docks, etc., during the World War.—That the President shall have power to prescribe the order of priority in which persons in possession of dry docks, wharves, lighterage systems, or loading or discharging terminal facilities in any port of the United States, or warehouses, equipment or terminal railways connected therewith, shall serve vessels and shippers, and to determine, prescribe, and enforce the rates, terms, and conditions charged or required for the furnishing of such services, including stevedoring and handling of cargo, and the handling, dispatching, and bunkering of vessels, and to make such rules and regulations with respect to the conduct of any such business as may be necessary and proper. It shall be unlawful to charge, collect, or claim any compensation, or to enforce or attempt to enforce any terms or conditions, or to make or receive any payment or do any act, with respect to any such service not in accordance with the rates, terms, and conditions so prescribed, any thing in any contract, whether heretofore or hereafter made, to the contrary notwithstanding. *Sec. 12, act of July 18, 1918 (40 Stat. 915).*

1258. Requisition of terminals during the World War.—That the President shall have power to lease or requisition the use or temporary possession of, or to assume temporary control of, any dry docks, wharves, or loading or discharging terminal facilities, in any port of the United States, or warehouses, equipment, or terminal railways connected therewith.

Whenever the President requisitions or assumes control of any such property, the United States shall pay just compensation therefor, to be determined by the President. If the amount so determined is not satisfactory to the person entitled to receive just compensation, the President shall pay to such person seventy-five per centum of the amount so determined and such person shall be entitled to sue the United States to recover such further sum as added to such seventy-five per centum will make up such amount as will be just compensation.

Whenever the President acquires by purchase, lease, or requisition, or assumes control of any such property immediate possession may be taken thereof to the extent of the interest acquired therein, and such property may be immediately occupied and used without regard to the provisions of section three hundred and fifty-five of the Revised Statutes.

Nothing in this section shall authorize the President to requisition the title to any such property owned by any State, municipality, or subdivision thereof. *Sec. 13, act of July 18, 1918 (40 Stat. 915).*

1259. Operation of requisitioned vessels, terminals, etc., during the World War.—That all vessels of which the possession or services are requisitioned under this Act, and all dry docks, wharves, loading or discharging terminal facilities, warehouses, equipment, or terminal railways, of which the President

may acquire the title or possession or of which he may assume control under this Act, may be operated and managed as the President may from time to time direct. The net proceeds derived from any activity authorized in this Act or the joint resolution of May twelfth, nineteen hundred and seventeen (Public Numbered Two), or the division entitled "Emergency shipping fund" of the Act of June fifteenth, nineteen hundred and seventeen (Public Numbered Twenty-three), shall be deposited in the Treasury in a separate and distinct fund and may be expended by the President in carrying out the purposes of this Act, and within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels: *Provided*, That none of the provisions of this Act shall apply to vessels plying exclusively on the inland rivers and canals of the United States. *Sec. 15, act of July 18, 1918 (40 Stat. 916).*

1260. Agencies for Federal control of shipping during the World War.—That the President may exercise the power and authority hereby vested in him through such agency or agencies as he shall determine from time to time. *Sec. 2, act of July 18, 1918 (40 Stat. 913).*

1261. Definitions for the shipping act of July 18, 1918.—That when used in this Act—

(a) The term "United States" includes any State, Territory, or District of the United States, the insular possessions, the Canal Zone, and all lands or waters subject to the jurisdiction of the United States.

(b) The term "person" includes corporations, partnerships, associations and States, municipalities, and other subdivisions thereof.

(c) The term "charter" means any agreement, contract, lease, or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel. *Sec. 1, act of July 18, 1918 (40 Stat. 913).*

1262. Period of Federal control of shipping during the World War.—That all power and authority hereby vested in the President or by him delegated and all restrictions imposed in this Act shall cease upon the proclamation of the final treaty of peace between the United States and the Imperial German Government: *Provided*, That if, in the judgment of the President, the tonnage shortage at such time is so severe that national interests of the United States are jeopardized, he may, by proclamation, extend the provisions of this Act for a further period of not exceeding nine months. *Sec. 3, act of July 18, 1918 (40 Stat. 913).*

1263. Powers of the President not decreased.—That the powers herein conferred shall be without prejudice to any power heretofore conferred on the President, or by him delegated. *Sec. 4, act of July 18, 1918 (40 Stat. 913).*

1264. Punishment of offenders against the shipping act of July 18, 1918.—That whoever does or attempts to do anything in this Act declared to be unlawful, or willfully violates any rule, regulation, or order issued under authority conferred herein, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both: *Provided*, That the district court of the Canal Zone shall have jurisdiction of offenses committed against the provisions of this Act within the Canal Zone. *Sec. 16, act of July 18, 1918 (40 Stat. 916).*

1265. Procedure in suits against the United States.—That whenever by this Act permission is given to sue the United States such suit shall be brought in the manner provided in section twenty-four, paragraph twenty, and section

one hundred and forty-five of the Judicial Code. *Sec. 14, act of July 18, 1918 (40 Stat. 916).*

For par. 20, sec. 24, Judicial Code, see 450, ante.
For sec. 145, Judicial Code, see 451, 458, 459, ante.

1266. Validity of the shipping act of July 18, 1918.—That if any provision of this Act, or the application of such provision to certain circumstances, is held unconstitutional, the remainder of the Act, and the application of such provision to circumstances other than those as to which it is held unconstitutional, shall not be affected thereby. *Sec. 17, act of July 18, 1918 (40 Stat. 916).*

1267. Definitions for the shipping act, 1916.—That when used in this Act:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country. *Sec. 1, act of Sept. 7, 1916 (39 Stat. 728).*

* * * The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States," means "registered, enrolled, or licensed under the laws of the United States." *Sec. 1, act of July 15, 1918 (40 Stat. 900), amending sec. 1, act of Sept. 7, 1916 (39 Stat. 728).*

That this act may be cited as "Shipping Act, 1916." *Sec. 44, added to the act of Sept. 7, 1916, by sec. 4, act of July 15, 1918 (40 Stat. 903).*

1268. Composition of the United States Shipping Board.—That a board is hereby created, to be known as the United States Shipping Board, and hereinafter referred to as the board. The board shall be composed of five commissioners, to be appointed by the President, by and with the advice and consent of the Senate; said board shall annually elect one of its members as chairman and one as vice chairman. * * *

The board may adopt rules and regulations in regard to its procedure and the conduct of its business. *Sec. 3, act of Sept. 7, 1916 (39 Stat. 729).*

The formation of the United States Shipping Board Emergency Fleet Corporation was authorized by sec. 11, act of Sept. 7, 1916 (39 Stat. 731), the majority of the stock being held by the United States Shipping Board, to construct, lease, charter, maintain, and operate merchant vessels. Said corporation was to be dissolved not later than five years after the conclusion of the World War. The emergency shipping fund, $150,000,000, was appropriated by 1284, post, and the President empowered to expend it through such agencies as he should determine, including the aforesaid corporation.

Notes of Decisions.

Status of Emergency Fleet Corporation.—The United States Shipping Board Emergency Fleet Corporation is an entity separate from the United States, notwithstanding the ownership by the Government of all its capital stock, and a person employed by such corporation is not an agent of the United States within the meaning of section 41, Criminal Code, ante, 763. U. S. *v.* Strang (1921), 41 Sup. Ct. 165; 65 L. Ed. 174.

The United States Shipping Board Emergency Fleet Corporation, although all of its stock is owned by the United States, is not exempt from service of process, and may be garnished and sued, even though it may appear at the trial that the matter is one relating to which the corporation is clothed with the attributes of sovereignty, and not subject to suit. Commonwealth Finance Corp. *v.* Landis (D. C. 1919), 261 Fed. 440; Gould Coupler Co. *v.* U. S. Shipping Board E. F. Corp. (D. C. 1919), 261 Fed. 716; Perna *v.* Same (D. C. 1920), 266 Fed. 896; Banque-Russo A.-L. *v.* Same (D. C. 1920), 266 Fed. 897.

Offenses.—A conspiracy to raise fraudulent time checks at a ship building plant, of which the United States Shipping Board Emergency Fleet Corporation was "owner," was a conspiracy to defraud the United States, under section 37, Criminal Code, for the funds expended were funds of the United States, and the effect of the conspiracy would be to deplete them. U. S. *v.* Carlin (D. C. 1917), 259 Fed. 904.

1269. Detail of officers to the United States Shipping Board.— * * * The President, upon the request of the board, may authorize the detail of officers of the military, naval, or other services of the United States for such duties as the board may deem necessary in connection with its business. * * * *Sec. 4, act of Sept. 7, 1916 (39 Stat. 729).*

1270. Procurement of ships for military purposes by the United States Shipping Board.—That the board, with the approval of the President, is authorized to have constructed and equipped in American shipyards and navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels: * * * *Sec. 5, act of Sept. 7, 1916 (39 Stat. 730).*

* * * *Provided*, That after the approval of this Act no contract shall be entered into or work undertaken for the construction of any additional vessels for the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation. *Act of Mar. 4, 1921 (41 Stat. 1382–1383), making appropriations for sundry civil expenses: Emergency shipping fund.*

1271. Possession of vessels taken during the World War.—That the President, upon giving to the person interested such reasonable notice in writing as in his judgment the circumstances permit, may take possession, absolutely or temporarily, for any naval or military purpose, of any vessel purchased, leased, or chartered from the board: *Provided*, That if, in the judgment of the President, an emergency exists requiring such action he may take possession of any such vessel without notice.

Thereafter, upon ascertainment by agreement or otherwise, the United States shall pay the person interested the fair actual value based upon normal conditions at the time of taking of the interest of such person in every vessel taken absolutely, or if taken for a limited period, the fair charter value under normal conditions for such period. In case of disagreement as to such fair value it shall be determined by appraisers, one to be appointed by the board, one by the person interested, and a third by the two so appointed. The finding of such appraisers shall be final and binding upon both parties. *Sec. 10, act of Sept. 7, 1916 (39 Stat. 731).*

1272. Documentation unchanged until surrender of ship shall be approved by the United States Shipping Board.—That any vessel registered, enrolled, or licensed under the laws of the United States shall be deemed to continue to be documented under the laws of the United States within the meaning of subdivision (b) of section thirty-seven, until such registry, enrollment, or license is surrendered with the approval of the board, the provisions of any other Act of Congress to the contrary notwithstanding. *Sec. 42, added to the act of Sept. 7, 1916, by sec. 4, act of July 15, 1918 (40 Stat. 903).*

1273. Charter hire of ships waived by the United States Shipping Board.—The United States Shipping Board shall not require payment from the War Department for the charter hire of vessels furnished or to be furnished from July 1, 1918, to June 30, 1919, inclusive, for the use of that department when such vessels are owned by the United States Government. *Par. 3, act of Nov. 4, 1918 (40 Stat. 1022).*

1274. Transfer of surplus Government ships to the United States Shipping Board.—That the President may transfer either permanently or for limited periods to the board such vessels belonging to the War or Navy Department as are suitable for commercial uses and not required for military or naval use in time of peace, and cause to be transferred to the board vessels owned by the Panama Railroad Company and not required in its business. *Sec. 6, act of Sept. 7, 1916 (39 Stat. 730).*

1275. Ships sold, leased, etc., to private parties.—That the board, upon terms and conditions prescribed by it and approved by the President, may charter, lease, or sell to any person, a citizen of the United States, any vessel so purchased, constructed, or transferred. *Sec. 7, act of Sept. 7, 1916 (39 Stat. 730).*

That any vessel purchased, chartered, or leased from the board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this Act, and vessels owned, chartered, or leased by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. No such vessel, without the approval of the board, shall be transferred to a foreign registry or flag, or sold; nor, except under regulations prescribed by the board, be chartered or leased.

No vessel documented under the laws of the United States or owned by any person a citizen of the United States or by a corporation organized under the laws of the United States or of any State, Territory, District, or possession thereof, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States or transferred to or placed under a foreign registry or flag, unless such vessel is first tendered to the board at the price in good faith offered by others, or, if no such offer, at a fair price to be determined in the manner provided in section ten.

Any vessel sold, chartered, leased, transferred to or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000 or to imprisonment for not more than five years, or both. *Sec. 9, act of Sept. 7, 1916 (39 Stat. 730), as amended by sec. 3, act of July 15, 1918 (40 Stat. 900-901).*

See 1310 and 1311, post.

Notes of Decisions.

Right to libel Shipping Board vessels.—Under the act of June 15, 1917 (40 Stat. 182), empowering the President, inter alia, to requisition private shipping for use and operation by the United States, permitting the exercise of the power through such agencies as he may determine, and providing that ships so requisitioned shall be managed, operated and disposed of as he may direct; and under the President's order of July 11, 1917, delegating those powers for exercise by the Shipping Board and Emergency Fleet Corporation, a ship in course of construction was requisitioned and completed by the Corporation, documented in the name of the United States, and operated by the board through the corporation and a private firm, which, as managing and operating agents of the board, chartered her to a private company for the coastwise carriage of a private cargo of coal. While so engaged a collision occurred, and the vessel was libeled in the district court. Held, that the district court had jurisdiction to arrest the vessel, under that provision of this section that vessels purchased, chartered, or leased by the board, "while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein." The Lake Monroe (1919), 250 U. S. 246. See also notes to 1268, ante.

It is not to be assumed that Congress intended that the power given by the act of June 15, 1917, supra, should be exercised by the President arbitrarily or that the President by his order intended to vest absolute powers in the Shipping Board and Fleet Corporation, subject only to such regulations as he might from time to time prescribe. Id.

Liability for collision.—Despite rule that act of sovereign can not be illegal within its borders, libel against American vessel, requisitioned by United States Shipping Board Emergency Fleet Corporation and chartered to French Government, on account of collision occurring on high seas while vessel was in charge of French crew, can not be denied because it would involve scrutiny of conduct of French crew. The Florence H. (D. C. 1918), 248 Fed. 1012.

Where vessel, requisitioned by United States Shipping Board Emergency Fleet Corporation and chartered to French Government, damaged British vessel in collision, such vessel is subject, under this section, to lien for collision though belonging to United States and operated by French crew. Id.

Liability to arrest.—Under this section vessel requisitioned by United States Shipping Board Emergency Fleet Corporation, and by United States Shipping Board chartered to French Government as carrier of food, held subject to arrest under libel for collision on high seas. Id.

1276. **Sale of unserviceable Government ships.**—That when any vessel purchased or constructed by or transferred to the board as herein provided, and owned by the United States, becomes, in the opinion of the board, unfit for the purposes of this Act, it shall be appraised and sold at public or private competitive sale after due advertisement free from the conditions and restrictions of this Act. *Sec. 8, act of Sept. 7, 1916 (39 Stat. 730).*

1277. Approval of charter parties, transfers, etc., by the United States Shipping Board.—That when the United States is at war, or during any national emergency, the existence of which is declared by proclamation of the President, it shall be unlawful, without first obtaining the approval of the board:

(a) To transfer to or place under any foreign registry or flag any vessel owned in whole or in part by any person a citizen of the United States or by a corporation organized under the laws of the United States, or of any State, Territory, District, or possession thereof; or

(b) To sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, (1) any such vessel or any interest therein, or (2) any vessel documented under the laws of the United States, or any interest therein, or (3) any shipyard, dry dock, ship-building or ship-repairing plant or facilities, or any interest therein; or

(c) To enter into any contract, agreement, or understanding to construct a vessel within the United States for or to be delivered to any person not a citizen of the United States, without expressly stipulating that such construction shall not begin until after the war or emergency proclaimed by the President has ended; or

(d) To make any agreement or effect any understanding whereby there is vested in or for the benefit of any person not a citizen of the United States, the controlling interest or a majority of the voting power in a corporation which is organized under the laws of the United States, or of any State, Territory, District, or possession thereof, and which owns any vessel, shipyard, dry dock, or ship-building or ship-repairing plant or facilities; or

(e) To cause or procure any vessel constructed in whole or in part within the United States, which has never cleared for any foreign port, to depart from a port of the United States before it has been documented under the laws of the United States.

Whoever violates, or attempts or conspires to violate, any of the provisions of this section shall be guilty of a misdemeanor, punishable by a fine of not more than $5,000 or by imprisonment for not more than five years, or both.

Any vessel, shipyard, dry dock, ship-building or ship-repairing plant or facilities, or interest therein, sold, mortgaged, leased, chartered, delivered, transferred, or documented, or agreed to be sold, mortgaged, leased, chartered, delivered, transferred, or documented, in violation of any of the provisions of this section, and any stocks, bonds, or other securities sold or transferred, or agreed to be sold or transferred, in violation of any of such provisions, or any vessel departing in violation of the provisions of subdivision (e), shall be forfeited to the United States.

Any such sale, mortgage, lease, charter, delivery, transfer, documentation, or agreement therefor shall be void, whether made within or without the United States, and any consideration paid therefor or deposited in connection therewith shall be recoverable at the suit of the person who has paid or deposited the same, or of his successors or assigns, after the tender of such vessel, shipyard, dry dock, ship-building or ship-repairing plant or facilities, or interest therein, or of such stocks, bonds, or other securities, to the person entitled thereto, or after forfeiture thereof to the United States, unless the person to whom the consideration was paid, or in whose interest it was deposited, entered into the transaction in the honest belief that the person who paid or deposited such consideration was a citizen of the United States. *Sec. 37,*

added to the act of Sept. 7, 1916, by sec. 4, act of July 15, 1918 (40 Stat. 901–902).

1278. Conditions for approval of charter parties, transfers, etc., of ships.—That whenever by said section nine or thirty-seven the approval of the board is required to render any act or transaction lawful, such approval may be accorded either absolutely or upon such conditions as the board prescribes. Whenever the approval of the board is accorded upon any condition a statement of such condition shall be entered upon its records and incorporated in the same document or paper which notifies the applicant of such approval. A violation of such condition so incorporated shall constitute a misdemeanor and shall be punishable by fine and imprisonment in the same manner, and shall subject the vessel, stocks, bonds, or other subject matter of the application conditionally approved to forfeiture in the same manner, as though the act conditionally approved had been done without the approval of the board, but the offense shall be deemed to have been committed at the time of the violation of the condition.

Whenever by this Act the approval of the board is required to render any act or transaction lawful, whoever knowingly makes any false statement of a material fact to the board, or to any member thereof, or to any officer, attorney, or agent thereof, for the purpose of securing such approval, shall be guilty of a misdemeanor and subject to a fine of not more than $5,000 or to imprisonment for not more than five years, or both. *Sec. 41, added to the act of Sept. 7, 1916, by sec. 4, act of July 15, 1918 (40 Stat. 902–903).*

1279. End of an emergency.—That the fact that a war or emergency has ended shall, for the purposes of this Act, be evidenced by a proclamation of the President. *Sec. 43, added to the act of Sept. 7, 1916, by sec. 4, act of July 15, 1918 (40 Stat. 903).*

For joint resolution providing that certain statutes, the operation of which is contingent upon the existence of a state of war, shall be construed as if the World War had ended on March 3, 1921, see 2835, post.

1280. Powers of the President to obtain ships during the World War.—The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material. *Act of June 15, 1917 (40 Stat. 182).*

That paragraph (b) of section one of said Act is hereby amended by adding, after the word "material," in the third line of said paragraph, the following words, "or take possession, lease or assume control of, any street railroad, interurban railroad, or part thereof, cars and other equipment necessary to operation. *Sec. 2, act of Apr. 22, 1918 (40 Stat. 535), amending sec. 1 (b), act of June 15, 1917 (40 Stat. 182).*

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order. *Act of June 15, 1917 (40 Stat. 182).*

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant. *Act of June 15, 1917 (40 Stat. 182).*

In subdivision (d) of paragraph one, to begin said subdivision and to precede the words "to requisition," are now inserted the words: "To acquire, construct, establish, or extend any plant, and in pursuance thereof, to purchase, requisition, or otherwise acquire title to or use of land improved or unimproved or interest therein; and". *Par. 1 (I), act of Nov. 4, 1918 (40 Stat. 1022), amending sec. 1 (d), act of June 15, 1917 (40 Stat. 182).*

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship. *Act of June 15, 1917 (40 Stat. 182).*

(f) To take possession of, lease or assume control of, any street railroad, interurban railroad, or part thereof wherever operated, and all cars, appurtenances, and franchises or parts thereof commonly used in connection with the operation thereof necessary for the transfer and transportation of employees of shipyards or plants engaged or that may hereafter be engaged in the construction of ships or equipment therefore for the United States. *Sec. 1 (f), added to act of June 15, 1917, by sec. 1, act of Apr. 22, 1918 (40 Stat. 535).*

In subdivision (f) of said paragraph one, after the words "or assume control of," are now inserted the words "or to extend, improve, or increase, or cause to be extended, improved, or increased." *Par. 1 (II), act of Nov. 4, 1918 (40 Stat. 1022), amending sec. 1 (f) act of June 15, 1917 (40 Stat. 182).*

After said subdivision (f) in said paragraph one, a new subdivision is now inserted as follows:

"(g) In pursuance of the foregoing powers, or any of them, to make advance payments or loans of such amounts and upon such terms as the President may deem necessary and proper." *Sec. 1 (g), added to the act of June 15, 1917, by par. 1 (III), act of Nov. 4, 1918 (40 Stat. 1022).*

* * * The President may exercise the power and authority hereby vested in him through the several departments of the Government, and through such agency or agencies as he shall determine from time to time. *Sec. 3, act of Apr. 22, 1918 (40 Stat. 535).*

See notes to 1258, ante.

1281. Period of President's authority over the emergency shipping fund.—All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire. *Act of June 15, 1917 (40 Stat. 183).*

The power and authority granted the President under the emergency shipping fund in the deficiency appropriation Act approved June fifteenth, nineteen hundred and seventeen, are extended and made applicable to the appropriations and authorizations made herein under the emergency shipping fund. *Act of July 1, 1918 (40 Stat. 651).*

1282. Compensation for property.—That upon taking possession of such property, or leasing or assuming control thereof, just compensation shall be made therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive

the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States of America to recover such further sums as added to seventy-five per centum will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. * * * *Sec. 3, act of Apr. 22, 1918 (40 Stat. 535).*

1283. Priority of compulsory order.—Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient. *Act of June 15, 1917 (40 Stat. 182–183).*

1284. Payment for ships out of funds of the War Department.—The cost of purchasing, requisitioning, or otherwise acquiring plants, material, charters, or ships now constructed or in the course of construction and the expediting of construction of ships thus under construction shall not exceed the sum of $250,000,000, exclusive of the cost of ships turned over to the Army and Navy, the expenditure of which is hereby authorized, and in executing the authority granted by this Act for such purpose the President shall not expend or obligate the United States to expend more than the said sum; and there is hereby appropriated for said purpose, $150,000,000: *Provided*, That this appropriation shall be reimbursed from available funds under the War and Navy Departments for vessels turned over for the exclusive use of those departments or either of them. *Act of June 15, 1917 (40 Stat. 183).*

1285. Property of North German Lloyd and Hamburg-American lines.—The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem it necessary for the national security and defense: *Provided*, That if such property can not be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as aforesaid, the United States shall make just compensation therefor to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title of all such property so taken over shall immediately vest in the United States: *Provided further*, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to any expenditures herein or hereafter authorized in connection with the property acquired. *Act of Mar. 28, 1918 (40 Stat. 459).*

1286. Inland water transportation facilities transferred to the War Department.—On the termination of Federal control, as provided in section 200, all

boats, barges, tugs, and other transportation facilities, on the inland, canal, and coastwise waterways (hereinafter in this section called "transportation facilities") acquired by the United States in pursuance of the fourth paragraph of section 6 of the Federal Control Act (except the transportation facilities constituting parts of railroads or transportation systems over which Federal control was assumed) are transferred to the Secretary of War, who shall operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during Federal control shall be continued, and assume and carry out all contracts and agreements in relation thereto entered into by or through the President in pursuance of such paragraph prior to the time above fixed for such transfer. All payments under the terms of such contracts, and for claims arising out of the operation of such transportation facilities by or through the President prior to the termination of Federal control, shall be made out of moneys available under the provisions of this Act for adjusting, settling, liquidating, and winding up matters arising out of or incident to Federal control. Moneys required for such payments shall, from time to time, be transferred to the Secretary of War as required for payment under the terms of such contracts. *Sec. 201 (a), of Feb. 28, 1920 (41 Stat. 458).*

All other payments after such transfer in connection with the construction, utilization, and operation of any such transportation facilities, whether completed or under construction, shall be made by the Secretary of War out of funds now or hereafter made available for that purpose. *Sec. 201 (b), act of Feb. 28, 1920 (41 Stat. 458).*

Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above Saint Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above Saint Louis. *Sec. 201(d), act of Feb. 28, 1920 (41 Stat. 458).*

1787. Disposal of inland water transportation facilities.—That at the end of thirty days after the passage of this resolution the authority conferred upon the Secretary of War under section 201 of the Transportation Act, 1920, to operate for commercial purposes boats, barges, tugs, or other transportation facilities upon the New York State Barge Canal shall cease, and thereafter there shall be no such operation by the Secretary of War or any other agency of the United States. The Secretary of War shall as soon as is practicable, dispose of boats, barges, tugs, and other transportation facilities purchased or constructed for use upon the said canal, and, pending final disposition, the Secretary of War may lease the same: *Provided*, That all the money obtained from the sale or lease of these boats, barges, and tugs shall be available until expended by the inland and coastwise waterways service of the War Department in the inauguration and development of other inland, canal, and coastwise waterways in accordance with the expressed desire of Congress in section 500 of the Transportation Act, 1920: *Provided further*, That not to exceed 25 per centum of the boats, barges, and tugs built or purchased for the United States, herein authorized to be sold, may be retained by the United States for the operation of other inland, canal, or coastwise routes of the United States until such equipment can be replaced by other equipment to be purchased from funds received from the sale prescribed above. *Joint resolution of Feb. 27, 1921 (41 Stat. 1149-1150).*

For sec. 500, transportation act, above, see post, 1290.

1288. Inland water transportation facilities operated according to shipping laws, etc.—The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the "Shipping Act, 1916," as now or hereafter amended, in the same manner and to the same extent as if such transportation facilities were privately owned and operated; and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein. For the performance of the duties imposed by this section the Secretary of War is authorized to appoint or employ such number of experts, clerks, and other employees as may be necessary for service in the District of Columbia or elsewhere, and as may be provided for by Congress. *Sec. 201 (e), act of Feb. 28, 1920 (41 Stat. 458).*

For additional expense incurred in the operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways acquired by the United States in pursuance of the fourth paragraph of section 6 of the Federal Control Act of March 21, 1918, and operated in pursuance of section 201 of the Transportation Act approved February 28, 1920, $1,225,000: *Provided,* That not to exceed $30,000 of this appropriation may be used for the payment of experts, clerks, and other employees in the War Department in accordance with the provisions of section 201 (e) of the Transportation Act, 1920, approved February 28, 1920: * * * *Act of Mar. 4, 1921 (41 Stat. 1392), making appropriations for sundry civil expenses: Transportation facilities on inland and coastwise waterways.*

1289. Terminal facilities for inland water transportation.—The Secretary of War is hereby authorized, out of any moneys hereafter made available therefor, to construct or contract for the construction of terminal facilities for the interchange of traffic between the transportation facilities operated by him under this section and other carriers whether by rail or water, and to make loans for such purposes under such terms and conditions as he may determine to any State whose constitution prohibits the ownership of such terminal facilities by other than the State or a political subdivision thereof. *Sec. 201 (c), act of Feb. 28, 1920 (41 Stat. 458).*

* * * *And provided further,* That section 201 (c), Transportation Act, 1920, be amended by striking out the words "whose constitution prohibits the ownership of such terminal facilities by other than the State or a political subdivision thereof," and insert in lieu thereof the following: "municipality or transportation company; or to expend such moneys for necessary terminal improvements and facilities upon property leased from States, cities, or transportation companies under terms approved by the Interstate Commerce Commission, or otherwise, in accordance with any order rendered by said commission under subheading (a), paragraph 13, section 6, Interstate Commerce Act." *Act of Mar. 4, 1921 (41 Stat. 1392), making appropriations for sundry civil expenses: Transportation facilities on inland and coastwise waterways.*

1290. Investigations, etc., as to inland water transportation.— * * * It shall be the duty of the Secretary of War, with the object of promoting, encouraging, and developing inland waterway transportation facilities in connection with the commerce of the United States, to investigate the appropriate types of boats suitable for different classes of such waterways; to investigate the subject

of water terminals, both for inland waterway traffic and for through traffic by water and rail, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, and also railroad spurs and switches connecting with such terminals, with a view to devising the types most appropriate for different locations, and for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities, cities, and towns regarding the appropriate location of such terminals, and to cooperate with them in the preparation of plans for suitable terminal facilities; to investigate the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and whether the water carriers utilizing such waterways are interchanging traffic with the railroads; and to investigate any other matter that may tend to promote and encourage inland water transportation. It shall also be the province and duty of the Secretary of War to compile, publish, and distribute, from time to time, such useful statistics, data, and information concerning transportation on inland waterways as he may deem to be of value to the commercial interests of the country.

The words "inland waterway" as used in this section shall be construed to include the Great Lakes. *Sec. 500, act of Feb. 28, 1920 (41 Stat. 499).*

CHAPTER 24.

ADMIRALTY AND MARITIME LAW.

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1291. Reports of accidents to vessels.—That from and after the first day of July, eighteen hundred and seventy-four, whenever any vessel of the United States has sustained or caused any accident involving the loss of life, the material loss of property, or any serious injury to any person, or has received any material damage affecting her seaworthiness or her efficiency, the managing owner, agent, or master of such vessel shall within five days after the happening of such accident or damage, or as soon thereafter as possible, send, by letter to the collector of customs of the district wherein such vessel belongs or of that within which such accident or damage occurred, a report thereof, signed by such owner, agent, or master, stating the name and official number (if any) of the vessel, the port to which she belongs, the place where she was, the nature and probable occasion of the casualty, the number and names of those lost, and the estimated amount of loss or damage to the vessel or cargo; and shall furnish, upon the request of either of such collectors of customs, such other information concerning the vessel, her cargo, and the casualty as may be called for; and if he neglect or refuse to comply with the foregoing requirements after a reasonable time, he shall incur a penalty of one hundred dollars. *Sec. 10, act of June 20, 1874 (18 Stat. 128).*

That the Secretary of the Treasury may, upon application therefor, remit or mitigate any penalty provided for in this Act, or discontinue any prosecution to recover the same, upon such terms as he, in his discretion, shall think proper, and shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may think proper. All penalties herein provided may be sued for, prosecuted, recovered, and disposed of in the manner prescribed by section forty-three hundred and five of the Revised Statutes. *Sec. 13, act of June 20, 1874 (18 Stat. 128), as amended by sec. 11, act of Mar. 3, 1897 (29 Stat. 689).*

The above provisions were made applicable to barges in tow in open sea by sec. 15, act of Mar. 4, 1915 (38 Stat. 1184).

Notes of Decisions.

Tampering with report.——The unexplained abstraction from the files of the office of the local inspectors of the report of a vessel in collision, and the filing of an amended report four days after, both of which were in the handwriting of a clerk of the claimant, is irregular and unlawful, and presumably chargeable upon the claimant, and would throw discredit upon its case, if the merits were otherwise doubtful. Dinniny *v.* The Sam Sloan (D. C. 1894), 65 Fed. 125.

1292. Aid given by Canadian vessels in United States waters.—That Canadian vessels and wrecking appurtenance may render aid and assistance to Canadian or other vessels and property wrecked, disabled, or in distress in the waters of the United States contiguous to the Dominion of Canada: *Provided*, That this act shall not take effect until proclamation by the President of the United States that the privilege of aiding American or other vessels and property wrecked, disabled, or in distress in Canadian waters contiguous to the United States has been extended by the Government of the Dominion of Canada to

American vessels and wrecking appliances of all descriptions. This act shall be construed to apply to * * * the canal and improvement of the waters between Lake Erie and Lake Huron, and to the waters of the Saint Mary's River and canal: *And provided further*, That this act shall cease to be in force from and after the date of the proclamation of the President of the United States to the effect that said reciprocal privilege has been withdrawn, revoked, or rendered inoperative by the said Government of the Dominion of Canada. *Act of June 19, 1878 (20 Stat. 175), as amended by act of May 24, 1890 (26 Stat. 120).*

The words "the Welland Canal," omitted here, were stricken out by act of Mar. 2, 1893 (27 Stat. 683).

On July 17, 1893, President Cleveland made proclamation that the condition above specified had been fulfilled and that above acts are in full force and effect.

1293. Aid in case of collision of vessels.—That in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default. *Sec. 1, act of Sept. 4, 1890 (26 Stat. 425).*

That every master or person in charge of a United States vessel who fails, without reasonable cause, to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of one thousand dollars, or imprisonment for a term not exceeding two years; and for the above sum the vessel shall be liable and may be seized and proceeded against by process in any district court of the United States by any person; one-half such sum to be payable to the informer and the other half to the United States. *Sec. 2, act of Sept. 4, 1890 (26 Stat. 425).*

Notes of Decisions.

Excuse for failure to stand by.—Where a schooner collided with one of two barges towed by a steam tug, and was swept on by the wind, and carried a considerable distance to leeward before the extent of her own injuries and peril could be ascertained, in view of the fact that the injured barge was near land, and the steam tug and the other barge were at hand, the schooner should not be held liable because she proceeded on her course without returning to the assistance of the barge, or giving her name, as required by this section. Boston Towboat Co. v. Winslow (1898), 76 Fed. 595, 22 C. C. A. 327.

The failure of the captain of one of two vessels, both of which were seriously injured in a collision, to stand by after the other had been beached, or to take off her passengers, was not a violation of this section, where it was calm and there was little danger to the passengers, and the extent of the injury to his own vessel was unknown, and where, after proceeding to port, only 4 miles distant, he at once gave notice and himself returned with a tug, and all the passengers and crew were safely taken off. The Trader (D. C. 1901), 129 Fed. 462.

Effect of failure of vessel to stand by.—The failure of a vessel to stand by after collision merely places upon her the burden of proof in a suit for the collision. Crossley v. The Hercules (D. C. 1895), 70 Fed. 334; reversed (1897), 80 Fed. 998, 26 C. C. A. 301; The Luzerne (D. C. 1906), 148 Fed. 133.

1294. Collision by vessel engaged upon river and harbor work.—That whenever any vessel belonging to or employed by the United States engaged upon river and harbor works collides with and damages another vessel, pier, or other legal structure belonging to any person or corporation, and whenever, in the prosecution of river and harbor works, an accident occurs damaging or destroying property belonging to any person or corporation, and whenever personal property of employees of the United States, who are employed on or in connection with river and harbor works, is damaged or destroyed in connection with the loss, threatened loss, or damage to United States property, or through efforts to save life or to preserve United States property, the Chief of Engineers shall cause an immediate examination to be made, and if, in his judgment, the facts and circumstances are such as to make the whole or any part of the damages or destruction a proper charge against the United States, the Chief of Engineers, subject to the approval of the Secretary of War, shall have authority to adjust and settle all claims for damages or destruction caused by the above designated collisions, accidents, and so forth, in cases where the damage or expense does not exceed $500, and pay the same from the appropriation directly involved, and to report such as exceed $500 to Congress for its consideration. *Sec. 4, act of June 25, 1910 (36 Stat. 676), as amended by sec. 9, act of June 5, 1920 (41 Stat. 1015).*

Notes of Decisions.

Liability for injury caused by dredge.—A dredge, while working at a place 140 feet out from Long Island City pier, was moored to the pier by two wire cables stretched above the water, with nothing to give notice of their presence, except the cables themselves and a sign on the dredge to "look out for anchor cables." A New York City fireboat, attempting to pass between the dredge and pier in answering a call to a fire, did not see the cables until too late to stop or avoid them, and was injured by running into them. Held, that the dredge was in fault for not giving a better warning of such an unusual obstruction, and the fireboat was not chargeable with contributory fault because she was not in the center of the river, as required of all vessels by a State statute. The No. 1 (1910), 180 Fed. 969, 104 C. C. A. 125.

1295. Salvage not an obligation for Government vessels.—That nothing in this Act shall be construed as applying to ships of war or to Government ships appropriated exclusively to a public service. *Sec. 5, act of Aug. 1, 1912 (37 Stat. 242).*

1296. Vessels stranded on foreign coasts.—Consuls and vice-consuls, in cases where vessels of the United States are stranded on the coasts of their consulates respectively, shall, as far as the laws of the country will permit, take proper measures, as well for the purpose of saving the vessels, their cargoes and appurtenances, as for storing and securing the effects and merchandise saved, and for taking inventories thereof; and the merchandise and effects saved, with the inventories thereof so taken, shall, after deducting therefrom the expenses, be delivered to the owners. No consul or vice-consul shall have authority to take possession of any such merchandise, or other property, when the master, owner, or consignee thereof is present or capable of taking possession of the same. *R. S. 4238.*

1297. Saving life at sea.—That the master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding one thousand dollars or imprisonment for a term not exceeding two years, or both. *Sec. 2, act of Aug. 1, 1912 (37 Stat. 242).*

1298. Salvage claim in case of common ownership.—That the right to remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services. *Sec. 1, act of Aug. 1, 1912 (37 Stat. 242).*

1299. Salvage services rendered by a Government vessel and crew.—That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel. *Sec. 10, act of Mar. 4, 1920 (41 Stat. 528).*

1300. Salvors of life to share in remuneration for salvage.—That salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories. *Sec. 3, act of Aug. 1, 1912 (37 Stat. 242).*

1301. Time limit for salvage suits.—That a suit for the recovery of remuneration for rendering assistance or salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salved vessel within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business. *Sec. 4, act of Aug. 1, 1912 (37 Stat. 242).*

Notes of Decisions.

Salvage claims.—There are three elements necessary to a salvage claim: (1) A marine peril to the property rescued; (2) service voluntarily rendered when not required as an existing duty or from a special contract; and (3) success in whole or in part, or that the service rendered contributed to such success. It is unnecessary to show that escape from danger by other means was not possible, provided the danger was real and imminent. Manchester Liners, Ltd., v. U. S. (1918), 53 Ct. Cl. 449.

1302. Bills of lading required.—That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. *Sec. 4, act of Feb. 13, 1893 (27 Stat. 445).*

The provisions of this section were made inapplicable to the transportation of live animals by sec. 7 of this act.

Notes of Decisions.

Right to, and sufficiency of, bill of lading.—A shipper of goods on a vessel is entitled to a bill of lading therefor as a matter of right; but, where the master claims demurrage for delay in loading, he has the right to give notice of the claim in, or by indorsement upon, such bill, so as to charge a transferee with such notice. Watt v.

Cargo of Lumber (1908), 161 Fed. 104, 88 C. C. A. 268.

It is the duty of a master on the loading of his vessel to tender a bill of lading, although the charterer has not submitted a correct bill as required by the charter party. Hansen *v.* American Trading Co. (1913), 206 Fed. 884, 126 C. C. A. 44.

A master is without right to refuse to sign a bill of lading because a claim for demurrage is not paid. Pendleton Bros. *v.* Atlantic Lumber Co. (1908), 60 S. E. 377, 3 Ga. App. 714.

Effect of bills of lading issued before goods were received on board.—The owner of a steamship, which issued bills of lading acknowledging the receipt of merchandise on board for transportation from Calcutta to New York, is liable for loss resulting to the consignee because of the failure to forward by such vessel and the delay resulting. The Gutenfels (1909), 170 Fed. 937, 96 C. C. A. 97, affirming decree (D. C. 1908), 166 Fed. 989.

Provisions of bills of lading as to quantity or condition of goods.—While the statement in a bill of lading of the quantity of cargo received is strong prima facie evidence of such receipt, it is not conclusive on the vessel owner; and where it is clearly shown that all that was received was delivered, the owner can not be held liable for a shortage because of an erroneous statement in the bill of lading given by the master. James *v.* Standard Oil Co. of New York (D. C. 1911), 189 Fed. 719, decree affirmed (1911), 191 Fed. 827, 112 C. C. A. 341; Bolton Steam Shipping Co. *v.* Crossman (D. C. 1913), 206 Fed. 183.

A bill of lading for logs which states their number and weight "shipper's load and count" and "shipper's weight (subject to correction)" complies with this section. U. S. *v.* Cobb (D. C. 1906), 163 Fed. 791.

Recitals in bills of lading that the goods were "shipped in apparent good order and well conditioned" apply only to such conditions as are visible or fairly ascertainable. The Solveig (D. C. 1914), 217 Fed. 805.

Qualified statements.—Bills of lading, which, although containing formal recitals of the weight of a commodity received, also contain a clause, "Weight, measure, and contents unknown," are not conclusive against the vessel as to the exact weight; and the uncontradicted testimony of the master and mate that the commodity was not weighed when taken on board, and that all that was actually received was delivered, is sufficient to exonerate the ship from liability for a prima facie shortage. The Seefahrer (D. C. 1904), 133 Fed. 793.

Where through bills of lading for boxes of bristles recited that the weight and quantity were unknown, the burden rests upon the shipper to show their weight, when received, in order to hold the last carrier liable for a claimed short weight in the quantity delivered. The Seneca (D. C. 1908), 163 Fed. 591, decree reversed (1909), 172 Fed. 370, 97 C. C. A. 68.

The burden of proof.—A ship has the burden of explaining the cause of damage to cargo shown to have been received in good condition to relieve itself from liability for such damage. The La Kroma (D. C. 1905), 138 Fed. 936.

1303. Failure to issue a proper bill of lading.—That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. *Sec. 5, act of Feb. 13, 1893 (27 Stat. 446).*

See notes to sec. 1 of this act, 1304, post.

Notes of Decisions.

Damages occasioned by false bill of lading.—This section does not make the vessel liable for the damages occasioned by the issuance by the master of a false bill of lading. The Isola Di Procida (D. C. 1903), 124 Fed. 942.

Mode of procedure.—Violators of the act may be prosecuted by indictment. United States *v.* Cobb (D. C. 1906), 163 Fed. 791.

Sufficiency of indictment.—An indictment under such act averring that such bill was issued by defendant, and setting out a copy

of such bill, from which it appears that defendant's name was signed thereto "per" another, it is unnecessary to allege that it was so signed by defendant's authority; that being matter of proof. U. S. v. Cobb (D. C. 1906), 163 Fed. 791.

1304. **Liability not to be disclaimed in a bill of lading.**—That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. *Sec. 1, act of Feb. 13, 1893 (27 Stat. 445).*

This was the first section of the Harter Act, cited above, entitled "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property."

The provisions of this section were made inapplicable to the transportation of live animals, by sec. 7 of this act.

Notes of Decisions.

Decisions as to stowage prior to enactment of statute.—[C. S. p. 8564.]

Decisions as to custody and care of goods prior to enactment of statute.—[C. S. p. 8565.]

Decisions as to negligence in delivery of goods prior to enactment of statute.—[C. S. p. 8565.]

Applicability of act.—This section applies to a vessel transporting goods from a foreign port to a port of the United States as well as to those transporting them from United States ports to foreign ports. Knott v. Botany Worsted Mills (1900), 21 Sup. Ct. 30, 32, 179 U. S. 69, 45 L. Ed. 90.

This section applies to any shipment "from ports of the United States," whether to a foreign or domestic port. The Tampico (D. C. 1907), 151 Fed. 689.

This act did not affect the liability of carriers in cases not embraced by it, and therefore did not change the rule that it is against public policy to permit a carrier of passengers to contract against its liabilities for its own negligence. The Kensington (1902), 22 Sup. Ct. 102, 104, 183 U. S. 263, 46 L. Ed. 190.

Foreign vessels are entitled to the benefit of the Harter Act, and will be held subject to its limitations by courts of the United States in suits for damages to cargo arising on the high seas on voyages to this country. The Frey (D. C. 1899), 92 Fed. 667.

A negligence clause exempting a shipowner from liability for damages to a shipment from "any act, neglect, or default of pilot, master, mariner," etc., is a good defense to an action in the United States for damages to cargo from negligence in handling, where the destination is not the United States or any country under whose laws such clauses are proven to be invalid. The Miguel di Larrinaga (D. C. 1914), 217 Fed. 678.

Private carriers.—[C. S. p. 8565.]

A contract by a lighterage company to carry the product of a manufacturing company in and about New York Harbor, furnishing the full capacity of its vessels, made it a private carrier; and a provision of its contract that it should not be liable for goods lost or damaged, but requiring the owner to insure against such loss, is valid. The Maine (1909), 170 Fed. 915, 96 C. C. A. 131, reversing decree (D. C. 1907), 153 Fed. 635, and affirming The Maine (D. C. 1908), 161 Fed. 401.

Validity of particular exemptions.—A stipulation that the law of the ship's flag shall govern, in a bill of lading for goods in a foreign vessel on a voyage from a foreign port to the United States, is nullified by the Harter Act. Knott v. Botany Worsted Mills (1900), 21 Sup. Ct. 30, 179 U. S. 69, 45 L. Ed. 90, affirming decree Botany Worsted Mills v. Knott (1897), 82 Fed. 471, 27 C. C. A. 326.

A general clause in a bill of lading, exempting a shipowner from liability for loss of goods while on the quay, or loss by thieves, is not to be construed as applying to cases where such loss arises through the carrier's negligence or failure in proper custody or care, so as to render it invalid, nor is it rendered void, under such provision, by a subsequent clause extending all exemption provisions to cases of negligence, the two clauses being sep-

arable; but the carrier is entitled to the benefit of the exemption, unless it is found that its negligence or fault contributed to the loss. Cunard S. S. Co. *v.* Kelley (1902), 115 Fed. 678, 53 C. C. A. 310.

A bill of lading can not exempt a vessel from liability for damage to cargo, due to the negligence of the carrier or its servants. Gilchrist Transp. Co. *v.* Boston Ins. Co. (1915), 223 Fed. 716, 139 C. C. A. 246.

This section is broad enough to render void a clause of a bill of lading by which the shipper waives any lien upon the vessel for any breach thereof, where it is attempted to set up such clause as a defense to a libel in rem to recover for loss or damage to cargo arising from negligence of the carrier. The Tampico (D. C. 1907), 151 Fed. 689.

Robbery or theft of cargo by those on board can not be made a ground of exemption from liability of a vessel under the Harter Act. The Seneca (D. C. 1908), 163 Fed. 591; decree reversed (1909), 172 Fed. 370, 97 C. C. A. 68.

A strike clause in a bill of lading is not forbidden by this act. The Toronto (D. C. 1908), 168 Fed. 386.

An interstate carrier by water may by contract exempt itself from liability for loss of shipment by fire before it was loaded on the vessel where the fire or the loss is not caused by its negligence. Canby *v.* Merchants' & Miners' Transp. Co. (Ga. App. 1915), 85 S. E. 361.

Effect of exemptions in bill of lading.—A ship is liable for damage to cargo, resulting from negligence in stowage, custody, care, and delivery, notwithstanding any exemptions in the bills of lading. The Mississippi (1903), 120 Fed. 1020, 56 C. C. A. 525, affirming decree (D. C. 1902), 113 Fed. 985; The Ghazee (1909), 172 Fed. 368, 97 C. C. A. 66; The Manitou (D. C. 1902), 116 Fed. 60, decree affirmed (1903), 127 Fed. 554, 63 C. C. A. 109; writ of certiorari denied, Atlantic Transport Co. *v.* Dodge (1904), 24 Sup. Ct. 853, 193 U. S. 671, 48 L. Ed. 841; The J. L. Luckenbach (D. C. 1913), 209 Fed. 142.

Stipulations in bills of lading that the carrier shall not be liable for any damage to goods which is capable of being covered by insurance will not relieve the vessel from liability for loss due to the carrier's negligence. The Seaboard (D. C. 1902), 119 Fed. 375.

A provision in a bill of lading that the risk of due refrigeration of meats shall be borne by the shipper, though damage be caused by neglect of the carrier's servant, does not excuse the carrier from the duty of reasonable care to provide a proper refrigerating plant. The Prussia (D. C. 1898), 88 Fed. 531, decree affirmed (1899), 93 Fed. 837, 35 C. C. A. 625.

Exemptions in bills of lading are not construed to cover the negligence or default of the carrier, unless it is expressly stipulated for. U. S. *v.* Cobb (D. C. 1906), 163 Fed. 791; The Toronto (D. C. 1908), 168 Fed. 386, decree affirmed (1909), 174 Fed. 632, 98 C. C. A. 386.

A provision in a bill of lading exempting the ship from liability for damage arising from latent defects in hull must be strictly construed. The Citta di Palermo (D. C. 1914), 226 Fed. 522.

Though a stipulation for exemption from liability be in part in contravention of law, yet such portion as is otherwise valid may be enforced. The Prussia (D. C. 1898), 88 Fed. 531, decree affirmed (1899), 93 Fed. 837, 35 C. C. A. 625.

Limitation of liability to stipulated sum.—A clause in a bill of lading reciting that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, or for goods of any description, which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, must be interpreted as releasing the carrier from any liability for packages valued at more than $100, and not merely for the excess over $100, and such release is in violation of the Harter Act, and therefore void. Calderon *v.* Atlas S. S. Co. (1898), 18 Sup. Ct. 588, 591, 170 U. S. 272, 42 L. Ed. 1033.

A provision of bills of lading held void, as ambiguous and open to a construction which would exempt the ship from any liability whatever for loss or injury to packages of goods above a stated value without special contract. Lines *v.* Atlantic Transport Co. (1915), 223 Fed. 624, 139 C. C. A. 170.

1305. Liability for negligence not avoided by a clause in a bill of lading.—That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, offi-

cers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. *Sec. 2, act of Feb. 13, 1893 (27 Stat. 445).*

See notes to sec. 1 of this act, 1304, ante.

Notes of Decisions.

Construction of section in general.—This section authorizes a vessel to contract against the obligation of seaworthiness, but not against the duty of exercising due diligence to render her seaworthy and fit for the voyage contemplated. It does not of its own force, without a contract for such purpose, relieve against the obligation of providing a seaworthy vessel. It is still incumbent upon the owner, master, or agents to provide a seaworthy vessel, unless by contract he, she, or they shall limit their obligation to the exercise of due diligence to make her so. The obligation to exercise due diligence, however, can not under any conditions be relieved against. The Carib Prince (1898), 18 Sup. Ct. 753, 756, 170 U. S. 655, 42 L. Ed. 1181; The Ninfa (D. C. 1907), 156 Fed. 512, 517.

This section is not essentially different from the preceding section in its general purport, though it may have been intended to impose a somewhat ampler liability. Calderon v. Atlas S. S. Co. (1898), 18 Sup. Ct. 588, 590, 170 U. S. 272, 42 L. Ed. 1033.

Applicability of section.—This section relates to contracts between carrier and shipper, and does not apply to a charter party by which a ship is demised. Golcar S. S. Co. v. Tweedie Trading Co. (D. C. 1906), 146 Fed. 563. Nor does it apply to passenger tickets. The Kensington (1899), 94 Fed. 885, 36 C. C. A. 533, affirming decree (D. C. 1898), 88 Fed. 331; La Bourgogne (1906), 144 Fed. 781, 75 C. C. A. 647, decree affirmed, Deslions v. La Compagnie Generale Transatlantique (1908), 28 Sup. Ct. 664, 210 U. S. 95, 5 L. Ed. 973.

Implied warranty.—The implied warranty of seaworthiness at the commencement of a voyage extends, not only to hull and equipment, but also to stowage and fitness of the ship to carry the cargo in safety and without injury. The Jeannie (D. C. 1915), 225 Fed. 178.

Validity of particular exemptions.—Stipulations in a bill of lading can not relieve a carrier from the discharge of his initial duty to use due diligence to furnish a seaworthy vessel. Martin v. The Southwark (1903), 24 Sup. Ct. 1, 2, 191 U. S. 1, 48 L. Ed. 65, reversing decree The Southwark (1901), 108 Fed. 880, 48 C. C. A. 123.

This section does not prevent an owner from stipulating against liability for loss by latent defects, provided he uses due diligence at the commencement of the voyage to make the vessel seaworthy. Wuppermann v. The Cahib Prince (1895), 68 Fed. 254, 15 C. C. A. 385, affirming decree The Carib Prince (D. C. 1894), 63 Fed. 266, and decree reversed (1898), 18 Sup. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181.

A stipulation, in a contract for the transportation of frozen meat, exempting the carrier from liability for loss or damage to the cargo in consequence of latent defects in such apparatus, which is not due to any fault or negligence on his part, is not in violation of sec. 2 of the Harter Act. The Prussia (1899), 93 Fed. 837, 35 C. C. A. 625, affirming decree (D. C. 1898), 88 Fed. 531.

"Proper delivery" includes timely delivery, and the parties can not evade the act by inserting stipulations determining what shall constitute proper delivery any further than shall appear reasonable under the circumstances proved, or a stipulation that shall cover negligence either in receiving and stowing the goods, or in making a proper search for them at the port of delivery. Calderon v. Atlas S. S. Co. (D. C. 1894), 64 Fed. 874, decree affirmed (1895), 69 Fed. 574, 16 C. C. A. 332.

1306. Value of goods must appear in a bill of lading.—If any shipper of gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or time-pieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any

vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered. *R. S. 4281.*

Notes of Decisions.

Act not applicable to carriage by railroad.—This section does not apply to a case against a railroad for loss of baggage. New York C. & H. R. R. Co. *v.* Fraloff (1879), 100 U. S. 24, 32, 25 L. Ed. 531.

Articles carried or worn on the person.—This section was intended to apply where such goods are received from a shipper by a carrier for transportation in the usual course of business, and does not relieve a shipowner from liability for jewelry worn and carried on board by a woman passenger with the intention of placing it in the custody of the purser, as permitted by the rules of the ship, but which was stolen by an employee of the ship before she had the opportunity to do so. The Minnetonka (1906), 146 Fed. 509, 77 C. C. A. 217, affirming decree (D. C. 1904), 132 Fed. 52, and writ of certiorari denied, Atlantic Transport Co. *v.* Barnes (1906), 27 Sup. Ct. 777, 203 U. S. 589, 51 L. Ed. 330.

1307. Loss by fire on a vessel.—No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. *R. S. 4282.*

See also notes to R. S., 4281, ante, 1306.

Notes of Decisions.

What are vessels within act.—See notes to 1317, post.

Fires not on ship.—The statute was designed to give relief against the consequences of fires incident to navigation, and is not applicable to fires after the goods have been landed and which are not communicated from the ship. Salmon Falls Mfg. Co. *v.* The Tangier (C. C. 1857), Fed. Cas. No. 12,265; The Egypt (D. C. 1885), 25 Fed. 320, 323, 324; The City of Clarksville (D. C. 1899), 94 Fed. 201; Black *v.* Ashley (1890), 44 N. W. 1120, 80 Mich. 90.

Construction of act.—The statute must be liberally construed in favor of the shipowners. Providence & N. Y. S. S. Co. *v.* Hill Mfg. Co. (1883), 3 Sup. Ct. 379, 386, 109 U. S. 578, 27 L. Ed. 1038.

This section can have no application when fire is but incident to the collision. The City of Norwich (D. C. 1870), 5 Fed. Cas. No. 2,761.

This section is not penal, but remedial, and should be construed, if not liberally, at least fairly to carry out the policy which it was enacted to promote. Chamberlain *v.* Western Transp. Co. (1871), 44 N. Y. 305, 4 Am. Rep. 681, reversing (1866), 45 Barb. 218.

Construction with other statutes.—The Carmack amendment to the Hepburn Act, Aug. 9, 1906 (39 Stat. 441), does not make an initial carrier liable for a loss occurring from fire, on a vessel of a connecting carrier, without its design or neglect. Burke *v.* Gulf, C. & S. F. Ry. Co. (Mun. Ct. N. Y. 1914), 147 N. Y. Supp. 794.

Construction of terms—"Neglect."—The word "neglect" involves the absence of willful injury, and means an unintended breach of duty resulting in injury to the property or person of another. The Strathdon (D. C. 1898), 89 Fed. 374, 378.

"Design."—The word "design" contemplates a causative act or omission, done or suffered willfully or knowingly by the shipowner, and involves an intention to cause a fire or to suffer it to be caused by another, and the culpability is in the nature of trespass. The Strathdon (D. C. 1898), 89 Fed. 374, 378.

"Merchandise."—The baggage of passengers is not "merchandise." The Marine City (D. C. 1881), 6 Fed. 413. Contra, Chamberlain *v.* Western Transp. Co. (1871), 44 N. Y. 305, 4 Am. Rep. 681, reversing (1866), 45 Barb. 218.

Horses and trucks, which are taken aboard a ferryboat by their drivers, who are passengers, and remain in their charge upon the trip, are not "merchandise." The Garden City (D. C. 1886), 26 Fed. 766.

"Shipped."—Cargo delivered on a wharf into the charge of the officers of a vessel is shipped so as to free the shipowners. Hill v. The Bertram (D. C. 1857), Fed. Cas. No. 6,510.

Negligence of part owners.—Where a libel in rem was filed to recover damages for injuries to goods by fire caused by the alleged negligence of the master, who was also part owner, but not by the design or neglect of the other part owners, held, that the part owners personally, and also their interest in the vessel, were exempt. Keene v. Whistler (D. C. 1873), Fed. Cas. No. 7,645.

Determination of question of owner's design or neglect.—In a proceeding by a shipowner in a district court for limitation of liability, the question whether a fire by which cargo was destroyed was caused by the design or neglect of such shipowner, if not previously adjudicated, will be determined by the court, and will not be left open to be determined by a jury in an action brought by the cargo owner for the purpose. In re Old Dominion S. S. Co. (D. C. 1902), 115 Fed. 845.

Burden of proof.—Shipowners are not liable for injury to the cargo by fire, unless the cargo owners prove by a preponderance of evidence that the fire was caused by the design or neglect of the shipowners personally. The Strathdon (D. C. 1898), 89 Fed. 374; In re Old Dominion S. S. Co. (D. C. 1902), 115 Fed. 845.

Negligence of officers or agents.—This section exempts the owners from liability for negligence of their officers or agents in which the owners have not directly participated. Walker v. Western Transp. Co. (1865), 3 Wall. 150, 155, 18 L. Ed. 172.

In the case of the loss by fire of a vessel owned by a corporation, the president and directors are regarded not merely as agents of the corporation, but as immediately representing the corporation; and their act or neglect, causing the fire, is the act or neglect of the shipowners. Hill Mfg. Co. v. Providence & N. Y. S. S. Co. (1873), 113 Mass. 495, 18 Am. Rep. 527.

Contract as to liability.—This act relieves shipowners from responsibilities, but parties may as before make contracts extending or limiting the liability of shipowners. New York C. R. Co. v. Lockwood (1873), 17 Wall. 357, 369, 21 L. Ed. 627.

A bill of lading measuring the carrier's liability by that of its own insurers, where the owner carried insurance against loss of cargo by fire, restored the carrier's common-law liability for loss by fire. Southern Cotton Oil Co. v. Merchants' & Miners' Transp. Co. (D. C. 1910), 179 Fed. 133.

A provision in the charter of a carrier by water, created by and operating entirely within the State, that it shall be liable to all common-law liabilities, does not conflict with this section. Houston Direct Nav. Co. v. Insurance Co. of North America (Tex. Civ. App. 1895), 31 S. W. 560.

Proximate cause of loss.—This section exempts a shipowner from liability for the loss of a steamer with a cargo, chiefly of lime, which took fire, and was scuttled by the city fire department, whereby the lime was destroyed. Deming v. The Rapid Transit (D. C. 1892), 52 Fed. 320.

The owner of a vessel which has deviated from her voyage by his order is not relieved from liability for loss of cargo by fire during such deviation. The Indrapura (D. C. 1909), 171 Fed. 929.

Losses covered by exemption.—This section does not relieve the owner from liability in any measure where the fire was caused by his design or neglect. Hill Mfg. Co. v. Providence & N. Y. S. S. Co. (1873), 113 Mass. 495, 18 Am. Rep. 527; Knowlton v. Providence & N. Y. S. S. Co. (1873), 53 N. Y. 76; Woodhouse v. Cain (1886), 95 N. C. 113.

Right and liability to general average.—The statute does not exempt shipowners from liability to contribute toward general average. The Roanoke (1893), 59 Fed. 161, 8 C. C. A. 67, affirming decree (D. C. 1891), 46 Fed. 297; The Wm. J. Quillan (D. C. 1910), 175 Fed. 207; reversed (1910), 180 Fed. 681, 103 C. C. A. 647.

The shipowner is entitled to general average contribution from the cargo for water damage done to the vessel in extinguishing fire. Ralli v. Troop (D. C. 1889), 37 Fed. 888, 890, reversed (1895), 15 Sup. Ct. 657, 157 U. S. 386, 39 L. Ed. 742.

Waiver of exemption.—The exemption granted by this section may be waived and the liability of a carrier by water may be extended. D'Utassy v. Mallory S. S. Co. (1914), 147 N. Y. S. 313, 162 App. Div. 410.

Effect of custom. Though the parties may expressly contract for a different liability, a local custom that a clause exempting the owner from liability for perils of navigation includes an exemption from liability for fire only when not caused by the negligence of the owner or his officers or agents will not be permitted to increase the liability. Walker v. Western Transp. Co. (1865), 3 Wall. 150, 154, 18 L. Ed. 172.

1308. Liability of owner limited to his interest.—The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. *R. S. 4283.*

See, also, notes to R. S. 4281, ante, 1306.

Notes of Decisions.

What are vessels within act.—See notes to 1317, post.

Intent and purpose of act.—The limitation of liability of shipowners by these sections may be considered as indicating the views of Congress as to how far legislation ought to prescribe exemption. The Montana (C. C. 1884), 22 Fed. 715, 729; affirmed (1889), 9 Sup. Ct. 469, 129 U. S. 397, 32 L. Ed. 788, and (1889), 9 Sup Ct. 480, 129 U. S. 464, 32 L. Ed. 800.

Construction in general.—The statute must be liberally constructed in favor of the shipowners. Providence & N. Y. S. S. Co. v. Hill Mfg. Co. (1883), 3 Sup. Ct. 379, 386, 109 U. S. 578, 27 L. Ed. 1038; The Marie Palmer (D. C. 1911), 191 Fed. 79; decree affirmed, South Atlantic Towing Co. v. Chaney (1913), 202 Fed. 1023, 120, C. C. A. 664.

Relation to other statutes.—The act of June 26, 1884, post, 1309, is to be construed as in pari materia with this section. Great Lakes Towing Co. v. Mill Transp. Co. (1907), 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.), 769; writ of certiorari denied, Mills Transp. Co. v. Great Lakes Towing Co. (1907), 28 Sup. Ct. 262, 207 U. S. 596, 52 L. Ed. 357; Gokey v. Fort (D. C. 1890), 44 Fed. 364; Rudolf v. Brown (D. C. 1905), 137 Fed. 106. But see Warner v. Boyer (D. C. 1896), 74 Fed. 873.

The limited liability act of 1851 reenacted into these sections was not repealed by sec. 18, act of June 26, 1884, post, 1309. The Republic (1894), 61 Fed. 109, 113, 9 C. C. A. 386.

Hepburn act of June 29, 1906 (34. Stat. 593), does not repeal this act. The Hoffmans (D. C. 1909), 171 Fed. 455.

A state constitutional provision prohibiting limitation of amount of recovery for injuries resulting in death can not be set up against this act. Loughin v. McCaulley (1898), 40 A. 1020, 186 Pa. St. 517, 42 Wkly. Notes Cas. 519, 48 L. R. A. 33, 65 Am. St. Rep. 872.

"Vessels" construed.—A dry dock is not a vessel within this act. Berton v. Tietjen & Lang Dry Dock Co. (D. C. 1915), 219 Fed. 763. But a motor boat. The Alola (D. C. 1915), 228 Fed. 1006.

Applicability of act as affected by commerce in which vessel is engaged.—This section applies to commerce between two cities in the same State carried on by means of an ocean-going vessel. Lord v. Goodall, N. & P. S. S. Co. (1880), 102 U. S. 541, 26 L. Ed. 224, affirming Lord v. Goodall, etc., S. S. Co. (C. C. 1877), Fed. Cas. No. 8506.

This section applies to a tugboat engaged in towing vessels engaged in interstate commerce into and out of Chicago Harbor, and sometimes going into the waters and ports of other States, is entitled to the limited liability provided by this section. In re Vessel Owners' Towing Co. (D. C. 1884), 26 Fed. 172; Id. (1886), 26 Fed. 169. This section applies to vessels navigating the waters of the East River and Long Island Sound between ports of the State of New York. In re Long Island North Shore Passenger & Freight Transp. Co. (D. C. 1881), 5 Fed. 599, 604.

Applicability to foreign vessels.—A foreign ship may limit its liability under this act. The Scotland (1881), 105 U. S. 24, 30, 26 L. Ed. 1001; Deslions v. La Compagnie Générale Transatlantique (1908), 28 Sup. Ct. 664, 670, 210 U. S. 95, 52 L. Ed. 973. [C. S. p. 8536.]

Where the British owner of a British ship is proceeded against in an American court by both British and American cargo owners in respect to a loss of cargo occurring in British waters, the extent of his liability is determined by the statutes of the United States, and not those of Great Britain. The State of Virginia (D. C. 1894), 60 Fed. 1018.

The extent of liability of an English vessel stranded in American waters is to be determined by this act and not by the general maritime law. The John Bramall (D. C. 1879), Fed. Cas. No. 7334.

Extent of limited liability.—Where a tug and tow are both at fault for a collision, the decree should provide that, if the value of either vessel is insufficient to pay the

half of the damages awarded, the injured vessel may recover the amount of the deficiency from the other vessel at fault. The Virginia Ehrman (1877), 97 U. S. 309, 317, 24 L. Ed. 890.

Shipowners are in no case liable for any loss, damage, or injury occasioned by collision beyond the amount of their interest in the colliding ship and her freight, except for costs and interest by way of damages in case of default of payment and suit to recover the amount. The Wanata v. Avery (1877), 93 U. S. 600, 605, 24 L. Ed. 461.

Losses for which liability is limited.—Liability to the United States for loss of goods shipped by it on vessels is limited by this act. U. S. v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft (1914), 212 Fed. 40, 128 C. C. A. 496; The Florida (D. C. 1910), 212 Fed. 334.

This section limits the shipowners' liability in three classes of damage or wrong, happening without their privity, and by the fault or neglect of the master or other persons on board: (1) Damage to goods on board; (2) damage by collision to other vessels and their cargo; and (3) any other damage or forfeiture done or incurred. Norwich & N. Y. Transp. Co. v. Wright (1871), 13 Wall. 104, 120, 20 L. Ed. 585.

A maritime lien for damages arising from a collision caused by negligent navigation has precedence over the lien of the crew of the offending vessel for wages prior to the collision, because the seamen have an additional remedy against the owner by personal action, while the owner of the injured vessel has no remedy except against the offending vessel itself. Cooper v. The F. H. Stanwood (1892), 49 Fed. 577, 1 C. C. A. 370.

The limited liability legislation does not exempt carriers by water from loss occurring through the contact of a vessel with pile structures negligently placed by the owner of the vessel in navigable waters. Darrall v. Southern Pac. Co. (1895), 47 La. Ann. 1455, 17 South. 884.

Baggage delivered by the purchaser of a ticket for passage on a steamer to the agent of the vessel to be placed on board, and which had been placed on a wharf boat to which the steamer was moored, where it was destroyed, together with the wharf boat and steamer, by fire, caused without the privity or knowledge of the owner, had been "shipped," and the loss is covered by the limitation of liability therein provided for. In re Louisville & C. Packet Co. (D. C. 1899), 93 Fed. 996.

The limited liability act does not affect the right of materialmen, having claims against the vessel libeled, to bring actions in personam against the owner to collect them. The Leonard Richards (D. C. 1890), 41 Fed. 818.

The owner of a tug may limit his liability for the loss of the tow. The M. Moran (D. C. 1903), 120 Fed. 556.

Cause of damage.—This act applies to a shipowner's liability for damage resulting through the fault of its vessel to another vessel and her cargo from a collision between the two vessels. Norwich & N. Y. Transp. Co. v. Wright (1871), 13 Wall. 104, 116, 20 L. Ed. 585, reversing Wright v. Norwich & N. Y. Transp. Co. (C. C. 1870), Fed. Cas. No. 18,087. To an unjustifiable sale of cargo by the master on the coast of Africa after his vessel has been condemned as unseaworthy. The Giles Loring (D. C. 1890), 48 Fed. 463. And to liability for injuries to passengers caused by fire or explosion of the boilers, though the boiler inspection laws had been violated, if such violation is without their knowledge or privity notwithstanding R. S. 4493, making owners liable to the full extent for injuries to passengers due to violations of the inspection laws. In re The Annie Faxon (D. C. 1895), 66 Fed. 575; decree modified (1896), 75 Fed. 312, 21 C. C. A. 366; In re Long Island North Shore Passenger & Freight Transp. Co. (D. C. 1881), 5 Fed. 599, 607.

Loss by fire on board a ship is within the relief of this section. Providence & N. Y. S. S. Co. v. Hill Mfg. Co. (1883), 3 Sup. Ct. 379, 394, 109 U. S. 578, 27 L. Ed. 1038; contra, Knowlton v. Providence & N. Y. S. S. Co. (1873), 53 N. Y. 76.

Loss during voyage.—The right of the owner of a vessel to a limitation of liability does not depend upon the fact that the vessel is actually engaged upon a voyage at the time of the doing of the act or the happening of the event against which the owner seeks to limit his liability, but the statute applies equally to a vessel at a dock in her home port, where she is being altered and refitted, and where she has remained for several months. In re Michigan S. S. Co. (D. C. 1904), 133 Fed. 577; decree reversed, McGill v. Michigan S. S. Co. (1906), 144 Fed. 788, 75 C. C. A. 518; writ of certiorari denied, Michigan S. S. Co. v. McGill (1906), 27 Sup. Ct. 782, 203 U. S. 593, 51 L. Ed. 332.

Nonmaritime torts. The right to limit liability under this section when originally enacted applied only to liability for maritime torts, and did not permit a limitation of liability for property damaged on land by the navigation of a vessel. Ex parte Phenix Ins. Co. (1886), 7 Sup. Ct. 25, 27, 118 U. S. 610, 30 L. Ed. 274; King v. American Transp. Co. (C. C. 1859), Fed. Cas. No. 7,787; Goodrich Transp. Co. v. Gagnon (C. C. 1888), 36 Fed. 123; Elwell

v. Bender (1894), 79 Hun, 243, 29 N. Y. Supp. 357; contra, In re Vessel Owners' Towing Co. (D. C. 1884), 26 Fed. 172; Id. (1886), 26 Fed. 169. But the right to a limitation of liability was extended to nonmaritime torts by the provisions of sec. 18, act of June 26, 1884, post, 1309. Richardson v. Harmon (1911), 32 Sup. Ct. 27, 222 U. S. 96, 56 L. Ed. 110.

Claims for personal injury or death.—The statute applies to cases of personal injury and death as well as to cases of loss of or injury to property. Craig v. Continental Ins. Co. (1891), 12 Sup. Ct. 97, 141 U. S. 638, 35 L. Ed. 886, following Butler v. Boston & S. S. S. Co. (1888), 9 Sup. Ct. 612, 130 U. S. 527, 32 L. Ed. 1017, and affirming judgment (C. C. 1886), 26 Fed. 798; [C. S. p. 8538].

Violation of statute.—A failure to comply with the steamboat inspection law may be invoked to prove that a shipowner is not entitled to a limitation of liability, though it is not set up in the pleadings of the parties to the proceeding for limitation. The Annie Faxon (1896), 75 Fed. 312, 21 C. C. A. 366, modifying decree In re The Annie Faxon (D. C. 1895), 66 Fed. 575.

Waiver of right to limit liability.—The right to limitation of liability is not waived or lost by a surrender of a vessel to the insurers. Place v. Norwich & N. Y. Transp. Co. (1886), 6 Sup. Ct. 1150, 1163, 118 U. S. 468, 30 L. Ed. 134.

Waiver of right to limit liability.—Vessel owners, by allowing a final decree for damages for collision in the district court, waive their right to institute proceedings to limit their liability. Dyer v. National Steam Nav. Co. (C. C. 1878), Fed. Cas. No. 4,225; In re New York & W. S. S. Co. (D. C. 1877), Fed. Cas. No. 10,200.

The right of a vessel owner to a limitation of liability, as against a decree for collision damages recovered against him in a suit in personam, is not waived by the giving of a supersedeas bond on appeal from such decree. Monongahela River Consol. Coal & Coke Co. v. Hurst (1912), 200 Fed. 711, 119, C. C. A. 127.

A vessel owner does not waive the right to limitation of liability against claims for collision damages by the failure to assert such right in the collision suit, nor by an exception to the libel therein. Id.

Jurisdiction of courts.—The United States district court, sitting in admiralty, has jurisdiction of cases arising under this act. Norwich Co. v. Wright (1871), 80 U. S. (13 Wall.) 104, 20 L. Ed. 585; Oregon R. & Nav. Co. v. Balfour (1900), 21 Sup. Ct. 28, 179 U. S. 55, 45 L. Ed. 82; In re Louisville & Cincinnati Packet Co. (D. C. 1915), 223 Fed. 185. But it can not take jurisdiction of a petition for limitation of liability where it would not have had cognizance in admiralty, originally, of the cause of action involved. Ex parte Phenix Ins. Co. (1885), 118 U. S. 610, 7 Sup. Ct. 25.

Defenses existing under this act are available to a carrier, sued for loss of shipment in a State court having cognizance and jurisdiction of the cause. Brinson & Kramer v. Norfolk Southern R. Co. (1915), 86 S. E. 371, 169 N. C. 425.

Effect of transfer of vessel on other proceedings.—See notes to 1313, post.

1309. Liability of a part owner of a vessel.—That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners. *Sec. 18, act of June 26, 1884 (23 Stat. 57).*

Notes of Decisions.

Construction of limited liability acts in general.—See notes to 1308, ante.

Relation to other statutes.—This section is to be construed as in pari materia with the act of 1851, R. S. secs. 4283-4285, and in accordance with the general maritime law, and does not embrace the personal contracts of such owners, or such as they have adopted as their personal liabilities. Great Lakes Towing Co. v. Mill Transp. Co. (1907), 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769; writ of certiorari denied, Mills Transp. Co. v. Great Lakes Towing Co. (1907), 28 Sup. Ct. 262, 207 U. S. 596, 52 L. Ed. 357; Gokey v. Fort (D. C. 1890), 44 Fed. 364. But see Warner v. Boyer (D. C. 1896), 74 Fed. 873.

§ 1308 ante, was amended by this act so as to do away with the restrictions on the character of debts and liabilities against which the limitation might be asserted. O'Brien v. Miller (1897), 18 Sup. Ct. 140, 168 U. S. 287, 303, 42 L. Ed. 469.

Persons liable as owners. Since the underwriters become the owners, by the abandonment of the insured vessel, in proportion as they are each liable for her insurance, each is also liable for the same proportion of the entire indebtedness incurred by the master for work done in the attempt to rescue the vessel. Gilchrist v. Chicago Ins. Co. (1899), 104 Fed. 566, 44 C. C. A. 43.

A part owner, having agreed with the other owners to run the vessel on shares, and pay her disbursements, and the vessel being lost, this section applies in favor of the other part owners as to the master's disbursements, but not as to the master's wages. Douse v. Sargent (D. C. 1891), 48 Fed. 695.

Persons entitled to limitation of liability. The managing owner of a vessel, who personally signed a charter party as her agent in which she was warranted seaworthy is not entitled to limit his liability for a loss of the cargo through unseaworthiness. Benner Line v. Pendleton (1914), 217 Fed. 497, 133 C. C. A. 349.

Extent of part owner's liability. A part owner's liability is limited to the proportion of the loss that his individual share of the vessel bears to the whole. Benner Line v. Pendleton (D. C. 1913), 210 Fed. 67.

Negligence of part owners. Where a libel in rem was filed to recover damages for injuries to goods by fire caused by the alleged negligence of the master, who was also part owner, but not by the design or neglect of the other part owners, held, that the part owners personally, and also their interest in the vessel, were exempt. Keeve v. Whistler (D. C. 1873), Fed. Cas. No. 7645.

Waiver of right. The right of a part owner of a steamship to a limitation of his liability for a personal injury to the proportion of the damages which his interest in the vessel bears to all the interests is a personal one, which may be waived, and is so waived where, after suit against a part owner for injury to a seaman, he files a petition for limitation of his liability "to the amount of the value of his interest" in the vessel, makes no request for further limitation in the trial court, and, after the amount of damages has been fixed, stipulates with the claimant for a reduction of such amount. Cook v. Smith (1911), 187 Fed. 538, 109 C. C. A. 304, affirming decree Smith v. Cook (D. C. 1908), 164 Fed. 628.

1310. Liability of the United States for loss or damage at sea. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company. *Sec. 1, act of March 9, 1920 (41 Stat. 525).*

That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem

or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. *Sec. 2, act of March 9, 1920 (41 Stat. 525).*

That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises. *Sec. 5, act of March 9, 1920 (41 Stat. 526).*

That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels. *Sec. 6, act of March 9, 1920 (41 Stat. 527).*

1311. Arbitration of claims against the United States.—That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 2, 4, 7, and 10 of this Act. *Sec. 9, act of March 9, 1920 (41 Stat. 527).*

1312. General average of compensation for loss among the shippers.—Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel, in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. *R. S. 4284.*

Section forty-two hundred and eighty-four is amended by striking out, in the seventh line, the word "owner," and inserting the word "owners." *Act of Feb. 27, 1877 (19 Stat. 251), amending R. S. 4284.*

Notes of Decisions.

Claims for personal injury or death.—Claims for injury to the person and loss of life resulting from a collision are within this section. The Catskill (D. C. 1899), 95 Fed. 700.

1313. Transfer of a shipowner's interest to a trustee in compliance with liability requirements.—It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease. *R. S. 4285.*

Notes of Decisions.

Construction of act in general.—The language of this section does not prevent the application of the act to liability for personal injuries. The Epsilon (D. C. 1873), Fed. Cas. No. 4,506. See In re Louisville & Cincinnati Packet Co. (D. C. 1915), 223 Fed. 185. See, also, notes to 1308, ante.

Right to transfer vessel and freight.—This section does not apply to the liability of the owner of a vessel in fault for a collision in which she was totally lost, so as to exempt him from all liability, since his liability is measured by the value of the vessel before the collision. Barnes v. Steamship Co. (C. C. 1868), Fed. Cas. No. 1,021; In re Sinclair (D. C. 1860), Fed. Cas. No. 12,895. But see notes to 1308, ante.

Though admiralty rule 54 gives the owner the option to retain the vessel by having her appraised and paying the appraised value into court or giving a stipulation therefor, the owner still has the right to ask for the appointment of a trustee to whom he may transfer the vessel and her freight. Ohio Transp. Co. v. Davidson S. S. Co. (1906), 148 Fed. 185, 78 C. C. A. 319, affirming decree (D. C. 1904), 131 Fed. 373; writ of certiorari denied (1906), 27 Sup. Ct. 782, 203 U. S. 593, 51 L. Ed. 332.

A dry dock is not a vessel within this section. Berton v. Tietjen & Lang Dry Dry Dock Co. (D. C. 1915), 219 Fed. 763.

Necessity for transfer of vessel or freight. Failure to surrender freight to trustee does not necessitate refusal to allow limitation of liability. Desilons v. La Compagnie Générale Transatlantique (1908), 28 Sup. Ct. 664, 210 U. S. 95, 52 L. Ed. 973; The City of Norwich (D. C. 1873), Fed. Cas. No. 2,762; The Mendota (D. C. 1882), 14 Fed. 358.

Surrender of the vessel or payment of her proceeds or value into court is necessary in order to bring other creditors into concourse with libelants, but is not necessary for defense. Thommessen v. Whitwill (1886), 6 Sup. Ct. 1172, 1173, 118 U. S. 520, 30 L. Ed. 156.

The owner of a foreign vessel, sunk in collision with an iceberg on high seas, when sued in the United States, may maintain a proceeding for limitation of liability, though there may be nothing to show the law of the foreign country to which the vessel belongs touching such liability, or it may appear that such law provides for limitation on different conditions from those prescribed by the Federal laws. Oceanic Steam Nav. Co. (1914), 34 Sup. Ct. 754, 233 U. S. 718, 58 L. Ed. 1171.

Where actual total loss occurred, formal abandonment is not necessary to entitle the owners to the benefit of the limited liability act. The Peshtigo (D. C. 1879), Fed. Cas. No. 11,018.

Property or interests which must be transferred in general.—Damages recovered by the owner for the loss of his vessel by collision stand in the place of the vessel, and must be surrendered for the benefit of the ship's creditors in order to entitle the owner to the benefit of the limitation of liability. O'Brien v. Miller (1897), 18 Sup. Ct. 140, 148, 168 U. S. 287, 42 L. Ed. 469.

Insurance effected by the owners on the vessel and her freight is not an "interest in such vessel and freight" which they are bound to surrender for the benefit of claimants for injuries, within the meaning of this section. The City of Columbus (D. C. 1884), 22 Fed. 460.

In order to obtain a limitation of liability with respect to claims arising upon a voyage subsequent to the accruing of previous liens, the shipowner must surrender the vessel, or her proceeds, free from such previous liens. In re The U. S. Grant (D. C. 1891), 45 Fed. 642.

The "transfer" required by this section is a transfer of the same valuable "interest" which 1308, ante, prescribes as the limit of liability. The Rose Culkin (D. C. 1892), 52 Fed. 328, 332.

Owners who surrender a vessel for the purpose of limiting liability can not be required to add interest on her appraised value from the time the liability was incurred, although they have long delayed the surrender. The Battler (D. C. 1893), 58 Fed. 704.

Vessels having common owner.—When the owner of a barge which has no motive power undertakes to transport freight by means of the barge, such barge and a tug, belonging to the same owner, by which the motive power is supplied, become one vessel for the purposes of the voyage, and the owner is not entitled to limit his liability for damages caused by the negligence of the crew of either craft, without surrendering both. Short v. The Columbia (1896), 73 Fed. 226, 19 C. C. A. 436, reversing judgment (1895), 67 Fed. 942, 15 C. C. A. 91.

The fact that the owner of a vessel charged with a negligent injury also owned other vessels employed in connection with such vessel does not require their surrender in a proceeding for limitation of liability

where they are not charged with any fault. The Sunbeam (1912), 195 Fed. 468, 115 C. C. A. 370.

Transfer of only one of two vessels liable.—Where shipowners have invoked the jurisdiction of a court of admiralty by a petition to limit their liability, and having thereby secured the stay of proceedings by libelants, surrender but one of two vessels held by the court to be liable, the court, having full equitable powers to adjust the rights of all parties interested, is not bound to dismiss the proceedings for that reason, but may by its own process, or its own order, seize the other vessel, and make distribution of the entire fund which it was the duty of the petitioners to tender by their petition; and such is the proper and only equitable course, where, by reason of the proceedings, suits by libelants have been delayed for a number of years, during which the shipowners have become insolvent. Oregan R. R. & Nav. Co. *v.* Balfour (1898), 90 Fed. 295, 33 C. C. A. 57.

Freight.—Where a lighter sank at a pier while being loaded, injuring a large part of her cargo, the fact that the uninjured cargo was then transferred by her owner to another vessel, and that such lighter did not deliver any part of it, does not relieve the owner in proceedings for limitation of his liability from the necessity of surrendering as "pending freight" the freight which she would have earned if she had carried the cargo. Ralli *v.* New York & T. S. S. Co. (1907), 154 Fed. 286, 83 C. C. A. 290.

Time for transfer.—A vessel may be surrendered under the statute allowing a limitation of liability before or after a verdict settling the responsibility for the claim against which the limitation is sought. In re P. Sanford Ross (D. C. 1912), 196 Fed. 921; decree reversed (C. C. A. 1913), 204 Fed. 248.

Sufficiency of transfer.—A tender, made in the libel of the vessel and wreckage to be disposed of by the court, is a sufficient abandonment. The John Bramall (D. C. 1879), Fed. Cas. No. 7,334.

It is sufficient to give jurisdiction to the district court, in a proceeding for limitation of liability, that some of several joint owners of the vessel, whose shares were uninsured and so could not be sold at an underwriter's sale, have transferred their title in what remains of the vessel to the trustee; and, having such jurisdiction, the court has the equitable power to compel the petitioners to bring in the money obtained for the insured interests and that for freight and passenger fares, in order to enable it to carry out the provisions of the statute. In re Meyer (D. C. 1896), 74 Fed. 881.

Bond or stipulation for value and freight.—The statute is not limited to cases of actual "transfer," but extends to cases in which what is required and done is tantamount to such transfer; as where the value of the owners' interest is paid into court, or secured by stipulation, and placed under its control for the benefit of the parties interested. Providence & N. Y. S. S. Co. *v.* Hill Mfg. Co. (1833), 3 Sup. Ct. 379, 394, 109 U. S. 578, 27 L. Ed. 1038; Morrison *v.* District Court of U. S. for Southern Dist. of New York (1893), 13 Sup. Ct. 246, 250, 252, 253, 147 U. S. 14, 37 L. Ed. 60; The Tolchester (D. C. 1890), 42 Fed. 180, 184.

Amount of bond or stipulation.—In proceedings for limitation of liability by the owner of a vessel which had been in collision, a bond for value given by petitioner must cover her value at the time she ended her voyage, and her then pending freight, and unadjudicated claims for salvage services and general average charges can not be deducted from such value, although such expenses were incurred to enable her to complete the voyage, and are entitled to precedence over collision claims, since the collision claimants have the right to contest such claimed liens. The H. F. Dimock (D. C. 1910), 186 Fed. 662.

Interest and costs.—Where the owners of a vessel, in proceedings for limitation of their liability for a collision, gave bond conditioned for the payment into court on its order of the appraised value of the vessel "and the interest on the same as provided by law," and thereafter contested their liability, the result being an award against the vessel exceeding its value, the stipulators are liable for interest on the bond from the date of its execution at the legal rate. The George W. Roby (1901), 111 Fed. 601, 49 C. C. A. 481, modifying decree In re Lakeland Transp. Co. (D. C. 1900), 103 Fed. 328.

Stay of other proceedings.—Pending a determination of the question of the shipowners' liability for injuries, the prosecution of suits for damages against the owners, whether in the court where such proceedings are pending or in the State courts, will be stayed. The City of Columbus (D. C. 1884), 22 Fed. 460; In re Whitelaw (D. C. 1896), 71 Fed. 733.

Where a district court had in its control the only fund to which claimants for damages by a collision had a right to resort for payment of their claims under the limiting liability act, being the only court competent to administer the admiralty rule for the limitation of the liability of the owners of the vessel, it has the authority and jurisdiction to issue an order

restraining the further prosecution of suits by claimants in the State courts. The Tolchester (D. C. 1890), 42 Fed. 180.

A court of admiralty, in a proceeding for limitation of liability has power to modify its injunctional order restraining the commencement or prosecution of suits by damage claimants to the extent of permitting the formal commencement of suits to prevent claims from possibly becoming barred by limitation. In re Oceanic Steam Navigation Co. (1913), 204 Fed. 260, 124 C. C. A. 452, modifying order The Titanic (D. C. 1912), 204 Fed. 295.

Effect of other proceedings to determine liability on proceedings to limit liability.—A proceeding by a vessel owner for limitation of liability after the recovery against him of decrees for damages in collision suits does not affect the status of such decrees as final adjudications both as to liability and amount of damages. Monongahela River Consol. Coal & Coke Co. v. Hurst (1912), 200 Fed. 711, 119 C. C. A. 127.

Where a shipowner does not institute proceedings for limitation of liability until after the damage claimant has recovered a judgment against it in a State court, it is concluded in such proceedings by the decision of the State court on all the issues involved in the action before it. In re P. Sanford Ross (1913), 204 Fed. 248, 122 C. C. A. 516, reversing decree (D. C. 1912), 196 Fed. 921.

The giving of a stipulation for the value of a vessel, on libel in collision, is no bar to a subsequent proceeding in limitation of liability, nor any bar to the surrender of the vessel herself in that proceeding; and though the vessel may have made several short voyages after the giving of such stipulation, and before the surrender, she may still be surrendered in exoneration of liability, provided her value has not in the meantime become impaired, and the circumstances show that no waiver of the right of surrender was intended. Eldridge v. The Rose Culkin (D. C. 1892), 52 Fed. 328.

Sale by trustee under order of court.—The trustee of an attached vessel showed that the vessel, if compelled to remain in custody until the termination of the litigation, was likely to be eaten up by custody fees, and her value greatly impaired, if not substantially destroyed, and asked to be allowed to sell the vessel free from any claim of the attaching creditors; the attachment to be transferred to the proceeds of the sale, and to that end that the attaching creditors be directed to cooperate in effecting the sale by surrender of the vessel to him. Held, that the court had the power to direct the sale proposed, since such a sale would work no injury to the rights of defendants, and require no present determination of questions that should be determined at final hearing. The Metadota (D. C. 1882), 14 Fed. 358.

1314. When a charterer is deemed an owner.—The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. *R. S. §286.*

Notes of Decisions.

Construction of act in general.—See notes to 1308, ante.

Persons liable.—One sailing a ship under an arrangement between himself and the other owners, whereby he sailed the vessel on shares, hiring his own crew, paying and victualing them, paying half the port charges, and retaining half the net freight, is to be considered the owner, and, as such, personally liable for a collision. Thorp v. Hammond (1870), 12 Wall. 408, 416, 20 L. Ed. 419.

A lighterage company which contracts to transfer cargo from one ship to another and for that purpose charters a lighter, the lighterman, who employs the stevedores, and superintends the work, being furnished by the owner, is not entitled to a limitation of liability, under this section. Smith v. Booth (D. C. 1901), 110 Fed. 680; decree affirmed (1903), 122 Fed. 626, 58 C. C. A. 479.

Liability of ship.—A ship is liable for the negligence of anyone lawfully in possession of her, whether as owner or as charterer. The Barnstable (1901), 21 Sup. Ct. 684, 686, 181 U. S. 464, 45 L. Ed. 954.

A ship chartered so that the charterer is deemed to be the special owner is nevertheless not freed from liability on his contracts of affreightment; and a decree for loss by negligence may be made directly against the ship, and need not provide that collection shall first be made from the charterer, and only the deficiency, if any, from the ship. The Abert (1894), 61 Fed. 113, 9 C. C. A. 390, affirming decree (D. C. 1889), 40 Fed. 836, and following The

Freeman *v.* Buckingham (1855), 18 How. 182. 15 L. Ed. 341.

Rights of owner against charterer.—Where in proceedings by a charterer both vessels had been found in fault for a collision, and each condemned to pay half the damages and the charterer has been required to contribute the value of his vessel and pending freight, and also the cause of action against the other vessel, the claims of third party claimants arising out of the collision are entitled to priority of payment from the fund over the claim of the owner for loss or damage to his vessel. The Mauch Chunk (D. C. 1905), 139 Fed. 747; decree affirmed (1907), 154 Fed. 182, 83 C. C. A. 276, and writ of certiorari denied, Central R. Co. of New Jersey *v.* Wren (1907), 28 Sup. Ct. 255, 207 U. S. 586, 52 L. Ed. 352.

Stipulation.—Where owner and charterer join in a petition for limitation of liability, in giving stipulation for release of the vessel, neither can be required to give stipulation for more than the value of his own interest. The Paraiso (D. C. 1915), 226 Fed. 966.

1315. Liability of the crew of a vessel for loss to a shipper.—Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. *R. S. 4287.*

Notes of Decisions.

Construction of act in general.—See notes to 1308, ante.

Intent of section.—This section implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so, and that is stated to be their negligence and fraud. Walker *v.* Western Transp. Co. (1865), 3 Wall. 150, 153, 18 L. Ed. 172.

1316. Shipping inflammable materials.—Any person shipping oil of vitriol, unslaked lime, inflammable matches, or gunpowder, in a vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars. But this section shall not apply to any vessel of any description whatsoever used in rivers or inland navigation. *R. S. 4288.*

1317. Limitations of liability of owners to apply to all vessels.—The provisions of the seven preceding sections, and of section eighteen of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters. *R. S. 4289, as amended by sec. 4, act of June 19, 1886 (24 Stat. 80).*

For sec. 18, above, see 1309, ante.

Notes of Decisions.

Construction of act in general.—See notes to sec. 1308, ante.

Constitutionality.—Since navigable rivers, though tideless, are subject to the maritime law and the admiralty jurisdiction of the United States, this section, which extends the benefit of limited liability to the owners of steamboats used on a river in inland navigation, is a valid and constitutional law, being an amendment of the maritime

law, to which they were already subject. Ex parte Garnett (1891), 11 Sup. Ct. 840, 141 U. S. 1, 35 L. Ed. 631; The Katie (D. C. 1889), 40 Fed. 480, 7 L. R. A. 55.

The amending act is valid, in view of the power of Congress to regulate commerce, because the law amended excepted from its operation inland navigation only, and not internal commerce, as insisted, and the amendment extended the operation of the law, not to internal commerce, but to inland navigation. The Katie (D. C. 1889), 40 Fed. 480, 7 L. R. A. 55.

Craft held to be within this section.—A steamer which had been wrecked and abandoned to the underwriter as a total loss, and was subsequently taken in tow by wrecking master with her cargo and crew, after which she sank. Craig v. Continental Ins. Co. (1891), 12 Sup. Ct. 97, 99, 141 U. S. 638, 35 L. Ed. 886.

A scow built for the carrying of stone, although she was at the time being used as a derrick boat in unloading other vessels. The Sunbeam (1912), 195 Fed. 468, 115 C. C. A. 370.

A vessel in a wrecked condition, though she be incapable of self-propulsion, or of carrying a cargo. Craig v. Continental Ins. Co. (C. C. 1886), 26 Fed. 708; judgment affirmed (1891), 12 Sup. Ct. 977, 141 U. S. 638, 35 L. Ed. 886.

A barge without motive power, which is used for transporting excursion parties on New York Harbor and adjacent waters. In re Myers Excursion & Navigation Co. (D. C. 1893), 57 Fed. 240; decree affirmed, The Republic (1894), 61 Fed. 109, 9 C. C. A. 386.

A scow employed in carrying mud in Boston Harbor and adjacent waters, or other waters subject to the jurisdiction of admiralty courts. In re Eastern Dredging Co. (D. C. 1905), 138 Fed. 942.

A steamer, which had been taken on shore by her owners for the purpose of being dismantled, and from which the masts and engines had been removed, so long as the dismantling process had not proceeded so far as to render her wholly incapable of being navigated as a tow or otherwise. The C. H. Northam (D. C. 1906), 181 Fed. 983.

A barge with a pile driver mounted thereon. In re P. Sanford Ross (D. C. 1912), 196 Fed. 921; decree reversed (C. C. A. 1913), 204 Fed. 248.

Craft held not to be within this section.—A small steam pleasure yacht engaged in navigating the Detroit river, running in and out of the port of Detroit, though at the time of the loss out of which the cause of action arose she was chartered to a third person for hire, since it is only vessels engaged in what is ordinarily known as maritime commerce which are subject to the act, and the facts that they are duly enrolled, licensed, and inspected, and are otherwise subject to the navigation laws of the United States, are immaterial. The Mamie (D. C. 1881), 5 Fed. 813.

Right to limit liability as affected by ownership. The claim of a passenger on a steam ferryboat for damages growing out of a collision is one for a maritime tort within the jurisdiction of a court of admiralty, and against which the owner of the vessel is entitled to a limitation of liability, although such owner is a railroad company operating the vessel in connection with its road, and the passenger was being carried on a ticket which entitled him to both land and water carriage. The San Rafael (D. C. 1904), 134 Fed. 749, judgment reversed (1905), 141 Fed. 270, 72 C. C. A. 388, and writ of certiorari denied, North Pacific Coast R. Co. v. Hall (1906), 26 Sup. Ct. 756, 200 U. S. 619, 50 L. Ed. 623.

Foreign vessels. See notes to 1309, ante.

1318. Limitation of liability for errors of navigation, dangers of the sea, acts of God, etc.—That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence, to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. *Sec. 3, act of Feb. 13, 1893* (27 *Stat.* §§5).

That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives. *Sec. 6, act of Feb. 13, 1893 (27 Stat. 446).*

These are secs. 3 and 6 of the Harter Act.

Notes of Decisions.

Constitutionality.—This section is within the power of Congress to regulate commerce. Goodrich Transit Co. v. Interstate Commerce Commission (Com. C. 1911), 190 Fed. 943; reversed (1912), 224 U. S. 194, 56 L. Ed. 729.

Construction of section in general.—The trend of judicial decision in the United States has been to construe the Harter Act strictly, and not to extend the carrier's exemption from liability to doubtful and uncertain cases, but to leave such liability as it was defined and enforced by the law maritime and by the common law, unless the act plainly and unequivocally asserts a different liability. Flint v. Chrystall (1898), 18 Sup. Ct. 831, 834, 171 U. S. 187, 43 L. Ed. 130; The Germanic (1903), 124 Fed. 1, 59 C. C. A. 521, modifying decree (D. C. 1901), 107 Fed. 294, and decree affirmed, Oceanic Steam Nav. Co. v. Aitken (1905), 25 Sup. Ct. 317, 196 U. S. 589, 49 L. Ed. 610.

While this section exempts ships, their owners and charterers, from liability for losses under certain conditions, by no possible construction can it be a creator of a liability. Alaska Banking & Safe Deposit Co. of Nome v. Maritime Ins. Co. (D. C. 1907), 156 Fed. 710, 712.

Applicability of section.—This section applies to foreign vessels carrying goods to or from ports of the United States. The Silvia (1898), 19 Sup. Ct. 7, 8, 171 U. S. 462, 43 L. Ed. 241. [C. S. p. 8575.]

Injuries to passengers and claims for loss or damage to their personal baggage, not shipped as merchandise and not paying freight, are not within the exemptions of the Harter Act. The Rosedale (D. C. 1898), 88 Fed. 324; judgment affirmed (1899), 92 Fed. 1021, 35 C. C. A. 107; The Kensington (D. C. 1898), 88 Fed. 331; decree affirmed (1899), 94 Fed. 885, 36 C. C. A. 533, and on another ground (1902), 22 Sup. Ct. 102, 104, 183 U. S. 263, 46 L. Ed. 190.

The exemption of a shipowner from liability for loss or damage to cargo resulting from faults or errors in navigation or in the management of the vessel given by this section is conditioned on his having exercised due diligence to make the vessel seaworthy at the commencement of the voyage. The R. P. Fitzgerald (1914), 212 Fed. 678, 129 C. C. A. 214.

This section does not apply until a vessel has commenced her voyage. Gilchrist Transp. Co. v. Boston Ins. Co. (1915), 223 Fed. 716, 139 C. C. A. 246.

This section applies in a case where the question of liability arises in a proceeding by the owner for limitation of liability, as well as in a direct action against him. In re California Nav. & Imp. Co. (D. C. 1901), 110 Fed. 678.

Loss resulting from collision.—Notwithstanding the broad language used in this section in respect to relieving the vessel and her owners from liability resulting from faults of navigation, etc., the statute does not affect the liability of a vessel to other vessels with which she may come in collision, since the object of the act was to modify the relations between a vessel and her cargo. The Delaware (1896), 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, affirming decree (D. C. 1894) 61 Fed. 525. And where the cargo of one only is injured, the damages to the two vessels and their effects must be made even and borne equally. Hawkins v. The Viola (D. C. 1894) 60 Fed. 296.

In a case of collision by mutual fault, resulting in the total loss of one vessel and her cargo, this section does not prevent the other vessel, which alone is sued by the cargo owners for the full amount of their loss, from recouping one-half the amount awarded from the half damages awarded to the owners of the lost vessel. The Chattahoochee (1899), 19 Sup. Ct. 491, 173 U. S. 540, 43 L. Ed. 801, affirming decree (1896), 74 Fed. 899, 21 C. C. A. 162.

The provision of this section exempting the owner from liability for faults or errors in navigation where his vessel was properly manned, supplied, and equipped does not affect the operation of the equitable rule, which gives priority to the claim of the innocent cargo owners over that of the vessel owner against the fund available for the payment of damages sustained through a collision for which both vessels have been adjudged in fault. The George W. Roby (1901), 111 Fed. 601, 49 C. C. A. 481, modifying In re Lakeland Transp. Co. (D. C. 1900), 103 Fed. 328.

In cases falling within the Harter act, the intent of the act is that damages to cargo arising from negligence in navigation shall be borne by the cargo owner, and not by the ship; the act was not designed to increase or to diminish the liability of the other vessel in cases of mutual fault and a division of damages. The previous liability of either vessel, therefore, can not be exceeded, but may be reached, if that is necessary to indemnify the cargo of the other vessel; and where one vessel and cargo are wholly lost and the ship is of less value than the cargo, the shipowner can recover from the other vessel half his loss and retain it for his own use, and the cargo owner will lose so much of his claim. Stahl v. The Niagara (D. C. 1896), 77 Fed. 329.

Effect of section.—In awarding compensation to a ship for salvage services rendered while she was on a voyage to or from a port of the United States, the value of her cargo and freight are to be excluded from consideration. The Ereza (D. C. 1905), 124 Fed. 659.

This section does not give an owner who has exercised the required diligence a right to contribution in general average for sacrifices made to save the vessel and cargo when stranded through negligence of the ship's officers. Flint v. Chrystall (1898), 18 Sup. Ct. 831, 832, 171 U. S. 187, 43 L. Ed. 130. But it does leave such owner free to contract with cargo owners for contribution in general average for sacrifices made on negligent stranding of the vessel. The Jason (1912), 32 Sup. Ct. 560, 563, 225 U. S. 32, 56 L. Ed. 969, overruling on certified questions (D. C. 1908), 162 Fed. 56; decree affirmed (1910), 178 Fed. 414, 101 C. C. A. 628, and New York & C. Mail S. S. Co. v. Arnold Clock Co. (D. C. 1905), 139 Fed. 994.

Defenses existing under this section are available to a carrier sued for loss of ship sued in a State court having cognizance and jurisdiction of the cause. Brinson & Kramer v. Norfolk Southern R. Co. (N. C. 1915), 86 S. E. 371.

Warranty of seaworthiness.—This section does not relieve the owner of his obligation to provide a seaworthy ship, and substitute therefor an obligation merely to use due diligence to see that she is seaworthy. Waggermann v. The Carib Prince (1898), 18 Sup. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181 (reversing decree [1895] 68 Fed. 254, 15 C. C. A. 385); Benner Line v. Pendleton (D. C. 1913), 210 Fed. 67.

Seaworthiness.—This section, as construed does not exempt the vessel nor owner from liability for the consequences of unseaworthiness, even though due diligence was exercised to make her seaworthy. The Ninfa (D. C. 1907), 156 Fed. 512. And this section does not relieve the owner from the duty of furnishing a seaworthy vessel, at the beginning of the voyage, nor affect his liability for damages to the cargo arising from unseaworthiness, but only exempts him from liability for damage arising from the risks therein designated when due diligence has been used to make the vessel seaworthy, etc. There is no expressed intention in the statute to replace the carrier's obligation under the general maritime law to furnish a seaworthy vessel by the less extensive obligation to exercise due diligence to that end, and it can not be extended by construction beyond its terms. Farr & Bailey Mfg. Co. v. International Nav. Co. (D. C. 1899), 94 Fed. 675; affirmed, International Nav. Co. v. Farr & Bailey Mfg. Co. (1901), 21 Sup. Ct. 591, 181 U. S. 218, 45 L. Ed. 830.

The requirement of seaworthiness intends that the ship shall be in a fit state as to repair, equipment, crew, and in all other respects to encounter the ordinary perils of a contemplated voyage. The Tjomo (D. C. 1902), 115 Fed. 919.

Fitness for cargo and stowage.—The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. Martin v. The Southwark (1903), 24 Sup. Ct. 1, 3, 191 U. S. 1, 48 L. Ed. 65; The Silvia (1902), 19 Sup. Ct. 7, 8, 171 U. S. 462, 43 L. Ed. 241; The F. & T. Lupton (D. C. 1910), 182 Fed. 144.

Particular defects.—A vessel was not unseaworthy at the beginning of her voyage because ports between decks, eight inches in diameter and a few feet above the water line, were closed only with the glass covers, and the hatches were battened down where the hatches could be taken off in two minutes, the cargo was so stowed as to afford free access to the ports, and they were provided with additional covers of iron, which could be closed if deemed necessary. The Silvia (1898), 19 Sup. Ct. 7, 171 U. S. 462, 43 L. Ed. 241, affirming judgment (1895) 68 Fed. 230, 15 C. C. A. 362. But if a ship starts on a voyage with a port intended to be closed negligently left open, causing damage to cargo, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage. International Nav. Co. v. Farr & Bailey Mfg. Co. (1901), 21 Sup. Ct. 591, 592, 181 U. S. 218, 45 L. Ed. 830, affirming Farr & Bailey Mfg. Co. v. International Nav. Co. (1899), 98 Fed. 656, 39 C. C. A. 197; The Manitoba (D. C. 1900), 104 Fed. 145; The Penelos (D. C. 1905), 137 Fed. 443, decree affirmed (1907), 151 Fed. 1022, 82 C. C. A. 671; writ of

certiorari denied Deutsche Levante Linie *v.* Stephenson (1907), 27 Sup. Ct. 792, 205 U. S. 546, 51 L. Ed. 923.

Diligence to render vessel seaworthy.—Due diligence to make a vessel in all respects seaworthy does not require merely due diligence on the part of the owner himself, nor in respect to construction only, but on the part of those to whom the owner has intrusted the duty, and in respect, not only to construction, but also to inspection, maintenance, and repair. The Niagara (1898), 84 Fed. 902, 905, 28 C. C. A. 528 [C. S. p. 8579].

In exercising the degree of care and diligence imposed on an owner to make his vessel seaworthy by the Harter Act, he will be required to take such precautions as are reasonably adequate for the protection of the cargo against known perils, or which reasonable foresight may have anticipated. The R. P. Fitzgerald (1914), 212 Fed. 678, 129 C. C. A. 214.

Manning and equipment.—Failure to have a mechanical fog horn in good condition for use at the commencement of a voyage shows want of due diligence in equipping the vessel, and is not a fault in her management, so as to excuse the owners from liability under the Harter Act. Stahl *v.* The Niagara (1898), 84 Fed. 902, 28 C. C. A. 528, affirming (D. C. 1896), 77 Fed. 329.

Where the owner of a vessel, while in her home port, permitted all of her crew to leave for the night, except the fireman, cook, and a deck hand, and permitted them to sleep without maintaining a proper watch, and the fires to be banked so that no steam was available to work the pumps in case of an emergency, she is no longer properly manned or equipped. The Valentine (D. C. 1904), 131 Fed. 352.

Use of pumps.—Lack of proper attention to a vessel's pumps, which might have disclosed a leak, and prevented damage which resulted therefrom to the cargo, was negligence in the "management of the ship." The British King (1899), 92 Fed. 1018, 35 C. C. A. 159, affirming decree (D. C. 1898), 89 Fed. 872.

Management on navigation.—The exemption from liability for loss or injury to cargo resulting from faults or errors in navigation or in the management of the vessel applies only to the vessel after the voyage has commenced. International Nav. Co. *v.* Farr & Bailey Mfg. Co. (1901), 21 Sup. Ct. 591, 592, 181 U. S. 218, 45 L. Ed. 830; Ralli *v.* New York & T. S. S. Co. (1907), 154 Fed. 286, 83 C. C. A. 290; Steamship Wellesley Co. *v.* C. A. Hooper & Co. (1911), 185 Fed. 733, 108 C. C. A. 71.

The negligent failure of the officers of a vessel to make proper use of the ventilating apparatus by which cargo was damaged is not a fault in the management of the vessel. The Jean Bart (D. C. 1911), 197 Fed. 1002.

Loading and unloading.—Damage to cargo from the sinking of a ship after arriving in port, due to hurried and imprudent unloading, which brought the center of gravity of the ship too high for safety, does not result from faults or errors in navigation or in the management of said vessel. Oceanic Steam Nav. Co. *v.* Aitken (1905), 25 Sup. Ct. 317, 318, 196 U. S. 589, 49 L. Ed. 610, affirming decree The Germanic (1903), 124 Fed. 1, 59 C. C. A. 521.

Closing ports.—Negligence in failing to have the portholes in a compartment of a vessel closed when the voyage begins, where they were supposed to be closed and access to them was prevented by the cargo, is not a mere fault or error in navigation or in the management of the vessel. International Nav. Co. *v.* Farr & Bailey Mfg. Co. (1901), 21 Sup. Ct. 591, 592, 181 U. S. 218, 45 L. Ed. 830, affirming decree Farr & Bailey Mfg. Co. *v.* International Nav. Co. (1899), 98 Fed. 636, 39 C. C. A. 197; The Manitoba (D. C. 1900), 104 Fed. 145; The Tenedos (D. C. 1905), 137 Fed. 443; decree affirmed (1907), 151 Fed. 1022, 82 C. C. A. 671; writ of certiorari denied, Deutsche Levante Linie *v.* Stephenson (1907), 27 Sup. Ct. 792, 205 U. S. 546, 51 L. Ed. 923. But the injury of a cargo by water by reason of the failure to close a port for which an iron shutter was provided, after the glass cover had been broken out by the seas, where the cargo was so placed that the port was readily accessible, was due to a fault or error in navigation or in the management of the vessel, within the Harter Act (27 Stat. 445, sec. 3); and neither the vessel nor her owners are liable therefor. The Silvia (1898), 19 Sup. Ct. 7, 8, 171 U. S. 462, 43 L. Ed. 241, affirming judgment (1895), 68 Fed. 230, 15 C. C. A. 362, affirming decree (D. C. 1894), 64 Fed. 607.

Dangers of the sea or other navigable waters.—"Perils of the sea" means "all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel; casualties which may, and not consequences which must, occur." Ceballos *v.* The Warren Adams (1896), 74 Fed. 413, 20 C. C. A. 486; certiorari denied (1896), 16 Sup. Ct. 1199, 163 U. S. 679, 41 L. Ed. 316.

"Perils of the sea" means perils which are peculiar to the sea and which are of an extraordinary nature, or arise from irresistible force, or overwhelming power, and which can not be guarded against by the ordinary exertions of human skill and pru-

dence. The Giulia (1914), 218 Fed. 744, 134 C. C. A. 422.

Rough seas, although not extraordinary, are sea perils, and, if sufficient to account for damage to cargo properly stowed, the loss is within the exception of such perils in bills of lading. The Newport News (D. C. 1912), 199 Fed. 968.

Deviation to save life or property.—The steamer E., on a voyage from San Francisco, found the steamer B. stranded and in a dangerous position. She pulled the B. off the rocks, and towed her to the nearest harbor, where she pumped out. This harbor, though safe at the time, was exposed to the winds, and liable to become dangerous to a vessel of the size of the B. and in her condition; but two tugs were present in the harbor, which were fully able to assist the B. and tow her to San Francisco. The E., however, after helping the B. to pump out, towed her back to San Francisco. Held, that the E.'s deviation, in towing the B. to the harbor where she pumped out, was for the purpose of saving life and property at sea, but that the further deviation, in towing her back to San Francisco after she had been made safe by the presence of the tugs, was unjustifiable. In re Meyer (D. C. 1896), 74 Fed. 881.

Inherent defect of thing carried. A canal boat brought a cargo of hay from Quebec to New York, where it arrived in good condition. It was loaded by the consignor, and was to be unloaded by libelants, who had become owners of the bills of lading. On arriving in New York the boat and cargo were seized by libelants under process from the State court in a suit against the consignor, and held on demurrage for some 30 days, when the suit was dismissed and the cargo was unloaded. Where during the time a vessel loaded with hay was detained under process weather was damp, and the hay in the hold became musty, the injury arose from an inherent defect of the thing carried. The M. C. Currie (D. C. 1904), 132 Fed. 125.

Presumptions. Where disaster overtakes a vessel at the beginning of her voyage, without stress of weather or other adequate cause appearing, the presumption is that she was unseaworthy when the voyage commenced, and the burden rests on the owner to avoid liability for cargo lost or injured to overcome such presumption by showing affirmatively that the ship was seaworthy. Steamship Wellesley Co. v. C. A. Hooper & Co. (1911), 185 Fed. 733, 108 C. C. A. 71; [C. S. p. 8583].

The burden of proving that a defect in a vessel which was the cause of damage to cargo was latent and could not have been detected by a careful inspection rests on the claimant. The Citta di Palermo (C. C. A. 1915), 226 Fed. 529.

Under act Feb. 13, 1893, and R. S. 4283, ante, 1308, the burden is upon the owner of the vessel lost to show that he exercised due diligence in supplying a seaworthy vessel; failure to exercise such diligence rendering him privy to the fault through which the loss occurs. Brinson & Kramer v. Norfolk Southern R. Co. (N. C. 1915), 86 S. E. 371.

Evidence.—While, in determining whether or not the construction of a vessel rendered her unseaworthy, it is proper to consider evidence of the usual custom of shipowners and the usual method of construction of ships and their appliances, such evidence is not necessarily conclusive, and should be considered in the light of what would appear to be the prudent method of construction, and may be rejected entirely where the construction is obviously defective. The Indrapura (1911), 190 Fed. 711, 112 C. C. A. 351, affirming decree (D. C. 1910), 178 Fed. 591.

The fact that one vessel passed through a storm without injury to her cargo is not evidence of much weight on the question whether another, sailing two days after her, was subjected by such storm to unusual sea perils. The Hyades (D. C. 1902), 118 Fed. 85; decree affirmed (1903), 124 Fed. 58, 59 C. C. A. 424.

1319. Qualifications of seamen. That no vessel of one hundred tons gross and upward, except those navigating rivers exclusively and the smaller inland lakes and except as provided in section one of this Act, shall be permitted to depart from any port of the United States unless she has on board a crew not less than seventy-five per centum of which, in each department thereof, are able to understand any order given by the officers of such vessel, nor unless forty per centum in the first year, forty-five per centum in the second year, fifty per centum in the third year, fifty-five per centum in the fourth year after the passage of this Act, and thereafter sixty-five per centum of her deck crew, exclusive of licensed officers and apprentices, are of a rating not less than able seaman. Every person shall be rated an able seaman, and qualified for service as such on the seas, who is nineteen years of age or upward, and has

had at least three years' service on deck at sea or on the Great Lakes, on a vessel or vessels to which this section applies, including decked fishing vessels, naval vessels or coast guard vessels; and every person shall be rated an able seaman, and qualified to serve as such on the Great Lakes and on the smaller lakes, bays or sounds, who is nineteen years of age or upward and has had at least eighteen months' service on deck at sea or on the Great Lakes or on the smaller lakes, bays, or sounds, on a vessel or vessels to which this section applies, including decked fishing vessels, naval vessels, or coast guard vessels; and graduates of school ships approved by and conducted under rules prescribed by the Secretary of Commerce may be rated able seamen after twelve months' service at sea: *Provided*, That upon examination, under rules prescribed by the Department of Commerce as to eyesight, hearing, and physical condition, such persons or graduates are found to be competent: *Provided further*, That upon examination, under rules prescribed by the Department of Commerce as to eyesight, hearing, physical condition, and knowledge of the duties of seamanship a person found competent may be rated as able seaman after having served on deck twelve months at sea, or on the Great Lakes; but seamen examined and rated able seamen under this proviso shall not in any case compose more than one-fourth of the number of able seamen required by this section to be shipped or employed upon any vessel.

Any person may make application to any board of local inspectors for a certificate of service as able seaman, and upon proof being made to said board by affidavit and examination, under rules approved by the Secretary of Commerce, showing the nationality and age of the applicant and the vessel or vessels on which he has had service and that he is entitled to such certificate under the provisions of this section, the board of local inspectors shall issue to said applicant a certificate of service, which shall be retained by him and be accepted as prima facie evidence of his rating as an able seaman.

Each board of local inspectors shall keep a complete record of all certificates of service issued by them and to whom issued and shall keep on file the affidavits upon which said certificates are issued.

The collector of customs may, upon his own motion, and shall, upon the sworn information of any reputable citizen of the United States setting forth that this section is not being complied with, cause a muster of the crew of any vessel to be made to determine the fact; and no clearance shall be given to any vessel failing to comply with the provisions of this section: *Provided*, That the collector of customs shall not be required to cause such muster of the crew to be made unless said sworn information has been filed with him for at least six hours before the vessel departs, or is scheduled to depart: *Provided further*, That any person that shall knowingly make a false affidavit for such purpose shall be deemed guilty of perjury and upon conviction thereof shall be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or by both such fine and imprisonment, within the discretion of the court. Any violation of any provision of this section by the owner, master, or officer in charge of the vessel shall subject the owner of such vessel to a penalty of not less than $100 and not more than $500: *And provided further*, That the Secretary of Commerce shall make such rules and regulations as may be necessary to carry out the provisions of this section, and nothing herein shall be held or construed to prevent the Board of Supervising Inspectors, with the approval of the Secretary of Commerce, from making rules and regulations authorized by law as to vessels excluded from the operation of this section. *Sec. 13, act of March 4, 1915 (38 Stat. 1169-1170).*

1320. Time for which seamen may ship.—That a master of a vessel in the foreign trade may engage a seaman at any port in the United States, in the manner provided by law, to serve on a voyage to any port, or for the round trip from and to the port of departure, or for a definite time, whatever the destination. The master of a vessel making regular and stated trips between the United States and a foreign country may engage a seaman for one or more round trips, or for a definite time, or on the return of said vessel to the United States may reship such seaman for another voyage in the same vessel, in the manner provided by law, without the payment of additional fees to any officer for such reshipment or re-engagement. *Sec. 19, act of June 26, 1884 (23 Stat. 58).*

Notes of Decisions.

Statute as affecting commissioner's fees.—This section does not affect the right of a shipping commissioner to fees for shipping crews for vessels engaged in the coastwise trade under sec. 2 of act of June 19, 1886 (24 Stat. 80), though the seamen shipped on the same vessels from which they had but recently been formally discharged. Ravesies v. U. S. (D. C. 1888), 35 Fed. 917, 919.

Reshipment.—A reshipment within this statute consists in the seaman's continuing in the service of the same vessel, after the expiration of the original term of service, without any interruption by discharge and release, whether under new articles, or merely an indorsement on the original articles. Ravesies v. U. S. (D. C. 1888), 35 Fed. 917.

1321. Shipping seamen in foreign ports.—Every master of a merchant vessel who engages any seaman at a place out of the United States, in which there is a consular officer or commercial agent, shall, before carrying such seaman to sea, procure the sanction of such officer, and shall engage seamen in his presence; and the rules governing the engagement of seamen before a shipping-commissioner in the United States, shall apply to such engagements made before a consular officer or commercial agent; and upon every such engagement the consular officer or commercial agent shall indorse upon the agreement his sanction thereof, and an attestation to the effect that the same has been signed in his presence, and otherwise duly made. *R. S. §4517.*

Every master who engages any seaman in any place in which there is a consular officer or commercial agent, otherwise than as required by the preceding section, shall incur a penalty of not more than one hundred dollars, for which penalty the vessel shall be held liable. *R. S. §518.*

1322. Reshipment of seamen.—That every master of a vessel in the foreign trade may engage any seaman at any port out of the United States, in the manner provided by law, to serve for one or more round trips from and to the port of departure, or for a definite time, whatever the destination; and the master of a vessel clearing from a port of the United States with one or more seamen engaged in a foreign port as herein provided shall not be required to reship in a port of the United States the seamen so engaged, or to give bond, as required by section forty-five hundred and seventy-six of the Revised Statutes, to produce said seamen before a boarding officer on the return of said vessel to the United States. *Sec. 20, act of June 26, 1884 (23 Stat. 58).*

The requirement of the bond above referred to did not appear in the amendment of R. S. 4576 by sec. 3, act of Mar. 3, 1897 (29 Stat. 688).

1323. Lost seamen may be replaced.—In case of desertion or casualty resulting in the loss of one or more of the seamen, the master must ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same or higher grade or rating

with those whose places they fill, and report the same to the United States consul at the first port at which he shall arrive, without incurring the penalty prescribed by the two preceding sections. This section shall not apply to fishing or whaling vessels or yachts. *R. S. 4516, as amended by sec. 1, act of March 4, 1915 (38 Stat. 1164).*

For penalties prescribed by R. S. 4514 and 4515, see post, 1330 and 1329.

Notes of Decisions.

Failure to replace mate as excusing refusal of crew to work.—That the master of a vessel failed to replace a second mate who had been paid off at an intermediate port, as required by this section, was no excuse for the total refusal of members of the crew to work the vessel, and was therefore no defense to the master's right to punish them for their disobedience. The Cora F. Cressy (D. C. 1904), 131 Fed. 144.

Failure to employ seaman of same grade as one discharged as justification for others leaving ship.—Where a seaman employed by a master during a voyage to take the place of one discharged by reason of illness, although not of the same grade as the one whose place he took, as required by this section, was able to perform the work to the satisfaction of the master, and no complaint was made by the other seamen, the latter were not justified, by reason of such employment, in leaving the ship at an intermediate port, and by their desertion forfeited their right to recover wages. The Moonlight (D. C. 1903), 125 Fed. 429.

1324. Unlawful shipments of seamen void.—All shipments of seamen made contrary to the provisions of any act of Congress shall be void; and any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment. *R. S. 4523.*

Notes of Decisions.

Application to inland river vessels.—The statute does not apply to the hiring of seamen on vessels navigating rivers of the interior States. The Pacific (D. C. 1885), 23 Fed. 154, 155.

Right of seamen to leave vessel and recover wages.—Seamen may leave the vessel at any time where the shipping articles do not describe the voyage, and an imprisonment by the master for refusing to remain and do duty is a tort. Snow *v.* Wope (C. C. 1855), Fed. Cas. No. 13,149.

1325. Seamen shipping for the Philippine Islands.— * * * The laws relating to seamen on foreign voyages shall apply to seamen on vessels going from the United States and its possessions aforesaid to said Islands, the customs officers there being for this purpose substituted for consular officers in foreign ports. * * * *Sec. 84, act of July 1, 1902 (32 Stat. 711).*

1326. Shipping articles.—The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or the republic of Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this Title, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:

First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.

Second. The number and description of the crew, specifying their respective employments.

Third. The time at which each seaman is to be on board, to begin work.

Fourth. The capacity in which each seaman is to serve.

Fifth. The amount of wages which each seaman is to receive.

Sixth. A scale of the provisions which are to be furnished to each seaman. *R. S. 4511.*

Seventh. Any regulations as to conduct on board and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which may be sanctioned by Congress or authorized by the Secretary of the Treasury not contrary to or not otherwise provided for by law, which the parties agree to adopt. *R. S. 4511, as amended by sec. 19, act of Mar. 3, 1897 (29 Stat. 691).*

Eighth. Any stipulations in reference to advance and allotment of wages, or other matters not contrary to law. *R. S. 4511*

This section was amended, as cited above, by striking out from the seventh paragraph, after the words "sanctioned by Congress," the words "as proper to be adopted, and which the parties agree to adopt," and substituting therefor all matter beginning with the words "or authorized by the Secretary of the Treasury," etc.

The eighth paragraph of this section was repealed, in so far as it related to the domestic trade as defined in R. S. 4596, post, 1359, 1362–1366, by sec. 25 of act of Dec. 21, 1898 (30 Stat. 764).

Notes of Decisions.

Repeal of act of 1790.—Act July 20, 1790, requiring a written contract on the shipment of seamen, is not repealed by act June 7, 1872. The City of Mexico (D. C. 1873), Fed. Cas. No. 2,756.

Necessity of writing in general.—Where two distinct contracts, for service on two distinct voyages, are made at the same time, and one only is reduced to writing, the other may be proved by parol. Page v. Sheffield (C. C. 1855), Fed. Cas No. 10,667.

Parol evidence on the part of a seaman is admissible to vary or contradict the shipping articles. The Cypress (D. C. 1829), Fed. Cas No. 3,530.

Accidental omission from shipping articles may be supplied by parol. Wickham v. Blight (D. C. 1834), Fed. Cas. No. 17,611; The Antelope (D. C. 1867), Fed. Cas. No. 484.

A stipulation in writing for a series of voyages may be terminated or varied by mutual consent of the master and crew, and a new voyage substituted by parol agreement. Piehl v. Balchen (D. C. 1844), Fed. Cas No. 11,137.

The maritime law requires that contracts touching the service of seamen shall be in writing. Smith v. Chase (D. C. 1876), Fed. Cas. No. 13,023.

The contract of service of a seaman as evidenced by the shipping articles can not be changed by parol evidence unless fraud is clearly established. The Ucayali (D. C. 1908), 164 Fed. 807.

Time of making written or printed contract.—Shipping articles signed by the seamen after they leave port are not binding upon them The Theodore Perry (D. C. 1878), Fed. Cas. No. 13,880.

Signature of master.—The agent of the master in shipping a crew can not also act as the agent of a seaman and sign his name to the shipping articles. In re Bryant (D. C. 1865), Fed. Cas. No. 2,067.

Contracts of minors.—Seamen, who were minors when they signed shipping articles, may disaffirm the contract and recover the reasonable value of the services rendered, regardless of the contract terms. Belyea v. Cook (D. C. 1908), 162 Fed. 180.

Construction and operation in general.—Shipping articles constitute a several contract with each seaman. Oliver v. Alexander (1832), 6 Pet. 143, 145, 8 L. Ed. 349.

Where libelant signed shipping articles he became a member of the vessel's crew from that time, subject to all penalties imposed on seamen by the maritime law of the United States. The Ida G. Farren (D. C. 1904), 127 Fed. 766.

A seaman who signs a contract to perform a voyage is bound to a specific per-

formance and may not elect to pay damages for nonperformance of it. Ex parte Pool (1821), 2 Va. Cas. 276.

There is no custom exempting the crew from the duty of handling cargo when it consists of ice, in the absence of an express stipulation in the shipping articles. O'Brien v. The Cramp (D. C. 1898), 84 Fed. 696.

Voyage and term of service.—Under this section, which provides that the shipping articles signed by a crew shall indicate the nature of the intended voyage, the shipowner can not vary such articles by evidence of a verbal agreement, made at the time they were signed, that the voyage should be other than that described therein. Northwestern S. S. Co. v. Turtle (1908), 162 Fed. 256, 89 C. C. A. 236, affirming decree Turtle v. Northwestern S. S. Co. (D. C. 1907), 154 Fed. 146.

Where the voyage is "from Philadelphia to South America, or any other port or ports, backward and forward, when and where required, and back to Philadelphia," the master may proceed from South America to Europe. Magee v. The Moss (D. C. 1831), Fed. Cas. No. 8,944.

Shipping articles described the voyage as follows: "From the port of San Francisco, Calif., to any port or ports on Puget Sound or British Columbia for orders. At Puget Sound or British Columbia, vessel may be ordered to load cargo for any port or ports in Alaska, as the master may direct. If the vessel is ordered to Alaska, the trips between Puget Sound or British Columbia and Alaska to be repeated one or more times; thence to San Francisco for final discharge, either direct, or via one or more ports on the Pacific coast,—for a term of time not exceeding six months." Held, that the articles set forth the nature, duration, and termination of the voyage with sufficient certainty to satisfy the statute. Diochet v. The Occidental (D. C. 1898), 87 Fed. 485.

Shipping articles which provide for a voyage to one or more foreign ports, or for a coasting voyage, at the option of the master, do not sufficiently state the nature of the voyage as required by the statute, and are void. The Occidental (D. C. 1900), 101 Fed. 997.

Shipping articles described the voyage for which the seamen became bound as from New York to Shanghai; "thence, if required, to any ports and places within the limits of 75 degrees north and 65 degrees south latitude, trading to and fro for a period not to exceed three years; voyage to end at a port in the United States, the United Kingdom, or the continent of Europe." Held, that the contract was for a voyage, and not for a term of three years, and that such voyage terminated, and the seamen were entitled to discharge, on the return of the ship to a port of the United States. The Falls of Kelly (D. C. 1902), 114 Fed. 357.

Time when seamen shall be on board and begin work.—Shipping articles specifying no time when service shall begin are valid, and the service is to commence in a reasonable time, which may be shown by parol. Smith v. Chase (D. C. 1876), Fed. Cas. No. 13,023.

Wages and payment thereof.—A stipulation not to demand wages until arrival of vessel at final destination will not bar wages. Relf v. The Maria (D. C. 1865), Fed. Cas. No. 11,602; The General Chamberlain (D. C. 1872), Fed. Cas. No. 5,316.

When a seaman, by written instrument, agreed that if discharged the wages due him should be payable on the next regular pay day of his employer, and on being discharged commenced suit for his wages without waiting for such pay day, the suit was premature. Smith v. The Columbus (D. C. 1890), 43 Fed. 686.

Advance and allotment of wages or other matter not contrary to law.—Stipulations in derogation of general rights void unless fully explained and additional compensation allowed adequate to the restrictions and risks imposed thereby. Brown v. Lull (C. C. 1836), Fed. Cas. No. 2,018 [C. S. p. 8790].

Articles not conforming to law as affecting rights of seamen as to wages and care.—The rights of a seaman against the vessel for wages and care are not affected by the fact that the shipping articles signed by him did not conform to the requirement of the laws of the United States. The master can not be permitted to take advantage of his own neglect in that regard. Paulson v. The Governor Ames (D. C. 1891), 55 Fed. 327.

Stipulation that seamen shall pay for medical advice and medicines.—A stipulation that the seamen shall pay for medical advice and medicines, without any condition that there shall be a suitable medicine chest, etc., is void, as contrary to the policy of the act of Congress. Harden v. Gordon (C. C. 1823), Fed. Cas. No. 6,047.

Shipping without signing articles.—Though no shipping articles are signed, seamen are bound to remain with the ship until the voyage is terminated. Jansen v. The Theodor Heinrich (D. C. 1838), Fed. Cas. No. 7,215. But see The Australia (D. C. 1859), Fed. Cas. No. 607.

A seaman shipped without signing articles is entitled to all benefits and subject to all forfeitures prescribed by the maritime law. Jameson v. The Regulus (D. C. 1800), Fed. Cas. No. 7,198.

Where a sailor whose name does not appear on the shipping articles, and who says that he shipped without signing them, performs his duty properly until the vessel reaches a port, when he leaves her he is entitled to recover on a quantum meruit for the time he served. Kelly v. The Topsy (D. C. 1890), 44 Fed. 631.

Seaworthiness of ship.—Under the general maritime law, in every contract of hiring of the crew, as well as of affreightment, there is an implied warranty on the part of the shipowner that the ship is seaworthy at the beginning of the voyage. Rainey v. New York & P. S. S. Co. (C. C. A. 1914), 216 Fed. 449.

Liability for personal injuries to crew.—A vessel is not liable in rem to one of the crew for personal injuries sustained by him through the negligent order of the master in directing a gangway for the discharge of cargo to be hoisted before the arrival of the vessel at her dock and during a heavy wind. The Osceola (1903), 23 Sup. Ct. 483, 189 U. S. 158, 47 L. Ed. 760.

A seaman injured in a collision was not chargeable with contributory negligence because he went below for his coat after the danger of collision became imminent. The Buena Ventura (D. C. 1902), 117 Fed. 988.

A seaman injured in a collision is entitled to recover full damages against other vessels in fault, notwithstanding the contributory fault of the vessel on which he was employed. The Prudence (D. C. 1914), 212 Fed. 541.

A barge held liable for an injury to a seaman by steam from an exhaust pipe, which, as located, was an unsafe appliance and was unknown to libelant. The Badger (D. C. 1914), 218 Fed. 81.

An injury to a longshoreman while engaged in loading lumber on the deck of a vessel held due to the negligence of fellow servants, for which the vessel was not liable. The Rosalie Mahony (D. C. 1914), 218 Fed. 695.

1327. Signing shipping articles.—The following rules shall be observed with respect to agreements:

First. Every agreement, except such as are otherwise specially provided for, shall be signed by each seaman in the presence of a shipping-commissioner.

Second. When the crew is first engaged the agreement shall be signed in duplicate, and one part shall be retained by the shipping-commissioner, and the other part shall contain a special place or form for the description and signatures of persons engaged subsequently to the first departure of the ship, and shall be delivered to the master.

Third. Every agreement entered into before a shipping-commissioner shall be acknowledged and certified under the hand and official seal of such commissioner. The certificate of acknowledgment shall be indorsed on or annexed to the agreement; and shall be in the following form:

"State of ———, County of ———:

"On this ——— day of ———, personally appeared before me, a shipping-commissioner in and for the said county, A. B., C. D., and E. F., severally known to me to be the same persons who executed the foregoing instrument, who each for himself acknowledged to me that he had read or had heard read the same; that he was by me made acquainted with the conditions thereof, and understood the same; and that, while sober and not in a state of intoxication, he signed it freely and voluntarily, for the uses and purposes therein mentioned." *R. S. 4512.*

Notes of Decisions.

Application to British vessels.—The statute does not apply to a British vessel. The Montapedia (D. C. 1882), 14 Fed. 427.

Signature by seaman shipping in foreign port.—It is not necessary that a seaman shipping in a foreign port should sign articles. Gladding v. Constant (D. C. 1844), Fed. Cas. No. 5,468.

Execution of articles before notary public.—Where a steamship ships a crew under articles executed before a notary public, it is a violation of act of June 7, 1872, and the ship incurs the penalty provided therein. The City of Mexico (D. C. 1873), Fed. Cas. No. 2,756.

Signature after services commenced and without reading articles.—Seamen who sign articles without reading them, after their services have commenced under an oral contract, will not be held bound by the written

agreement. Sweeney *v.* Cloutman (C. C. 1862), Fed. Cas. No. 13,685.

New articles signed under protest.—New shipping articles at reduced wages, signed by colored seamen under protest in a port where they are obliged to remain in jail or on board the vessel while she stays there, are not binding. Stratton *v.* Babbage (D. C. 1855), Fed. Cas. No. 13,527.

1328. Shipping articles to be posted.—The master shall, at the commencement of every voyage or engagement, cause a legible copy of the agreement, omitting signatures, to be placed or posted up in such part of the vessel as to be accessible to the crew; and on default shall be liable to a penalty of not more than one hundred dollars. *R. S. 4519.*

1329. Shipping seamen without articles.—If any master, mate, or other officer of a vessel knowingly receives, or accepts, to be entered on board of any merchant-vessel, any seaman who has been engaged or supplied contrary to the provisions of this Title, the vessel on board of which such seaman shall be found shall, for every such seaman, be liable to a penalty of not more than two hundred dollars. *R. S. 4515.*

Notes of Decisions.

Application to coastwise voyages.—This statute, providing penalties for receiving on board of any merchant vessel any seaman who has been engaged or supplied contrary to the provisions of this title, has no application to coasting voyages. United States *v.* The Thomas W. Haven (C. C. 1880), 3 Fed. 347.

Voyage from New York to Mexican port.—An agreement with a seaman on a voyage from New York to a port in Mexico is required under the act of July 20, 1790, in the form prescribed and under the penalty provided by this section. U. S. *v.* The City of Mexico (C. C. 1874), Fed. Cas. No. 14,797.

1330. Liability of a vessel if seamen are shipped without an agreement.—If any person shall be carried to sea, as one of the crew on board of any vessel making a voyage as hereinbefore specified, without entering into an agreement with the master of such vessel, in the form and manner, and at the place and times in such cases required, the vessel shall be held liable for each such offense to a penalty of not more than two hundred dollars. But the vessel shall not be held liable for any person carried to sea, who shall have secretly stowed away himself without the knowledge of the master, mate, or of any of the officers of the vessel, or who shall have falsely personated himself to the master, mate, or officers of the vessel, for the purpose of being carried to sea. *R. S. 4514.*

Notes of Decisions.

Treating injury to stowaway.—A stowaway was required by the master to sign shipping articles for the voyage, and was later severely injured. Held, that the master was without authority to pledge the credit of the vessel for his treatment. The Laura Madsen (D. C. 1901), 112 Fed. 72.

1331. Liability of a master of a vessel for shipping seamen without an agreement.—If any master of such vessel of the burden of fifty tons or upward shall carry out any seaman or mariner, except apprentices or servants, without such contract or agreement being first made and signed by the seamen, such master shall pay to every such seaman the highest price or wages which shall have been given at the port or place where such seaman was shipped, for a similar voyage, within three months next before the time of such shipping, if such seaman shall perform such voyage; or if not, then for such time as he shall continue to do duty on board such vessel; and shall moreover be liable to a penalty of twenty dollars for every such seaman, recoverable, one-*half to the use of* the person prosecuting for the same, and the other half to

the use of the United States. Any seaman who has not signed such a contract shall not be bound by the regulations nor subject to the penalties and forfeitures contained in this Title. *R. S. §521.*

Notes of Decisions.

Recovery of highest rate of wages.—If it is to be assumed that a pilot of a steam vessel, who is a licensed and sworn officer, is a "seaman," within the meaning of this section and that his hiring in consequence must be by shipping articles, yet he can not, under these statutes, recover the highest rate of wages paid to any seaman for a similar voyage during the three months preceding his hiring, unless his libel avers, or his proofs show, that the vessel on which he was employed was of the burden of 50 tons or upward. Werling v. The Lud Keefer (1892), 51 Fed. 44, 2 C. C. A. 95, modifying The Lud Keefer (D. C. 1892), 49 Fed. 650.

A seaman shipped without signing articles must be paid according to the acts of Congress. Jameson v. The Regulus (D. C. 1800), Fed. Cas. No. 7,198.

Where wages are not stipulated in the shipping articles, the seaman may either prove them by parol, or recover under act of July 20, 1790, the highest rate payable, etc. The Warrington (D. C. 1852), Fed. Cas. No. 17,208; The Crusader (D. C. 1837), Fed. Cas. No. 3,456; Graham v. The Exporter (D. C. 1875), Fed. Cas. No. 5,664.

1332. Discharge of seamen.—All seamen discharged in the United States from merchant-vessels engaged in voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall be discharged and receive their wages in the presence of a duly authorized shipping-commissioner under this Title, except in cases where some competent court otherwise directs; and any master or owner of any such vessel who discharges any such seaman belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than fifty dollars. *R. S. §549.*

1333. Certificate of discharge of a seaman.—Upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of discharge, specifying the period of his service and the time and place of his discharge, in the form marked Table B in the schedule annexed to this Title; and every master who fails to sign and give to such seaman such certificate and discharge, shall, for each such offense, incur a penalty not exceeding fifty dollars. But whenever the master shall discharge his crew or any part thereof in any collection-district where no shipping-commissioner has been appointed, he may perform for himself the duties of such commissioner. *R. S. §551.*

1334. Commencement of wages of seamen.—A seaman's right to wages and provisions shall be taken to commence either at the time at which he commences work, or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens. *R. S. §524.*

Notes of Decisions.

Stipulation in contract as void under statute. A provision, in shipping articles signed by seamen for a voyage on a vessel then detained in port by ice, which usually went out within a very few days, that "the crew shall make no claim for wages or provisions while the vessel is detained by ice prior to departure," is not in violation of the statutes made for the protection of seamen, but is reasonable, and

binding upon the crew where they had full knowledge of it before signing. The Joseph B. Thomas (1906), 148 Fed. 762, 78 C. C. A. 428, affirming judgment (D. C. 1905), 136 Fed. 693.

Specifying when seamen shall be on board and begin work.—In an admiralty proceeding by seamen against a vessel for wages claimed to be due them, the failure to have inserted in the shipping articles, before they were executed before a United States shipping commissioner, the time each seaman was to be on board to begin work, in violation of 1326, ante, as amended by sec. 8, act of Apr. 11, 1904 (33 Stat. 168), and of this section and 1327, ante, and 1335, post, and will justify a decision in favor of libelants, where the testimony is evenly balanced as to the time the men were required to be on board. The Shetland *v.* Johnson (1903), 21 App. D. C. 416.

When service begins and right to wages accrues.—A seaman, who signed articles before a shipping commissioner at a distance from the vessel, to which he was furnished transportation, arriving on the same day at 6 p. m., held to be in the service of the ship that day, and entitled to wages therefor. The Alice B. Phillips (D. C. 1901), 106 Fed. 956.

Term of service ending on the same hour of day on which was commenced.—Seamen whose terms of service end at the same hour of the day at which they commenced work are not entitled to payment of wages both for the day on which they commenced and that on which they completed their service. The Carrier Dove (D. C. 1899), 98 Fed. 313.

1335. Wages of seamen forfeited for delay in beginning a voyage.—At the foot of every such contract to ship upon such a vessel of the burden of fifty tons or upward there shall be a memorandum in writing of the day and the hour when such seaman who shipped and subscribed shall render himself on board to begin the voyage agreed upon. If any seaman shall neglect to render himself on board the vessel for which he has shipped at the time mentioned in such memorandum without giving twenty-four hours' notice of his inability to do so, and if the master of the vessel shall, on the day in which such neglect happened, make an entry in the log book of such vessel of the name of such seaman, and shall in like manner note the time that he so neglected to render himself after the time appointed, then every such seaman shall forfeit for every hour which he shall so neglect to render himself one-half of one day's pay, according to the rate of wages agreed upon, to be deducted out of the wages. If any such seaman shall wholly neglect to render himself on board of such vessel, or having rendered himself on board shall afterwards desert, he shall forfeit all of his wages or emoluments which he has then earned. *R. S. 4522, as amended by sec. 2, act of Dec. 21, 1898 (30 Stat. 755).*

Notes of Decisions.

Failure or neglect of seamen to render themselves on board or report for duty.—Receiving a seaman on board after the time appointed does not remit the penalty for his neglect to render himself. Malone *v.* Bell (D. C. 1805), Fed. Cas. No. 8,994.

In the case of a special indulgence to a seaman, wages can not be deducted for failure to render himself on board at the time appointed in the articles. Thompson *v.* The Philadelphia (D. C. 1805), Fed. Cas. No. 13,973.

The seaman loses his right to wages where, though especially requested, he made no attempt until the last moment to get aboard. Smith *v.* The Utica (D. C. 1844), Fed. Cas. No. 13,123.

A seaman signing articles, and not re*porting for duty* at the stipulated time, or, if no time is fixed, within a reasonable time, may be discharged. Smith *v.* Chase (D. C. 1876), Fed. Cas. No. 13,023.

Mariners hired for a voyage, who, pursuant to the contract, presented themselves at the wharf where the boat lay, and offered their services, but without good reason were refused admission to the boat, may sue in rem in admiralty for their stipulated wages, the boat having prosecuted the voyage. The Acorn (D. C. 1887), 32 Fed. 638.

Where a seaman, who has signed shipping articles, went to his vessel, on her sailing day, intoxicated, and declined to go aboard, and the master, being pressed for time, thereupon shipped another man, while the fact that he was drunk was not a sufficient ground for a rescission of his

contract, his refusal to go aboard entitled the master to supply his place, and, when the place was filled, no subsequent application could help him. Lyons v. The Grace Littleton (D. C. 1892), 50 Fed. 285.

Shipping articles, which required a seaman to report on board on a day named, but specified no hour, are to be construed most favorably to the seaman; and where he reported for duty on the day named, several hours before the time fixed for the vessel to sail, he will be held to have complied with the contract. The fact that, after the articles were signed, the master told him verbally to report at an earlier hour, can not affect the construction of the contract. The Alice Blanchard (D. C. 1899), 92 Fed. 519.

1336. Extra wages of seamen in case of improper discharge.—Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned. *R. S. 4527.*

Notes of Decisions.

Application by analogy to seaman serving more than a month.—By analogy to this section a court of admiralty may, when equitable, award a seaman wrongfully discharged an additional month's wages, although he served more than a month, and is not therefore within the terms of the statute. Caffyn v. Peabody (D. C. 1906), 149 Fed. 294.

Nature of extra wages.—The additional wages are in the nature of damages for breach of contract, and not a penalty or forfeiture.

Waiver or release of claim for extra wages. A vessel, soon after starting on a voyage, became so disabled in a storm as to be unable to proceed and jettisoned a portion of her cargo, and returned to the port of departure for repairs, where the master discharged the crew, and paid them their wages for the time served. The men protested that they were entitled to a month's pay, but without compulsion accepted the money tendered, and signed a full release in the presence of the shipping commissioner. Held, that they were bound by such release, and could not maintain a suit against the vessel for additional wages. The Charles D. Lane (D. C. 1901), 106 Fed. 746.

Services not rendered.—Except in the cases provided for in this section, where shipping articles have been signed, and a seaman is thereafter unwarrantably discharged by the master, there can be no recovery for wages unless services have in fact been rendered. A seaman engaged for a voyage, but not signed or shipped, has no claim for wages or for expenses incurred. The Gloucester (D. C. 1899), 96 Fed. 768.

Commencement of voyage.—When a vessel with all her cargo aboard left her dock to be towed to a buoy in the bay for temporary mooring, her voyage "commenced." Manhattan Canning Co. v. Wilson (1914), 217 Fed. 41, 133 C. C. A. 322, affirming decree Wilson v. Manhattan Canning Co. (D. C. 1914), 210 Fed. 898.

Justifiable discharge.—The master may discharge seamen at the inception of the voyage where they are quarrelsome and intend mischief. The George Burnham (D. C. 1872), Fed. Cas. No. 5,331.

Discharge of seamen employed by the month. A hiring at monthly wages imports that the engagement is by the month, and the seaman loses the month's wages where he quits, and recovers the whole wages where he is discharged before its expiration. The Hudson (D. C. 1846), Fed. Cas. No. 6,831.

In the absence of usage to the contrary, seamen employed on a tug by the month are, in case of discharge during the middle of the month, entitled to a full month's wages. Moore v. Neafie (D. C. 1880), 3 Fed. 650.

Release in full on wrongful discharge.—A release in full signed by a seaman on his wrongful discharge is not binding on him where it was not voluntarily given, but was required by the vessel owners, and he was at the time of his discharge in Alaska, at a place where he could not obtain legal redress and without money, and received no more than the amount of wages admittedly due him. Caffyn v. Peabody (D. C. 1906), 149 Fed. 294.

1337. Extra wages of seamen if a ship be sold.—Whenever a vessel of the United States is sold in a foreign country and her company discharged, it

shall be the duty of the master to produce to the consular officer a certified list of the ship's company, and also the shipping articles, and besides paying to each seaman or apprentice the wages due him, he shall either provide him with adequate employment on board some other vessel bound to the port at which he was originally shipped, or to such other port as may be agreed upon by him, or furnish the means of sending him to such port, or provide him with a passage home, or deposit with the consular officer such a sum of money as is by the officer deemed sufficient to defray the expenses of his maintenance and passage home; and the consular officer shall indorse upon the agreement with the crew of the ship which the seaman or apprentice is leaving the particulars of any payment, provision, or deposit made under this section. A failure to comply with the provisions of this section shall render the owner liable to a fine of not exceeding fifty dollars. *R. S. 4582, as amended by sec. 5, act of Dec. 21, 1898 (30 Stat. 759).*

Notes of Decisions.

Statute as modifying general maritime law.—The general maritime law, which, in a case of seminaufragium, or where the vessel was condemned and sold as too unseaworthy to be repaired, gave discharged seamen passage home and wages up to the time of reaching home, is modified by the statute. Kelly v. Otis (C. C. 1885), 23 Fed. 903, 905.

Extra wages in general.—If, pending the voyage, there be an interdiction of commerce with the port of destination, by war or otherwise, and, in consequence, the voyage is broken up, no wages are due. The Saratoga (C. C. 1814), Fed. Cas. No. 12,355.

The disturbed condition of the country to which a vessel is bound, existing some time before the vessel sailed, is no excuse for breaking up the voyage; and where the vessel is intercepted en route, and directed to discharge the crew, the seamen are entitled to extra wages and their discharge. Campbell v. The Uncle Sam (C. C. 1856), Fed. Cas. No. 2,372.

A seaman, rejoining his vessel after being left sick in a foreign port, is entitled to the wages originally contracted for, though the master paid the consul three months' extra wages, under act of Feb. 28, 1803. Shakerly v. Pedrick (D. C. 1837), Fed. Cas. No. 12,699.

Extra wages (act 1803, chap. 62), are not allowed on a discharge abroad on shipwreck, unless the vessel can be repaired at a reasonable expense and in a reasonable time, the burden of negativing which is upon the owners. The Dawn (D. C. 1839), Fed. Cas. No. 3,665.

But where the unseaworthiness existed at the inception of the voyage they may recover, under R. S. 4582, 4583, from the owners three months' extra pay. The Wenonah (D. C. 1875), Fed. Cas. No. 17,412.

Seamen held entitled to three months' extra wages where the vessel is cast away by the master. Brown v. Chandler (D. C. 1877), Fed. Cas. No. 1,908.

A shipment for a voyage from the United States and return, with a provision that the seamen may be discharged in a foreign port by mutual consent of themselves and the master, does not take the case out of the statute. Pray v. U. S. (1874), 10 Ct. Cl. 453.

The three months' pay, over and above the wages due mariners, provided for by act of Feb. 28, 1803, ch. 9, in certain cases, establishes a necessary connection between the pay so to be advanced to the consul by the shipmaster and the rate of wages then accruing to the seamen. (1829) 2 Op. Atty. Gen. 256.

The policy of that act was to discourage the discharge of American seamen in foreign ports. Id.

What constitutes discharge.—Where a seaman leaves a vessel under permission of the mate, it is a discharge, and, if in a foreign port, he is entitled to three months' extra wages. The Caroline E. Kelly (C. C. 1870), Fed. Cas. No. 2,422.

Coercing seamen into remaining on board a vessel sold to a foreign government is equivalent to a discharge, entitling them to the three months' wages given under act of 1803 on a discharge abroad. Dustin v. Murray (D. C. 1871), Fed. Cas. No. 4,201.

Right of discharged master to additional pay.—A master of a vessel is entitled, if a citizen of the United States, to three months' additional wages on being discharged in a foreign port, as in the case of a like discharge of any other seaman or mariner. (1866) 11 Op. Atty. Gen. 458.

Seamen leaving ship with connivance of master.—Extra wages allowed seamen who left the ship in a foreign port with the

connivance of the master, where a discharge was refused by both master and consul. The Hermon (D. C. 1870), Fed. Cas. No. 6,411.

Seamen left behind on account of sickness.—Seamen left behind in a foreign country on account of inability, from sickness, to return in the vessel in which they went out, are within the provisions of act of Feb. 28, 1803, ch. 9, supplementary to the act concerning consuls; and for them the master should deposit with the consul three months' pay over wages, etc., as in other cases of voluntary discharge. (1823) 1 Op. Atty. Gen. 593.

Seamen returned to port of shipment.—Seamen are not entitled to the two months' extra wages as having been discharged abroad, where they are actually returned to the port of shipment, and their wages and expenses paid in full to the date of their return. Rogers v. Lewis (D. C. 1868), Fed. Cas. No. 12,014.

Foreigner shipped at and discharged at a foreign port.—A foreigner shipped at a foreign port, and discharged at a foreign port in accordance with his contract, is not entitled to two months' extra pay. The Hermon (D. C. 1870), Fed. Cas. No. 6,411.

Foreign port.—A seaman shipping at Maine and discharged in New Orleans, at his own request, is not entitled to wages for the entire voyage, or to extra wages, as for a discharge in a foreign port. Sec. 3, ch. 9, act of 1803. Nor is the consent of a consul or a commercial agent necessary to render his discharge valid. Brown v. Hartley (D. C. 1851), Fed. Cas. No. 2,009a.

R. S. 4582 does not apply to seamen discharged in a foreign port without their consent; and enforced payment of wages to a foreign consul, under the statute, will not affect their rights. Heynsohn v. Merriman (D. C. 1880), 1 Fed. 728, 729.

R. S. 4582 requiring a master, on discharging a seaman who is a citizen of the United States, with his own consent in a foreign country, to pay his wages to the consul, has no application to a seaman discharged in a foreign port without his consent; and enforced payment of wages to a consul under the provisions of that statute will not affect the rights of the libelant. Heynsohn v. Merriman (D. C. 1880), 1 Fed. 728, 729.

An American seaman discharged from an American vessel in a foreign port, because the captain "has no funds to pay and could sail no further," will be deemed discharged with his own consent, within the meaning and equity of this section, which was designed to furnish the seaman, in such cases, with means of return to his own country; and no consul being found in the foreign port, nor extra wages paid there, as required, the seaman may maintain an action in admiralty on his return against the owners, for his two months' extra pay. Gove v. Judson (D. C. 1884), 19 Fed. 523.

Cruel treatment of seamen.—A seaman so severely chastised with an improper weapon, because of insolence, as to be necessarily left behind at a foreign port, is entitled to wages to the last port of delivery, but not to benefit of act of Feb. 28, 1803. Brown v. The Independence (D. C. 1836), Fed. Cas. No. 2,014.

Consuls have authority to discharge seamen with three months' extra pay, where they have been cruelly treated, though they have not deserted. Coffin v. Weld (D. C. 1871), Fed. Cas. No. 2,953.

Seizure, condemnation, and sale of vessel.—Where a voyage was broken up by a seizure of the vessel for the debts of its owners, one month's extra pay was allowed the seamen. Woolf v. The Oder (D. C. 1802), Fed. Cas. No. 18,027.

Where an American vessel is condemned as unseaworthy, and voluntarily sold in a foreign port on that account, seamen are entitled to two months' extra wages, under sec. 3, act of Feb. 28, 1803. Wells v. Meldrun (D. C. 1832), Fed. Cas. No. 17,402.

The two months' extra wages, and the expense of returning home, are not allowed the crew of a vessel condemned in a foreign port as unfit for service, where she was seaworthy when she sailed. The Rupee (D. C. 1839), Fed. Cas. No. 12,140; Hoffman v. Yarrington (D. C. 1867), Fed. Cas. No. 6,580.

Where a vessel is condemned as unseaworthy at an intermediate port, and sold, and the cargo is transshipped by order of the shipowner's agents, and reaches its destination, the seamen are entitled to wages. Wallace v. Munford (D. C. 1855), Fed. Cas. No. 17,102.

The payment to the consul of the extra wages required by law, on the condemnation and sale abroad of an injured vessel, discharges the owner's liability, though the seamen refused to receive it. Drew v. Pope (D. C. 1871), Fed. Cas. No. 4,080.

An American seaman discharged in a foreign port on loss of the vessel from unseaworthiness existing at the inception of the voyage, may recover under R. S. 4582, 4583, from the owners three months' extra wages. The Wenonah (D. C. 1875), Fed. Cas. No. 17,412.

A vessel abandoned to the underwriters on report of surveyors that she be condemned as unseaworthy is "condemned as unfit for service," under R. S. 4582, relieving the vessel from liability for the three

months' extra wages where seamen are discharged abroad. Gallagher v. Murray (D. C. 1879), Fed. Cas. No. 5,193.

Feeding and caring for sailors after their discharge can not be held to be a revocation of the discharge. Id.

Where the vessel had been wrecked on the coast of Spain, and the captain, exercising the authority vested in him under those circumstances, sold her on account of the underwriters and discharged the company: Held, that the case was not within act of Feb. 28, 1803, ch. 9, and that, therefore, the consul of the district can not retain three months' extra wages for the seamen. (1831) 2 Op. Atty. Gen. 419.

Power to remit extra wages.—The consul alone has power to remit the extra wages allowed seamen on discharge ordered by him in foreign port, where voyage is voluntarily broken up. Campbell v. The Uncle Sam (D. C. 1856), Fed. Cas. No. 2,371.

Deduction of charge for exchange on payment of extra wages.—Upon the payment of extra wages in a foreign port, the master has no right to deduct, from the amount due, a charge for exchange. Drew v. Pope (D. C. 1871), Fed. Cas. No. 4,080.

Libel of vessel or action against master or owner for extra wages.—Where they are discharged in a foreign port, they are entitled to the two months' wages (act of Feb. 28, 1803, ch. 62), and may recover the same in admiralty. The Saratoga (C. C. 1814), Fed. Cas. No. 12,355.

1338. Lien on ship for wages of seamen.—No seaman shall, by any agreement other than is provided by this Title, forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Title, and every stipulation by which any seaman consents to abandon his right to his wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative. *R. S. 4535.*

Notes of Decisions.

Release, waiver, or loss of lien.—A lien in favor of seamen on the cargo for the freight is not devested by a delivery of the property to one who made advances to the owners of the vessel in fitting her out and furnishing her with supplies before she set out on the voyage. Whitney v. Tibbol (1899), 93 Fed. 686, 35 C. C. A. 544.

The lien on the vessel is lost where seamen, with knowledge of a libel filed by other members of the crew, failed to apply for their wages. Trump v. The Thomas (D. C. 1796), Fed. Cas. No. 14,206.

The seaman does not lose his lien on the vessel by taking an order on the owner or charterer for the balance due at the close of the voyage. The Eastern Star (D. C. 1830), Fed. Cas. No. 4,254.

Lien for wages not destroyed by sale of vessel during seizure by customs officers, Anderson v. The Solon (D. C. 1836), Fed. Cas. No. 363.

The fact that a vessel has made several voyages since the contract was terminated will not discharge the lien where the seaman exerted himself to follow the vessel, and commenced suit at the earliest moment. Freeman v. The Jane (D. C. 1837), Fed. Cas. No. 5,086.

By the law maritime, a mariner, by an agreement understandingly made in a *proper case*, may waive his lien. The Highlander (D. C. 1859), Fed. Cas. No. 6,476; The Countess of Dufferin (D. C. 1878), Fed. Cas. No. 3,280.

Clear proof of an agreement to rely upon personal credit alone is required to defeat the lien. The Sirocco (D. C. 1881), 7 Fed. 599.

The provisions of a charter party can not deprive a seaman of his right to a lien on the vessel for his wages. The Gen. J. A. Dumont (D. C. 1907), 158 Fed. 312.

The statutes of the United St tes providing remedies for the collectio: of seamen's wages assume that they shall act promptly, and while no inflexible rule can be laid down to measure the time by lapse of which without action a claim may fairly be adjudged to be stale, but each case must be determined by its own circumstances, the general rule is that delay in enforcing such a claim after a reasonable opportunity to do so must be taken as a waiver of the right to a lien as against subsequent purchasers and incumbrancers in good faith without notice, unless the delay is satisfactorily explained. The Oliver Ames (D. C. 1910), 178 Fed. 740.

Settlements in general.—Contracts with seamen, upon a discharge before completion of voyage, concerning wages already earned, will be set aside or disregarded by courts of admiralty, if inequitable. The Hermine (D. C. 1874), Fed. Cas. No. 6,400.

Where seamen, after their discharge, through their attorney made a settlement of their wages with the master, agreeing upon the time when their service ended, they are bound thereby, and can not thereafter maintain an action to recover additional wages. The George B. Ferguson (D. C. 1905), 140 Fed. 955.

Release of wages under constraint.—A release of wages earned by a seaman, executed while on board the vessel on a voyage, and imprisoned in irons, on his being released from imprisonment and discharged will be presumed by a court of admiralty to have been given under constraint, and will not be given effect. The Fred E. Sander (D. C. 1899), 95 Fed. 829.

Impeachment of consideration for release.—Seamen who, after joining in a libel for damages, settle their claims, and execute a release, on receiving a small payment and a cancellation of their indebtedness to the ship for advances and merchandise, without fraud or duress, can not impeach the consideration for such release, and the suit as to them will be dismissed. The Belvedere (D. C. 1900), 100 Fed. 498.

Receipt in full.—A receipt by a seaman in full of all demands is no bar to a claim for which he has not received compensation. Harden v. Gordon (C. C. 1823), Fed. Cas. No. 6,047; [C. S. p. 8848].

Setting aside receipts.—A receipt for less than the amount due will not be set aside where the legal rights of the party were doubtful, honestly contested, and opportunity given him to satisfy himself in relation thereto. Thompson v. Faussat (C. C. 1815), Fed. Cas. No. 13,954.

Receipts procured by improper conduct, imposing on seamen, or deceiving, overawing or misleading them, will be disregarded, but when given with due deliberation and full explanation of circumstances will not be set aside on light grounds. Whiteman v. The Neptune (D. C. 1806), Fed. Cas. No. 17,569.

Wages as privileged as to payment and not subject to limitation of liability.—Seamen's wages are privileged in the matter of payment, and are not subject to the limitation of liability of shipowners. The Oliver Ames (D. C. 1910), 178 Fed. 740, 742.

Failure to claim exemption.—Where a seaman's wages, exempt from attachment, have been paid over for a debt justly due under attachment proceedings in which the seaman, though properly served, failed to claim exemption, a court of admiralty will not decree a second payment to the seaman himself. Hitchcock v. The St. Louis (D. C. 1891), 48 Fed. 312.

Assignment or release of salvage claim.—An assignment and release by a seaman, to the owners of the salvor vessel, of a claim for salvage, executed in ignorance of the facts, will not deprive him of his share. The Edward Lee (D. C. 1868), Fed. Cas. No. 4,292.

As the master and crew of a tug were employed for the ordinary business of the towing company, when it authorized the tug to be sent out in stormy weather for the purpose of rescuing a vessel, there arose an implied permission on the part of the owners to the crew to receive the usual proportion of the salvage award; and as, under this section, seamen are rendered incapable of releasing their right to participate in the award, they are entitled to their proportionate share, viz, one-third, after deducting costs. Baker Salvage Co. v. The Taylor Dickson (D. C. 1888), 40 Fed. 261.

Salvage services.—See notes under 1340, post.

1339. Lien for wages of seamen when the earnings of a ship are insufficient.—No right to wages shall be dependent on the earning of freight by the vessel; but every seaman or apprentice who would be entitled to demand and receive any wages if the vessel on which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the same of the master or owner in personam, notwithstanding that freight has not been earned. But in all cases of wreck or loss of vessel, proof that any seaman or apprentice has not exerted himself to the utmost to save the vessel, cargo, and stores, shall bar his claim. *R. S. 4525.*

1340. Wages of a shipwrecked seaman landed in a foreign port.—In cases where the service of any seaman terminates before the period contemplated in the agreement, by reason of the loss or wreck of the vessel, such seaman shall be entitled to wages for the time of service prior to such termination, but not for any further period. Such seaman shall be considered as a destitute seaman and shall be treated and transported to port of shipment as provided

in sections forty-five hundred and seventy-seven, forty-five hundred and seventy-eight, and forty-five hundred and seventy-nine of the Revised Statutes of the United States. *R. S. 4526, as amended by sec. 3, act of Dec. 21, 1898 (30 Stat. 755).*

For provisions of R. S. 4577 and 4578 see post, 1356 and 1357. R. S. 4579 provides that masters of vessels transporting destitute seamen from a port where there is no such consular officer shall be allowed a reasonable sum for that service.

Notes of Decisions.

Loss or wreck of vessel in general.—The crew of a vessel voluntarily stranded to avoid being driven on a rocky and dangerous part of the coast are entitled to wages, while employed in saving the cargo, even after the sale of the vessel is determined upon. Barnard *v.* Adams (1850), 51 U. S. (10 How.) 270, 13 L. Ed. 417.

In case of wreck, the seaman is entitled to wages out of the goods saved for the time served before the loss, and thereafter in caring for the goods saved. Weeks *v.* The Catharina Maria (D. C. 1790), Fed. Cas. No. 17,351.

Seamen of vessel lost on homeward voyage are entitled to wages to the time of discharge of cargo on outward voyage, but not for any of the time she remained in port. Bronde *v.* Haven (D. C. 1836), Fed. Cas. No. 1,924.

A ship to be "lost or wrecked" does not have to be completely destroyed, and if a vessel is lost to her owners without fault on their part, or if she is so injured by encountering perils of navigation as to be unfit to complete the particular voyage, the terms of this section are met. The Charles D. Lane (D. C. 1901), 106 Fed. 746.

Collision.—Where seamen shipped for a round trip, and by reason of a collision with another vessel the voyage was broken up, but they were induced by the master to proceed with the schooner to the port of delivery, and on arriving at the port of delivery they refused to aid in discharging the vessel, and claiming their discharge, which was denied by the master, they left and returned to the port of departure, held, that the vessel having been laid up at a distant port for the winter, and unable to complete the voyage till spring, that the seamen were entitled to their discharge without completing the round trip, and to compensation for services actually rendered, based upon the principles of a quantum meruit. Thorson *v.* Peterson (C. C. 1883), 14 Fed. 742.

Decision of master as to termination of services.—The decision of the master of a vessel as to the actual termination of the *seamen's* services, under the provision *that, in case of* termination of a seaman's services by wreck of the vessel, the seaman shall be entitled to wages only up to the time of such termination, will be supported, unless some wrong or injustice be practiced on the seamen. Survey and condemnation of a vessel is not a necessary ingredient of wreck. Flanagan *v.* U. S. & Brazil Mail S. S. Co. (D. C. 1886), 30 Fed. 202.

Voyage broken up by act of master.—Where a voyage is broken up, not from necessity or in consequence of the perils of the sea, but from the act of the master, the seamen are entitled to payment of their wages to the time, and also for a reasonable time to be allowed for their return home. Sullivan *v.* Morgan (N. Y. 1814), 11 Johns. 66.

Lien as continuing after wreck of vessel.—The lien for wages continues after the wreck of the vessel, subject to salvors' liens. Collins *v.* The Fort Wayne (D. C. 1861), Fed. Cas. No. 3,012.

Abandonment of vessel or wreck.—Where seamen abandon the wreck, they lose their right to wages. The Two Catherines (C. C. 1821), Fed. Cas. No. 14,288; Lewis *v.* The Elizabeth and Jane (D. C. 1823), Fed. Cas. No. 8,321.

Capture and condemnation of vessel.—A capture, unless followed by condemnation, does not dissolve the contract for wages. It is suspended during prize proceedings, and upon a decree of restoration it revives. The Saratoga (C. C. 1814), Fed. Cas. No. 12,355; Emerson *v.* Howland (C. C. 1816), Fed. Cas. No. 4,441; Clayton *v.* The Harmony (D. C.), Fed. Cas. No. 2,871; Watson *v.* The Rose (D. C. 1806), Fed. Cas. No. 17,288.

Seizure for violation of foreign revenue laws.—Where a voyage is broken up abroad by a seizure for violating the revenue laws of a foreign country, the seamen are only entitled to wages to the time of the seizure. Oxnard *v.* Dean (1813), 10 Mass. 143.

Salvage of part of vessel or cargo.—The seamen are not entitled to recover wages, as such, on the cargo brought to the port of destination by salvors. Reed *v.* Hussey (D. C. 1836), Fed. Cas. No. 11,646.

The wages earned by seamen after their vessel had been wrecked, but before she was

finally abandoned, do not constitute antecedent wages, in a sense which would postpone them to the claims of the salvors; and the proceeds derived from the sale of the outfit of the vessel must first be applied to the payment of the demands of such seamen. Dalstrom v. The E. M. Davidson (D. C. 1880), 1 Fed. 259, 260.

Salvage services by seamen on vessel.—Seamen in the ordinary course of things, in the performance of their duties are not allowed to become salvors, whatever may have been the perils, or hardships, or gallantry of their services in saving the ship and cargo. Hobart v. Drogan (1836), 10 Pet. 108, 120, 9 L. Ed. 363.

The contract of seamen is dissolved by the abandonment of their vessel in distress at sea, and where the rescuing vessel subsequently falls in with the derelict, and they perform services in saving part of her cargo, they are entitled to salvage. Taylor v. The Cato (D. C. 1806), Fed. Cas. No. 13,786.

Seamen, after a wreck, may recover from the materials and cargo, in relation to their respective values, wages for the time spent in saving them. Roberts v. The Ocean Star (D. C. 1860), Fed. Cas. No. 11,908.

Seamen are not discharged by the happening of disaster to the vessel, but it is their duty, so long as safety permits, to remain by the wreck and save as much as possible, and their right to wages continues until they abandon the vessel. Dalstrom v. The E. M. Davidson (D. C. 1880), 1 Fed. 259, 260.

It is the duty of seamen to remain by the wreck of a vessel so long as their personal safety will permit, and save as much as possible from the vessel; and when they have done so the fragments of the vessel, and the outfit saved, constitute a fund pledged for payment of their wages, superior to the claim of the salvors. The Davidson (D. C. 1880), 50 Fed. 323.

Seaman is not entitled to salvage for extricating vessel from hazardous situation. The C. P. Minch (D. C. 1894), 61 Fed. 511, 513, affirmed (1896), 73 Fed. 859, 20 C. C. A. 70.

1341. Suspension of wages of seamen.—No seaman or apprentice shall be entitled to wages for any period during which he unlawfully refuses or neglects to work when required, after the time fixed by the agreement for him to begin work, nor, unless the court hearing the case otherwise directs, for any period during which he is lawfully imprisoned for any offense committed by him. *R. S. 4528.*

Notes of Decisions.

Refusal to work or obey orders.—Seamen will not be allowed wages upon days when they wrongfully refuse to work or obey orders. The Jefferson Borden (D. C. 1881), 6 Fed. 301.

Laying off work on account of illness.—A seaman, during illness occasioned by his own fault, is not entitled to wages, and is liable for the expenses of his subsistence; but not for the wages paid another man in his place. Johnson v. Huckins (D. C. 1843), Fed. Cas. No. 7,390.

In such case the seaman is not liable for the detention of a vessel for want of his services, where the master could have obtained a substitute. Id.

Where a seaman laid off from work for five days in port on account of illness, although the surgeon refused to give him a certificate, and he made no complaint on that ground to the captain, and was logged and fined, and a copy of the log entry was given him, he can not recover wages for the time without proof that he was in fact too ill to work. The St. Louis (D. C. 1905), 137 Fed. 972.

Seaman put off duty on account of misconduct.—Where a cook was put off duty in consequence of negligence, disobedience, and insolence, he has no right to wages for the period during which he performed no duty. The Antioch (D. C. 1880), 11 Fed. 165.

Imprisonment.—A seaman rightfully imprisoned on shore for misconduct, but wrongfully left behind, may claim wages for the time he was imprisoned. The Maria (D. C. 1832), Fed. Cas. No. 9,074.

Going ashore against orders to apply to a consul for alleged cruel treatment will not justify imprisonment of seamen, nor deduction from their wages of the amount paid other hands, in their places, while so imprisoned. Hart v. The Otis (D. C. 1836), Fed. Cas. No. 6,154.

A seaman can not recover wages during the time that he was imprisoned by local authorities in the home port on a charge of mutiny. Thomas v. Gray (D. C. 1836), Fed. Cas. No. 13,898.

Where seamen were imprisoned in a foreign jail by order of the American consul, and there was no evidence of bad faith, the men must pay the charges of the imprisonment and the expense of substitutes, but not the charges of the consul. Chester v. Benner (D. C. 1871), Fed. Cas. No. 2,660.

1342. Canal-boats not to be libeled for wages.—No canal-boat, without masts or steam-power, which is required to be registered, licensed, or enrolled and licensed, shall be subject to be libeled in any of the United States courts for the wages of any person who may be employed on board thereof, or in navigating the same. *R. S. 4251.*

Notes of Decisions.

Construction with other statutes.—This section was not abrogated by the act of Apr. 18, 1874 (18 Stat. 31), which provided that the enrollment act of 1793 shall not be so construed as to extend the provisions of the latter act to such canal boats. The J. S. Woodward (D. C. 1881), 6 Fed. 636.

What are "canal boats."—A vessel engaged in navigating canals is a canal boat, within the meaning of the statute, without reference to its form, and a boat not engaged in navigating canals is not a canal boat, within the meaning of the statute, whatever may be its form. Smith *v.* The William L. Norman (D. C. 1891), 49 Fed. 285; The A. H. Chamberlain (D. C. 1913), 206 Fed. 996.

Jurisdiction of courts.—This section does not affect the jurisdiction of a United States district court over a libel filed against a canal boat to enforce a claim for towing it up the Hudson river. Ryan *v.* Hook (N. Y. 1884), 34 Hun, 185.

1343. Wages of seamen payable in gold.—Moneys paid under the laws of the United States, by direction of consular officers or agents, at any foreign port or place, as wages, extra or otherwise, due American seamen, shall be paid in gold or its equivalent, without any deduction whatever, any contract to the contrary notwithstanding. *R. S. 4548.*

Notes of Decisions.

Wages of American seamen paid abroad.—Foreign coin paid seamen on their discharge abroad is to be valued at its rate in the home port, under the laws of the United States; otherwise, where payment is a voluntary advance. The Cabot (D. C. 1848), Fed. Cas. No. 2,277.

Where the crew of an American ship had been shipped by the master in the United States, and the shipping articles contained a clause that "all moneys were to be paid in United States currency or its equivalent in gold at the current rate of exchange," held that, in settling some accounts with the master, at Singapore, India, for the wages of his crew, the United States consul there should have allowed a deduction from the pay of the seamen of the difference between "greenbacks" and gold or silver, the currency of Singapore, and the cost of exchange thereon between India and America. (1872), 13 Op. Atty. Gen. 557.

Wages payable in dollars and cents.—In the case of wages payable in dollars and cents, held that the seamen were entitled to a sum in United States currency that would make the payment equal to specie. The Rochambeau (D. C. 1864), Fed. Cas. No. 11,973.

The amount decreed to seamen shipped at Hamburg for a return voyage, which was broken up at New York, is the amount of their wages in Hamburg money reduced to United States coined dollars, without adding anything for the premium on gold. The Blohm (D. C. 1867), Fed. Cas. No. 1,556.

1344. Part payment of wages of seamen at ports.—Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided

in section forty-five hundred and twenty-nine of the Revised Statutes: *Provided further*, That notwithstanding any release signed by any seaman under section forty-five hundred and fifty-two of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: *And provided further*, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement. *R. S. 4530, as amended by sec. 4, act of March 4, 1915 (38 Stat. 1165).*

For R. S. 4529 see 1346, ante. For R. S. 4552 see 1347, ante.

1345. Account rendered before discharge of seaman.—Every master shall, not less than forty-eight hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged before a shipping-commissioner, to such shipping-commissioner, a full and true account of his wages, and all deductions to be made therefrom on any account whatsoever; and in default shall, for each offense, be liable to a penalty of not more than fifty dollars. No deduction from the wages of any seaman except in respect of some matter happening after such delivery shall be allowed, unless it is included in the account delivered; and the master shall, during the voyage, enter the various matters in respect to which such deductions are made, with the amounts of the respective deductions as they occur, in the official logbook, and shall, if required, produce such book at the time of the payment of wages, and, also, upon the hearing, before any competent authority, of any complaint or question relating to such payment. *R. S. 4550*

This section does not apply to deductions for desertion or for wrongful assault. See post, 1359, 1364.

Notes of Decisions.

Deduction on account of assault.—The wrongful assault by a mate on one of the seamen on the voyage, to the damage of the ship, may be set off against his claim for wages, though the deduction is not entered in the log nor claimed in the statement made to the shipping master. The T. F. Whiton (D. C. 1879), Fed. Cas. No. 13,849.

1346. Time for payment of seamen.—The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. *R. S. 4529, as amended by sec. 3, act of March 4, 1915 (38 Stat. 1164).*

Notes of Decisions.

Contract in violation of statute.—A contract providing that a seaman's wages should not be payable until a stated time, although his term of service might sooner terminate, held void as in violation of this section and the withholding of payment in reliance on such provision to subject the shipowner to the penalty prescribed by such section. The City of Montgomery (D. C. 1913), 210 Fed. 673.

Completion or end of voyage.—Seamen shipped for a voyage to "a port of discharge in the United States" can not maintain a libel for wages after leaving the ship at a port of distress in the United States. Fairchild *v.* The Aurelius (D. C. 1841), Fed. Cas. No. 4,609.

The voyage is not completed until the unlading of the cargo or ballast. The Eagle (D. C. 1846), Fed. Cas. No. 4,233.

A voyage is ended and a seaman's wages become due when the vessel is moored at her final port of destination, and if wages are not paid within 10 days thereafter, the seaman is entitled to admiralty process against the vessel. The Annie M. Smull (D. C. 1872), Fed. Cas. No. 423.

A seaman is not bound to stay by the ship after her arrival at the final port of destination, and assist in discharging her cargo, unless the shipping articles contain a contract to that effect, or the established custom of the port requires it. Id.

While it is true as a general rule that seamen will not be entitled to wages until the voyage is completed, there are exceptions to it, and among them is the case of a vessel employed to perform certain work or duties in a specified locality, and not engaged in carrying freight from port to port. Olsen *v.* The Edwin Post (D. C. 1881), 6 Fed. 314.

Seamen shipped for an outward voyage, "and back to a final port of discharge in the United States." The vessel was returning in ballast, bound for New York, when she became disabled in a gale, and bore away for Key West. There she discharged her crew, who were paid wages until their discharge, made temporary repairs, shipped another crew, and proceeded to New York. No cargo was loaded or ballast unloaded at Key West. Held, that New York, and not Key West, was her final port of discharge, and the original crew were entitled to recover against the vessel the cost of their passage from Key West to New York. Schermacher *v.* Yates (D. C. 1893), 57 Fed. 668.

In order to effect the termination of a voyage at a port of refuge, there must be some other act than the discharge of the crew. Id.

Where a ship takes ground within her port of destination, but, before arriving at her place of mooring, and afterwards, without having furled her sails or cast anchor, floats off, and comes to her moorings, the voyage is not ended, and consequently wages not earned until she has arrived at her moorings. Taber *v.* Nye (1831), 29 Mass. (12 Pick.) 105.

Payment on discharge.—Where the master, without any new agreement, undertakes a voyage other than that originally agreed upon, the seamen may demand their wages. Weiberg *v.* The St. Oloff (D. C. 1790), Fed. Cas. No. 17,357.

A mariner is entitled to his wages as soon as he is voluntarily discharged from the vessel, and if not paid within ten days after his discharge he may have process from a court of admiralty against the vessel to enforce payment. The Mary (D. C. 1838), Fed. Cas. No. 9,191.

Whether seamen are bound to remain after the end of a voyage to assist in discharging the cargo depends on the custom of the port. The Mary (D. C. 1838), Fed. Cas. No. 9,191; The Annie M. Smull (D. C. 1872), Fed. Cas. No. 423.

An arrest and imprisonment under a criminal charge by the master held equivalent to a discharge, entitling seamen to their wages. Hill *v.* The Triumph (D. C. 1841), Fed. Cas. No. 6,500.

A delay beyond a reasonable time to unload the vessel may be regarded as equivalent to a discharge of the seamen; but the burden of showing the discharge in such case is on the seaman alleging it, and his own oath is not sufficient evidence. The Eagle (D. C. 1846), Fed. Cas. No. 4,233.

Where the officers of a vessel are entitled to discharge a seaman at pleasure, they are bound to be ready to pay his wages at the time of his discharge. In such case a demand of the officer who employed and discharged the seaman is sufficient. Walsh *v.* The Louisiana (D. C. 1880), 4 Fed. 751.

Under this section, where seamen were discharged, and payment of wages refused, they were entitled to libel the vessel at once therefor, without instituting proceedings under R. S. 4546 and 4547, as amended by sec. 6, act of Dec. 21, 1898 (30 Stat. 756); such sections being permissive only. The Elihu Thompson (D. C. 1905), 139 Fed. 89.

Penalties and recovery thereof.—Seamen discharged at the home port, without payment of any portion of their wages, the amount of which was not disputed, held entitled to recover double pay for 10 days, although their suit was brought within

10 days from the discharge. The Columbia (D. C. 1873), Fed. Cas. No. 3,034.

An attachment of the seaman's wages is no excuse for delay in payment, and the penalty is recoverable. The John E. Holbrook (D. C. 1874), Fed. Cas. No. 7,330.

Seamen can not recover the penalty under this section, when the net proceeds from the sale of the vessel are insufficient to pay the officers and crew, and it does not appear that the master could have raised a sufficient sum for the purpose. The Wenonah (D. C. 1875), Fed. Cas. No. 17,412.

A seaman who libels a vessel for his wages after she arrives in port thereby elects to consider his engagement at an end, and can not recover for the time during which he continues to remain on board thereafter, except the 10 days' extra pay provided by this section. The Chas. L. Baylis (D. C. 1885), 25 Fed. 862.

On the discharge of a seaman, a dispute having arisen as to the amount due him, the master went with him before a shipping commissioner, who decided in favor of the contention of the master. Held, that such decision, although erroneous, constituted a reasonably "sufficient cause" for withholding the additional wages claimed to exempt the ship and owners from the penalty imposed by this section. The Alice B. Phillips (D. C. 1901), 106 Fed. 956.

Payment of wages of a seaman is not delayed "without sufficient cause" within this section, though the cause of the delay, a contention that an order of the seaman which had been paid was valid, was insufficient in law; "without sufficient cause" meaning "without reasonable cause." The George W. Wells (D. C. 1902), 118 Fed. 761.

Where a fine had been imposed on a seaman for disobedience, but the same was unavailable as a defense to an action for wages for failure of the ship's master to enter the offense in the ship's logbook on the day it occurred, the ship was justified in contesting its liability, and was therefore not liable to a fine for unreasonable delay in payment of the seaman's wages. The St. Paul (D. C. 1904), 133 Fed. 1002.

Where there was fair ground for claiming the right to reduce the wages of a mate because of neglect of duty, the refusal to pay him the agreed wages in full on his discharge was not "without sufficient cause," so as to subject the master or owner to the penalty imposed by this section. The Sadie C. Sumner (D. C. 1905), 142 Fed. 611.

A vessel owner, who fails to pay the wages of a seaman on his discharge without sufficient cause, is liable for the prescribed penalty until payment is made, and the cause of action therefor is not merged in a decree for the wages. Pacific Mail S. S. Co. v. Schmidt (1914), 214 Fed. 513, 130 C. C. A. 657, affirming decree Schmidt v. Pacific Mail S. S. Co. (D. C. 1913), 209 Fed. 264.

1347. Mutual release of all claims for wages of seamen.—The following rules shall be observed with respect to the settlement of wages:

First. Upon the completion, before a shipping-commissioner, of any discharge and settlement, the master or owner and each seaman, respectively, in the presence of the shipping-commissioner, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and the shipping-commissioner shall also sign and attest it, and shall retain it in a book to be kept for that purpose, provided both the master and seamen assent to such settlement, or the settlement has been adjusted by the shipping-commissioner.

Second. Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement.

Third. A copy of such release, certified under the hand and seal of such shipping-commissioner to be a true copy, shall be given by him to any party thereto requiring the same, and such copy shall be receivable in evidence upon any future question touching such claims, and shall have all the effect of the original of which it purports to be a copy.

Fourth. In cases in which discharge and settlement before a shipping-commissioner are required, no payment, receipt, settlement, or discharge otherwise made shall operate as evidence of the release or satisfaction of any claim.

Fifth. Upon payment being made by a master before a shipping-commissioner, the shipping-commissioner shall, if required, sign and give to such master a

statement of the whole amount so paid; and such statement shall, between the master and his employer, be received as evidence that he has made the payments therein mentioned. *R. S. 4552.*

Notes of Decisions.

Statute as relating only to merchant seamen.—This section was only intended to relate to merchant seamen, and it has not been extended by acts amendatory thereof or supplemental thereto. Domenico *v.* Alaska Packers' Ass'n (D. C. 1901), 112 Fed. 554, 560; reversed (1902), 117 Fed. 99, 54 C. C. A. 485.

Conclusiveness of releases.—Seamen signed for service on a vessel employed as a Government transport for a voyage to Manila and such other ports as the master might direct, and return to the Pacific Coast for discharge; the voyage not to exceed six months. At the expiration of the six months the vessel was at Manila, and they demanded their payment and discharge. Under orders of the military governor, their demand was refused, and on their refusal to serve longer they were arrested and confined by the military authorities, and subsequently returned to San Francisco, by another vessel. In the meantime the transport had arrived and departed on another voyage; the master leaving with a shipping commissioner the amount of their wages to the time they were taken from the vessel together with a release executed by him. On their arrival they demanded wages up to that time. They were told by the commissioner (in a joking way, as he testified) that they were lucky to get anything, and that they were not ordered shot at Manila. They were without money, and finally accepted the sum left with the commissioner, and executed the release. Held, that there was nothing in such circumstances amounting to legal duress or coercion, and that they were concluded by the release. Pettersson *v.* Empire Transp. Co. (1901), 111 Fed. 931, 50 C. C. A. 63.

Under the provisions of this section and 1322, ante, requiring seamen to be discharged and paid their wages before a shipping commissioner, in whose presence a mutual release shall be signed and attested by him, if the parties agree upon a settlement, and further providing that "such release shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto on account of wages in respect of the past voyage or engagement," a release so executed and attested without fraud or coercion is conclusive on the parties. Id.

1348. Attachment or arrestment of wages of seamen.—That no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen: *Provided*, That nothing contained in this or any preceding section shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children. Section forty-five hundred and thirty-six of the Revised Statutes of the United States is hereby repealed. *Sec. 12, act of March 4, 1915 (38 Stat. 1169).*

Notes of Decisions.

Attachment or arrestment of wages in general.—The wages of a seaman are not subject to attachment. The John E. Holbrook (D. C. 1874), Fed. Cas. No. 7,339.

This provision is applicable to all wages earned by seamen, whatever the nature of the voyage. The St. Louis (D. C. 1891), 48 Fed. 312, 314.

Seizure after judgment.—Seamen's wages are protected from seizure after judgment by attachment or proceedings in aid of execution by this section. Wilder *v.* Inter-Island Steam Nav. Co. (1908), 29 Sup. Ct. 58, 59, 211 U. S. 239, 53 L. Ed. 164, 15 Ann. Cas. 127.

Assignments.—The seamen's lien for wages does not pass to a shipping agent by reason of advances made to the seamen at the home port. Seaver *v.* The Thales (C. C. 1850), Fed. Cas. No. 12594.

The seaman's lien for wages is lost by an assignment of his claim. Patchin *v.* The A. D. Patchin (D. C. 1850), Fed. Cas. No. 10,792; Logan *v.* The Æolian (D. C. 1859), Fed. Cas. No. 8,465.

A claim for maritime wages is assignable, and the lien also passes by the assignment, so that the assignee is entitled to enforce such lien in his own name. Mark *v.* The New Idea (D. C. 1892), 60 Fed. 294.

A lien for seaman's wages will be enforced in the hands of an assignee when there is no reason to question the fairness of the assignment. The William M. Hoag (D. C. 1895), 69 Fed. 742; decree affirmed (1897), 18 S. Ct. 112, 168 U. S. 437, 42 L. Ed. 533.

1349. Limit of sum recoverable from a seaman during a voyage.—No sum exceeding one dollar shall be recoverable from any seaman, by any one person, for any debt contracted during the time such seaman shall actually belong to any vessel, until the voyage for which such seaman engaged shall be ended. *R. S. §537.*

Notes of Decisions.

Shipping paper as evidence of time of contract.—For a seaman, defending against an action on the ground that the debt for which he is sued was contracted during the time he belonged to a vessel, and consequently was not recoverable till the close of the voyage, the shipping paper is the proper evidence as to the time when he engaged. Reynard *v.* Brecknell (1826), 21 Mass. (4 Pick.) 302.

1350. Payment of wages in case of death of a seaman within the United States.—Whenever any seaman or apprentice dies in the United States, and is, at the time of his death, entitled to claim from the master or owner of any vessel in which he has served, any unpaid wages or effects, such master or owner shall pay and deliver, or account for the same, to the shipping-commissioner at the port where the seaman or apprentice was discharged, or was to have been discharged. *R. S. §542.*

That section forty-five hundred and forty-two of the Revised Statutes be, and is hereby, amended by adding thereto the words "or where he died." *Sec. 6, act of Mar. 3, 1897 (29 Stat. 689), amending R. S. §542.*

1351. Sale of effects of deceased seamen at auction.—Whenever any seaman or apprentice belonging to or sent home on any merchant-vessel, whether a foreign-going or domestic vessel, employed on a voyage which is to terminate in the United States, dies during such voyage, the master shall take charge of all moneys, clothes, and effects which he leaves on board, and shall, if he thinks fit, cause all or any of such clothes and effects to be sold by auction at the mast or other public auction, and shall thereupon sign an entry in the official log-book, and cause it to be attested by the mate and one of the crew, containing the following particulars:

First. A statement of the amount of money so left by the deceased.

Second. In case of a sale, a description of each article sold, and the sum received for each.

Third. A statement of the sum due to deceased as wages, and the total amount of deductions, if any, to be made therefrom. *R. S. §538.*

Notes of Decisions

Wages of deceased seaman in general.—The representatives of a seaman dying on a voyage in the service of the ship are entitled to his wages for the whole voyage where the engagement was by the month. Sims *v.* Jackson (C. C. 1806), Fed Cas. No. 12,890; Walton *v.* The Neptune (D. C. 1809), Fed. Cas. No. 17,135; Natterstrom *v.* The Hazard (D. C. 1809), Fed. Cas. No. 10,055; Johnson *v.* The Coriolanus (D. C. 1839), Fed. Cas. No. 7,380.

But no wages will be allowed during a sickness which arose from the fault or vice of the seaman. Walton *v.* The Neptune (D. C. 1809), Fed. Cas. No. 17,135.

Where a seaman dies before the voyage is completed his representatives are en

titled to his wages up to the time of his death. Scott *v.* The Greenwich (D. C. 1802), Fed. Cas. No. 12,531; Carey *v.* The Kitty (D. C. 1808), Fed. Cas. No. 2,402.

Where a seaman suffering from a disease when he ships dies during the voyage, his administrator can not recover wages. Writer *v.* The Richmond (D. C. 1807), Fed. Cas. No. 18,104.

A seaman who ships for a voyage, concealing from the master a long-standing disease which incapacitates him for labor, is not entitled to wages. Mowatt *v.* Brown (D. C. 1848), Fed. Cas. No. 0,889a.

A shipping commissioner has no authority to allow deductions from the wages of a seaman who died during the voyage unless they are shown by an entry in the official log, verified as therein required. U. S. v. McDonald (D. C. 1914), 217 Fed. 686.

Deduction of wages advanced on accounting for proceeds of sale of effects.—Where the master of a vessel sells at the mast the effects of a deceased seaman, and accounts to a shipping commissioner for the proceeds, in accordance with this section, he cannot deduct from such proceeds the amount due the ship by the sailor for wages advanced but not earned. U. S. *v.* Tobey (D. C. 1882), 12 Fed. 347.

1352. Delivery of effects of deceased seamen to a shipping commissioner or a consul.—In cases embraced by the preceding section, the following rules shall be observed:

First. If the vessel proceeds at once to any port in the United States, the master shall, within forty-eight hours after his arrival, deliver any such effects remaining unsold, and pay any money which he has taken charge of, or received from such sale, and the balance of wages due to the deceased, to the shipping-commissioner at the port of destination in the United States.

Second. If the vessel touches and remains at some foreign port before coming to any port in the United States, the master shall report the case to the United States consular officer there, and shall give to such officer any information he requires as to the destination of the vessel and probable length of the voyage; and such officer may, if he considers it expedient so to do, require the effects, money, and wages to be delivered and paid to him, and shall, upon such delivery and payment, give to the master a receipt; and the master shall within forty-eight hours after his arrival at his port of destination in the United States produce the same to the shipping-commissioner there. Such consular officer shall, in any such case, indorse and certify upon the agreement with the crew the particulars with respect to such delivery and payment.

Third. If the consular officer does not require such payment and delivery to be made to him, the master shall take charge of the effects, money, and wages, and shall, within forty-eight hours after his arrival at his port of destination in the United States, deliver and pay the same to the shipping-commissioner there.

Fourth. The master shall, in all cases in which any seaman or apprentice dies during the voyage or engagement, give to such officer or shipping-commissioner an account, in such form as they may respectively require, of the effects, money, and wages so to be delivered and paid; and no deductions claimed in such account shall be allowed unless verified by an entry in the official log-book, if there be any; and by such other vouchers, if any, as may be reasonably required by the officer or shipping-commissioner to whom the account is rendered.

Fifth. Upon due compliance with such of the provisions of this section as relate to acts to be done at the port of destination in the United States, the shipping-commissioner shall grant to the master a certificate to that effect. No officer of customs shall clear any foreign-going vessel without the production of such certificate. *R. S. 4539.*

Notes of Decisions.

Authority of commissioner as to taking possession of effects.—The United States shipping commissioner, under the act creating his office, may take possession of the property of a sailor, dying on a voyage to port, which such sailor leaves on the vessel. The act does not authorize the commissioner to take charge of the sailor's property on shore. In re Bedford's Estate (Cal. 1874), Myr. Prob. 60.

1353. Duties of consular officers in regard to effects of deceased seamen.—Whenever any such seaman or apprentice dies at any place out of the United States, leaving any money or effects not on board of his vessel, the consular officer of the United States at or nearest the place shall claim and take charge of such money and effects, and shall, if he thinks fit, sell all or any of such effects, or any effects of any deceased seaman or apprentice delivered to him under the provisions of this Title, and shall quarterly remit to the district judge for the district embracing the port from which such vessel sailed, or the port where the voyage terminates, all moneys belonging to or arising from the sale of the effects or paid as the wages of any deceased seamen or apprentices which have come to his hands; and shall render such accounts thereof as the district judge requires. *R. S. 4541.*

That section forty-five hundred and forty-one of the Revised Statutes be, and is hereby, amended by striking out the words, "district judge for the district," in the seventh line of said section, and substituting in place thereof the words "circuit court of the circuit;" and that said section be, and is hereby, further amended by striking out the words "district judge" where they occur in the eleventh and twelfth lines of said section and substituting in place thereof the words "circuit court." *Sec. 4, act of March 3, 1897 (29 Stat. 689), amending R. S. 4541.*

See note to 1354, post.

1354. Delivery to a circuit court of wages and effects of deceased seamen.—Every shipping-commissioner in the United States shall, within one week from the date of receiving any such money, wages, or effects of any deceased seaman or apprentice, pay, remit, or deliver to the circuit court of the circuit in which he resides, the money, wages, or effects, subject to such deductions as may be allowed by the circuit court for expenses incurred in respect to such money and effects; and should any commissioner fail to pay, remit, and deliver the same to the circuit court, within the time hereinbefore mentioned, he shall incur a penalty of not more than treble the value of such money and effects. *R. S. 4543.*

The circuit courts were abolished and their jurisdiction transferred to the district courts by Jud. Code, sections 289–291, (36 Stat. 1167).

Notes of Decisions.

Allowance of expenses to shipping commissioners.—The district court may allow a shipping commissioner expenses for turning over money, wages, and effects of deceased seamen, notwithstanding R. S. 4545, as amended by sec. 7, act of Mar. 3, 1897 (29 Stat. 689). U. S. v. Grant (D. C. 1914), 224 Fed. 644.

1355. Unclaimed wages and effects of deceased seamen.—A circuit court, in its discretion, may at any time direct the sale of the whole or any part of the effects of a deceased seaman or apprentice, which it has received or may hereafter receive, and shall hold the proceeds of such sale as the wages of deceased seamen are held. When no claim to the wages or effects or proceeds of the sale of the effects of a deceased seaman or apprentice, received by a circuit

court, is substantiated within six years after the receipt thereof by the court, it shall be in the absolute discretion of the court, if any subsequent claim is made, either to allow or refuse the same. Such courts shall, from time to time, pay any moneys arising from the unclaimed wages and effects of deceased seamen, which in their opinion it is not necessary to retain for the purpose of satisfying claims, into the Treasury of the United States, and such moneys shall form a fund for, and be appropriated to, the relief of sick and disabled and destitute seamen belonging to the United States merchant marine service. *R. S. 4545, as amended by sec. 7, act of March 3, 1897 (29 Stat. 689).*

The circuit courts were abolished and their jurisdiction transferred to the district courts by Jud. Code, secs. 289–291 (36 Stat. 1167).

Notes of Decisions.

Allowance of expenses to shipping commissioners.—Sec. 1354, ante, gives the district court power to allow a shipping commissioner expenses for turning over money, wages, and effects of deceased seamen, notwithstanding this section. U. S. v. Grant (D. C. 1914), 224 Fed. 644.

1356. Return of destitute seamen to the United States.—It shall be the duty of the consuls, vice-consuls, commercial agents, and vice-commercial agents, from time to time, to provide for the seamen of the United States, who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give. The seamen shall, if able, be bound to do duty on board the vessels in which they may be transported, according to their several abilities. *R. S. 4577.*

The words of this section, "commercial agents, and vice-commercial agents," became ineffective by the abolition of the grade of commercial agent by sec. 8, act of Apr. 5, 1906 (34 Stat. 100).

Notes of Decisions.

Foreigners employed on American vessels.—Foreigners employed as seamen in American merchant ships are seamen "of the United States," within the meaning of the statute. Matthews *v.* Offley (C. C. 1837), Fed. Cas. No. 9,290.

Seamen on war vessels.—Seamen on board vessels of war are not entitled to pecuniary assistance from consuls abroad under the statute. (1841) 3 Op. Atty. Gen. 683.

The moneys in the hands of the Secretary of State were raised from the wages of merchant seamen only, and should be applied only for the relief of that class of seamen which have contributed to the fund. Id.

Instructions to send home seamen at Government expense.—The public interest requiring that American seamen should not be discharged abroad, nor set on foreign shores in foreign ports, where they may be tempted to enter into foreign employment, to the loss of our service, the Government has given instructions to commanders to send home their discharged seamen at the expense of the United States. (1831) 2 Op. Atty. Gen. 468.

Recovery by Government of cost of subsistence and transportation furnished.—An American seaman, disabled in the service of the vessel, and who was left in a hospital at a foreign port, is entitled to medical expenses incident to a recovery from the injury and transportation back to the United States, and where these expenses are paid out of funds belonging to the United States, after notice to the owners of the vessel that they were liable for the same and demand made for payment, the owners of the vessel may be held liable therefor. (1911) 29 Op. Atty. Gen. 54.

Deduction of amount expended from wages.—The owners of an American vessel wrecked on the South Pacific Ocean, whose master paid the United States consul for clothing supplied the crew, out of the wages due the crew, they having subsequently recovered judgment for their wages in a United States court, have no valid claim against the United States for the money paid by the consul. The remedy, if any, is against the consul and the sureties on his bond. (1887) 19 Op. Atty. Gen. 22.

Where a United States consul general has provided shipwrecked, destitute seamen with food, clothing, and passage to a port in this country, the amount so expended should not be deducted by a United States shipping commissioner in this country, from the wages of such seamen paid by the owners of the vessel. (1894) 21 Op. Atty. Gen. 25, 34.

Seaman as bound to duty on home voyage.—A distressed American seaman, sent home on board an American vessel, his fare being paid by the American consul, is bound to do duty as a seaman when called upon by the mate of the vessel. U. S. v. Salisbury (C. C. 1843), Fed. Cas. No. 16,214.

1357. Transportation of destitute seamen to the United States.—All masters of vessels of the United States, and bound to some port of the same, are required to take such destitute seamen on board their vessels, at the request of consular officers, and to transport them to the port in the United States to which such vessel may be bound, on such terms, not exceeding ten dollars for each person for voyages of not more than thirty days, and not exceeding twenty dollars for each person for longer voyages, as may be agreed between the master and the consular officer; and said consular officer shall issue certificates for such transportation, which certificates shall be assignable for collection. If any such destitute seaman is so disabled or ill as to be unable to perform duty, the consular officer shall so certify in the certificate of transportation, and such additional compensation shall be paid as the First Comptroller of the Treasury shall deem proper. Every such master who refuses to receive and transport such seamen on the request or order of such consular officer shall be liable to the United States in a penalty of one hundred dollars for each seaman so refused. The certificate of any such consular officer, given under his hand and official seal, shall be presumptive evidence of such refusal in any court of law having jurisdiction for the recovery of the penalty. No master of any vessel shall, however, be obliged to take a greater number than one man to every one hundred tons burden of the vessel on any one voyage. *R. S. §4578, as amended by sec. 9, act of June 26, 1884 (23 Stat. 55).*

Section nine of "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, is hereby amended in the eighth line by inserting after the words "and the consular officer" the following: "When the transportation is by a sailing vessel; and the regular steerage passenger rate, not to exceed two cents per mile, when the transportation is by steamer." And the said section is further amended by adding at the end the following: "or to take any seaman having a contagious disease." *Sec. 18, act of June 19, 1886 (24 Stat. 83), amending R. S. §4578.*

Notes of Decisions.

Vessels required to receive and return seamen.—To require all American vessels in foreign ports, whether bound directly to some port of the United States or not, to receive destitute seamen would in many cases be very oppressive upon masters and owners. (1843) 4 Op. Atty. Gen. 185.

Act of Feb. 28, 1803, ch. 9, requiring masters of vessels belonging to citizens of the United States, and bound to some [illegible] to take, at the request [illegible] seamen on board, [illegible] to the port of the [illegible] such vessel may be bound, is limited to such vessels as shall be bound from the port where the request is made direct to some port in the United States. Id.

Return of deserters.—The fact that the seaman has deserted from a ship still in port does not prevent the consul from requiring another ship to bring him home. Matthews v. Offley (C. C. 1837), Fed. Cas. No. 9,290.

Seamen accused of crimes.—Shipmasters in foreign ports are subject, on the requisition of the consul, to take on board and convey to the United States distressed

mariners; but not seamen or other persons accused of crimes, and to be transported to the United States for prosecution. (1856) 7 Op. Atty. Gen. 722.

Pay for bringing seamen only halfway.—Although the Government will pay for bringing home seamen who have been discharged in foreign ports, yet where a merchantman received a seaman on board for the purpose of bringing him home, and brought him only half the way, when he voluntarily left, the captain can not justly claim full pay for the voyage, but only a compensation for the distance he brought him. (1831) 2 Op. Atty. Gen. 468.

Penalty for refusal.—Under act 1803, providing for the recovery of a penalty where a master refuses to take destitute seaman on board, the consul is the proper judge as to what ship shall bring to the United States a destitute seaman. Matthews *v.* Offley (C. C. 1837), Fed. Cas. No. 9,290.

1358. Duties of seamen.—That in all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel or her cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, and other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, nine hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section, the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels, or yachts. *Sec. 2, act of Mar. 4, 1915 (38 Stat. 1164).*

1359. Desertion by seamen.—Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned. * * * *R. S. 4596, as amended by sec. 7, act of March 4, 1915 (38 Stat. 1166).*

1360. Desertion by American seamen in foreign ports.—That in the judgment of Congress articles in treaties and conventions of the United States, in so far as they provide for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of the United States in foreign countries, and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and the Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment and any other treaty provision in conflict with the

provisions of this Act, ought to be terminated, and to this end the President be, and he is hereby, requested and directed, within ninety days after the passage of this Act, to give notice to the several Governments, respectively, that so much as hereinbefore described of all such treaties and conventions between the United States and foreign Governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions. *Sec. 16, act of March 4, 1915 (38 Stat. 1184).*

The notices referred to were duly presented to and accepted by various countries concerned.

1361. Desertion by foreign seamen in ports of the United States.—That upon the expiration after notice of the periods required, respectively, by said treaties and conventions and of one year in the case of the independent State of the Kongo, so much as hereinbefore described in each and every one of said articles shall be deemed and held to have expired and to be of no force and effect, and thereupon section fifty-two hundred and eighty and so much of section four thousand and eighty-one of the Revised Statutes as relates to the arrest or imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment, shall be, and is hereby, repealed. *Sec. 17, act of March 4, 1915 (38 Stat. 1184).*

1362. Seamen absent from a ship without leave.—Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows: * * *

Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to desertion, by forfeiture from his wages of not more than two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute.

Third. For quitting the vessel without leave, after her arrival at the port of her delivery and before she is placed in security, by forfeiture from his wages of not more than one month's pay. *R. S. 4596, as amended by sec. 7, act of March 4, 1915 (38 Stat. 1166).*

1363. Disobedience by seamen.—Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows: * * *

Fourth. For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience shall cease, and upon arrival in port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

Fifth. For continued willful disobedience to lawful command or continued willful neglect of duty at sea, by being, at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease, and upon arrival in port by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of a sum of not more than twelve days' pay, or by imprisonment for not more than three months, at the discretion of the court. *R. S. 4596, as amended by sec. 7, act of March 4 1915 (38 Stat. 1167).*

1364. Assault upon a master or mate by a seaman.—Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows: * * *

Sixth. For assaulting any master or mate, by imprisonment for not more than two years. *R. S. 4596, as amended by sec. 7, act of March 4, 1915 (38 Stat. 1167).*

1365. Damage of a vessel or cargo by a seaman.—Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows: * * *

Seventh. For willfully damaging the vessel, or embezzling or willfully damaging any of the stores or cargo, by forfeiture out of his wages of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for not more than twelve months. *R. S. 4596, as amended by sec. 7, act of March 4, 1915 (38 Stat. 1167).*

1366. Smuggling by a seaman.—Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows: * * *

Eighth. For any act of smuggling for which he is convicted and whereby loss or damage is occasioned to the master or owner, he shall be liable to pay such master or owner such a sum as is sufficient to reimburse the master or owner for such loss or damage, and the whole or any part of his wages may be retained in satisfaction or on account of such liability, and he shall be liable to imprisonment for a period of not more than twelve months. *R. S. 4596, as amended by sec. 7, act of March 4, 1915 (38 Stat. 1167).*

1367. Drunkenness or neglect of duty on the part of seamen.—Any master of, or any seaman or apprentice belonging to, any merchant-vessel, who, by willful breach of duty, or by reason of drunkenness, does any act tending to the immediate loss or destruction of, or serious damage to such vessel, or tending immediately to endanger the life or limb of any person belonging to or on board of such vessel; or who, by willful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such vessel from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb, shall, for every such offense, be deemed guilty of a misdemeanor, punishable by imprisonment for not more than twelve months. *R. S. 4602.*

Notes of Decisions.

Degrading seaman for intemperate habits.—Dishonesty or intemperate habits are sufficient causes for degrading a steward, and putting him before the mast. Black *v.* The Louisiana (D. C. 1804), Fed. Cas. No. 1461; Sherwood *v.* McIntosh (D. C. 1826), Fed. Cas. No. 12778.

Discharge of seaman for drunkenness.—Threats by a seaman under the influence of liquor furnished him on board, where his previous character was good, will not justify his immediate discharge. Jones *v.* Sears (D. C. 1861), Fed. Cas. No. 7494.

The master is justified in discharging a mate who had been drunk several times on board the vessel, and got drunk on the day of her departure, and joined her, while drunk, at another port. The El Dorado (D. C. 1868), Fed. Cas. No. 4327.

A mate may be discharged before leaving the home port, for intoxication rendering him disobedient, insolent, and negligent in his duty. The Garnet (D. C. 1875), Fed. Cas. No. 5244.

Evidence considered, and held insufficient to justify the discharge of an engineer of a steamer before the expiration of his term of service on the ground that he was incompetent by reason of excessive drinking. Caffyn *v.* Peabody (D. C. 1906), 149 Fed. 294.

Forfeiture of wages.—Intemperance will forfeit wages to the extent that it unfits the seaman for performance of his duties. Orne v. Townsend (C. C. 1827), Fed. Cas. No. 10583; Matthew v. Chase (D. C. 1849), Fed. Cas. No. 9283a; The Jasper (D. C. 1862), Fed. Cas. No. 7228.

Condonation of offense.—Allowance by the master of full wages, and giving a draft therefor, import that any grounds of complaint for intoxication were forgiven. Matthew v. Chase (D. C. 1849), Fed. Cas. No. 9283a.

1368. **Entry of offenses of seamen in the log book.**—Upon the commission of any of the offenses enumerated in the preceding section of an entry thereof shall be made in the official log book on the day on which the offense was committed, and shall be signed, by the master and by the mate or one of the crew; and the offender, if still in the vessel, shall, before her next arrival at any port, or, if she is at the time in port, before her departure therefrom, be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as he thinks fit; and a statement that a copy of the entry has been so furnished, or the same has been so read over, together with his reply, if any, made by the offender, shall likewise be entered and signed in the same manner. In any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof the court hearing the case may, at its discretion, refuse to receive evidence of the offense. *R. S. 4597, as amended by sec. 20, act of Dec. 21, 1898 (30 Stat. 761).*

Notes of Decisions.

Necessity of entry in general.—Under act of July 20, 1790, the entry in the log-book is indispensable to a forfeiture of wages. The Betsy v. Duncan (C. C. 1808), Fed. Cas. No. 1367; [C. S. p. 8908].

Failure to make entry.—The wrongful assault by a mate on one of the seamen on the voyage, to the damage of the ship, may be set off against his claim for wages, though the deduction is not entered in the log nor claimed in the statement made to the shipping master. The T. F. Whiton (D. C. 1879), Fed. Cas. No. 13,849.

Although the master of a vessel was justified in docking the crew's wages during their confinement for refusing to work, yet where he failed to comply with the provisions of this section, the deduction by the master will be disallowed. The Cora F. Cressy (D. C. 1904), 131 Fed. 144.

Conclusiveness, operation, and effect of entry in general.—The entry under act of July 20, 1790, is not incontrovertible. Orne v. Townsend (C. C. 1827), Fed. Cas. No. 10,583; Malone v. Bell (D. C. 1805), Fed. Cas. No. 8994.

But to be falsified it must be disproved by satisfactory evidence. Douglass v. Eyre (D. C. 1830), Fed. Cas. No. 4,032.

Entry of desertion or absence without leave.—The entry must contain the fact, of the name of the seaman, and of his having gone without leave. The Cadmus v. Matthews (C. C. 1830), Fed. Cas. No. 2,282; [C. S. p. 8909].

1369. **Enforcement of forfeitures of wages of seamen.**—Any question concerning the forfeiture of, or deductions from, the wages of any seaman or apprentice, may be determined in any proceeding lawfully instituted with respect to such wages, notwithstanding the offense in respect of which such question arises, though hereby made punishable by imprisonment as well as forfeiture, has not been made the subject of any criminal proceeding. *R. S. 4603.*

Notes of Decisions.

Pleading cause of forfeiture. No cause of forfeiture of seaman's wages is admissible in evidence, unless the answer propounds them, and puts them in issue. Orne v. Townsend (C. C. 1827), Fed. Cas. No. 10,583.

1370. **Disposal of forfeitures of wages of seamen.**—All clothes, effects, and wages which, under the provisions of this Title, are forfeited for desertion,

shall be applied, in the first instance, in payment of the expenses occasioned by such desertion, to the master or owner of the vessel from which the desertion has taken place, and the balance, if any, shall be paid by the master or owner to any shipping-commissioner resident at the port at which the voyage of such vessel terminates; and the shipping-commissioner shall account for and pay over such balance to the judge of the circuit court within one month after the commissioner receives the same, to be disposed of by him in the same manner as is prescribed for the disposal of the money, effects, and wages of deceased seamen. Whenever any master or owner neglects or refuses to pay over to the shipping-commissioner such balance, he shall be liable to a penalty of double the amount thereof, recoverable by the commissioner in the same manner that seamen's wages are recovered. In all other cases of forfeiture of wages, the forfeiture shall be for the benefit of the master or owner by whom the wages are payable. *R. S. 4604.*

Notes of Decisions.

Sale of clothing and other effects and disposition of proceeds.—Four seamen deserted from an American merchant vessel in a foreign port, leaving in the hands of the master, besides what was due them as wages, some clothing and other effects, all of which the master delivered to the United States consul at the port on the demand of the latter. By instructions from the State Department, the consul sold the clothing, etc., and forwarded the proceeds thereof, with the amount due the seamen as wages, to that department. No proceedings have been instituted against the seamen for the offense of desertion. Upon the question as to what disposition should be made by the department of the money, advised, that the funds, together with a statement of such facts touching the case as may be in the possession of the Department, be transmitted to the circuit judge for the district wherein the port is in which the vessel is owned or at which her voyage terminated. (1875) 14 Op. Atty. Gen. 520.

Consul's authority to demand money and effects.—A consul has no authority to demand and receive from the master of a vessel the money and effects belonging to a deserter from the vessel. (1875) 14 Op. Atty. Gen. 520.

Disposition of property by master.—The steps which should be taken by the master with reference to the disposition of such property indicated. (1875) 14 Op. Atty. Gen. 520.

1371. **Corporal punishment of seamen prohibited.**—Flogging and all other forms of corporal punishment are hereby prohibited on board of any vessel, and no form of corporal punishment on board of any vessel shall be deemed justifiable, and any master or other officer thereof who shall violate the aforesaid provisions of this section, or either thereof, shall be deemed guilty of a misdemeanor, punishable by imprisonment for not less than three months nor more than two years. Whenever any officer other than the master of such vessel shall violate any provision of this section, it shall be the duty of such master to surrender such officer to the proper authorities as soon as practicable, provided he has actual knowledge of the misdemeanor, or complaint thereof is made within three days after reaching port. Any failure on the part of such master to use due diligence to comply herewith, which failure shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages for such flogging or corporal punishment to the person illegally punished by such officer. *R. S. 4611, as amended by sec. 9, act of March 4, 1915 (38 Stat. 1167).*

Notes of Decisions.

Construction of statute.—This section is not a penal law, and no indictment can be framed on it. U. S. v. Cutler (C. C. 1853), Fed. Cas. No. 14910.

Punishment within statute.—Master has no right to flog seaman, though acting under the honest belief that the men had conspired to poison him. The Josephine, Fed. Cas. No. 7544.

Any punishment which, in substance and effect, amounts to corporal punishment by stripes inflicted with a cat, is within the provision of the statute, irrespective of its degree. U. S. v. Cutler (C. C. 1853), Fed. Cas. No. 14910.

Although this provision abolished punishment by flogging, it did not curtail the authority of the master in other respects, even as to reasonable corporal punishment. Dorrell v. Schwerman (D. C. 1901), 111 Fed. 209, 210.

Enforcement of commands by blows when necessary to safety of vessel.—Prompt obedience by the crew of a ship to the commands of the officer on deck is essential to the safety of the vessel, and may be enforced by the officer, even by blows, when necessary; and a court will not hold him liable in damages therefor where he uses no weapons, and there is no evidence of malice, or excessive punishment. Stout v. Weedin (D. C. 1899), 95 Fed. 1001.

Flogging deck hand or roustabout.—The officers of a steamboat are liable for injuries caused by severely beating a deck hand or roustabout. Riley v. Allen (D. C. 1885), 23 Fed. 46, 47.

The mate of a steamboat has no legal right to enforce his orders by beating one of the crew. The General Rucker (D. C. 1888), 35 Fed. 152.

1372. Removal of captains by owners of vessels.—Any person or body-corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner. This section shall not apply where there is a valid written agreement subsisting, by virtue of which such master would be entitled to possession, nor in any case where a master has possession as part owner, obtained before the nineteenth day of April, eighteen hundred and seventy-two. *R. S. 4250.*

Section four thousand two hundred and fifty is amended by striking out, in line seven, "nineteenth," and inserting "ninth." *Act of Feb. 18, 1875 (18 Stat. 320), amending R. S. 4250.*

1373. Penalty for boarding vessels without permission.—Every person who, not being in the United States service, and not being duly authorized by law for the purpose, goes on board any vessel about to arrive at the place of her destination, before her actual arrival, and before she has been completely moored, without permission of the master, shall, for every such offense, be punishable by a fine of not more than two hundred dollars, and by imprisonment for not more than six months; and the master of such vessel may take any such person so going on board into custody, and deliver him up forthwith to any constable or police-officer, to be by him taken before any justice of the peace, to be dealt with according to the provisions of this Title. *R. S. 4606.*

Notes of Decisions.

Validity of statute.—This section, making it an offense to board a vessel without permission of her master, before she has actually arrived at her destination, and has been moored held valid. U. S. v. Anderson (C. C. 1872), Fed. Cas. No. 14447.

Application to foreign vessels.—This section is intended to protect foreign vessels as well as vessels of the United States. U. S. v. Anderson (C. C. 1872), Fed. Cas. No. 14447.

This section applies to foreign vessels. U. S. v. Sullivan (C. C. 1890), 43 Fed. 602.

Act within prohibition of statute.—Climbing on the rail of the vessel from a boat, in the act of entering on the vessel without permission, is within the prohibition. U. S. v. Anderson (C. C. 1872), Fed. Cas. No. 14447.

CHAPTER 25.

RULES FOR NAVIGATION.

International rules to prevent collisions at sea:
- Observance, 1374.
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HISTORICAL NOTE.

By direction of the Secretary of War, Apr. 26, 1918, an Admiralty and Maritime Section was constituted, in the office of the Judge Advocate General, to have charge of all claims arising in connection with the operation of vessels and vessel property under the War Department.

The original rules for the prevention of collisions on the water were contained in R. S. 4233, which consisted of 26 rules, R. S. 4412, which authorized the board of supervising inspectors to establish such regulations to be observed by all steam vessels in

passing each other, as they should from time to time deem necessary for safety, and provided that copies of such regulations should be furnished to all of such vessels, to be kept posted up in conspicuous places in such vessels, and R. S. 4413, which prescribed a penalty for neglecting or willfully refusing to observe the regulations established pursuant to said R. S. 4412.

The rules prescribed by said R. S. 4233 were superseded as to navigation on the high seas and in all coast waters of the United States, except such as were otherwise provided for, by the adoption of the "Revised International Regulations" by act of Mar. 3, 1885 (23 Stat. 438), which said rules were superseded by the passage and adoption of act of Aug. 19, 1890 (26 Stat. 320), sec. 1 of which enacted a set of regulations for preventing collisions at sea to be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith, navigable by seagoing vessels.

Said act of Aug. 19, 1890 consisted of 31 articles. Sec. 2 of said act of Aug. 19, 1890, repealed all laws and parts of laws inconsistent with the regulations for preventing collisions at sea for the navigation of all public and private vessels of the United States upon the high seas, and in all waters connected therewith navigable by seagoing vessels, prescribed by sec. 1 of said act.

Sec. 3 of said act provided that the act should take effect at a time to be fixed by the President by proclamation issued for that purpose. Accordingly the President, on July 13, 1894, issued his proclamation (28 Stat. 1250), fixing Mar. 1, 1895, as the date on which the act should take effect; but the taking effect of the act at that time was postponed, and the President was authorized to fix a subsequent time when it should take effect by act of Feb. 23, 1895 (28 Stat. 680); and the President on Feb. 25, 1895, issued his proclamation that the act would not go into effect on Mar. 1 following, but on such future date as might be designated in a subsequent proclamation. The act was amended by sec. 1, act of June 10, 1896, and sec. 2 of said amendatory act (29 Stat. 382), provided that this act should take effect at a time to be fixed by the President. The President, on Dec. 31, 1896, issued his proclamation (29 Stat. 885) fixing July 1, 1897, as the date on which the act should take effect.

The rules prescribed by said R. S. 4233 were further superseded as to navigation on the Great Lakes and their connecting and tributary waters as far east as Montreal by act of Feb. 8, 1895 (28 Stat. 645), sec. 1 of which enacted rules for preventing collisions to be followed in the navigation of all public and private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal. Said sec. 1 contained 28 articles. Sec. 2 of said act of Feb. 8, 1895 (28 Stat. 649), prescribed a fine for violations of the act. Sec. 3 of said act of Feb. 8, 1895 (28 Stat. 649), gave the Secretary of the Treasury authority to establish all necessary regulations, not inconsistent with the act, necessary to carry the act into effect, and gave the board of supervising inspectors of the United States authority to establish such regulations to be observed by all steam vessels in passing each other, not inconsistent with the act, as they should from time to time deem necessary, and provided that the regulations so adopted, when approved by the Secretary of the Treasury, should have the force of law. Sec. 4 of said act of Feb. 8, 1895 (28 Stat. 650), repealed all laws or parts of laws, so far as applicable to the navigation of the Great Lakes and their connecting and tributary waters as far east as Montreal, inconsistent with the rules promulgated by the act.

The rules prescribed by said R. S. 4233, and by said R. S. 4412, 4414, and the regulations pursuant thereto, were required to be followed on the harbors, rivers, and inland waters of the United States, and the provisions of said sections were made special rules, duly made by local authority, relative to the navigation of harbors, rivers, and inland waters, as provided for by art. 30 of said act of Aug. 19, 1890, by sec. 1, act of Feb. 19, 1895 (28 Stat. 672). Sec. 2 of said act of Feb. 19, 1895, authorized the Secretary of the Treasury to designate and define by suitable bearing or range with lighthouses, light vessels, buoys, or coast objects, the lines dividing the high seas from rivers, harbors, and inland waters. Sec. 3 of said act of Feb. 19, 1895, required collectors or other chief officers of the customs to require sail vessels to be furnished with proper signal lights and prescribed a penalty to be assessed against vessels navigated without complying with the statutes of the United States or the regulations lawfully made thereunder. Sec. 4 of said act of Feb. 19, 1895, provided that the words "inland waters" should not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal, and provided that the act should not modify or affect the provisions of act of Feb. 8, 1895 (28 Stat. 645), which was the act prescribing rules for preventing collisions to be followed in the navigation of all public and private vessels upon the Great Lakes and their connecting and tributary waters as far east as Montreal.

The rules prescribed by said R. S. 4233 were further superseded as to the navigation of all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, by act of June 7, 1897 (30 Stat. 96), sec. 1 of which enacted a set of regulations for preventing collisions, to be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries. Said sec. 1 consisted of 31 articles. Sec. 2 of said act of June 7, 1897 (30 Stat. 102), authorized the supervising inspectors of steam-vessels and the Supervising Inspector General to establish rules to be observed by steam vessels in passing each other and as to the lights to be carried by ferryboats and by barges and canal-boats when in tow of steam vessels not inconsistent with the provisions of the act, such rules, when approved by the Secretary of the Treasury, to be special rules duly made by local authority, as provided for by art. 30, sec. 1, of said act of Aug. 19, 1890, which said article provided that nothing in the rules contained in said act should interfere with the operation of special rules duly made by local authority relative to the navigation of any harbor, river, or inland waters. Sec. 3 of said act of June 7, 1897, prescribed a penalty for violations of the provisions of the act or the regulations established pursuant to said sec. 2. Sec. 4 of said act of June 7, 1897, also prescribed a penalty to be assessed against vessels navigated without compliance with the provisions of the act. Sec. 5 of said act of June 7, 1897, repealed R. S. 4233, 4412 (with the regulations made in pursuance thereof, except the rules and regulations for the government of pilots of steamers navigating the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and except the rules for the Great Lakes and their connecting and tributary waters as far east as Montreal), 4413, act of Mar. 3, 1893 (27 Stat. 557), which amended R. S. 4233, secs. 1 and 3, act of Feb. 19, 1895, and secs. 5, 12, 13, act of Mar. 3, 1897 (29 Stat. 689), and all amendments thereto in so far as the harbors, rivers, and inland waters of the United States (except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries) were concerned.

This legislation resulted in the following situation: Navigation on the high seas is governed by act of Aug. 19, 1890, with its amendatory and supplementary acts, set forth 1374–1409, post; navigation on all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, is governed by act of June 7, 1897, as amended, set forth 1410–1438, post; and navigation on the Red River of the North and rivers amended and supplemented, set forth 1479–1510, post.

1374. Observance of international rules for preventing collisions at sea.—That the following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters collected therewith, navigable by sea-going vessels. * * * *Sec. 1, act of Aug. 19, 1890 (26 Stat. 320).*

That all laws or parts of laws inconsistent with the foregoing regulations for preventing collisions at sea for the navigation of all public and private vessels of the United States upon the high seas, and in all waters connected therewith navigable by sea-going vessels, are hereby repealed. *Sec. 2, act of Aug. 19, 1890 (26 Stat. 328).*

See "Historical Note" at the head of this chapter.
See also notes to 1401, 1447, 1479.

Notes of Decisions.

For decisions prior to enactment of rules see 1479, post.

Decisions under international rules of 1885, in general.—See The Aurania (D. C. 1886) 29 Fed. 98; [C. S. p. 8286].

Applicability of rules.—The rules of navigation established in the British orders in council Jan. 9, 1863, prescribing [illegible] kinds of lights to be used on [illegible] sels, and substantially reenac[illegible] of Apr. 29, 1864 (13 St[illegible] cepted as obligatory by the principal [illegible] world, are to be

to the vessels of those states, as laws of the sea. The Scotia (1871), 81 U. S. (14 Wall.) 171, 20 L. Ed. 822, affirming (C. C. 1870) Fed. Cas. No. 12,513.

The rules of the International Code are to be regarded as sufficient protection for a vessel under ordinary circumstances; and one vessel meeting another, whether of the same or a different nationality, has a right to assume that both are governed by the same laws, and may regulate her conduct accordingly. The Oregon (1895), 15 Sup. Ct. 804, 511, 158 U. S. 186, 39 L. Ed. 943.

The ordinary rules of navigation designed to prevent collision are binding on fishing vessels while engaged on their fishing grounds. The Summit (C. C. 1854), Fed. Cas. No. 13,606.

The regulations in this act for preventing collisions at sea are applicable to the Great Lakes and to all waters navigable for seagoing vessels connected either with the ocean or with the Great Lakes, whether the connection be by a navigable river or a canal, and are applicable to every kind of steam vessel. (1894) 21 Op. Atty. Gen. 106.

American vessels.—Those portions of the international rules which do not "interfere" with the operation of special rules duly made by local authority are rules for the guidance of American vessels, not only on the high seas, but also on "all waters connected therewith navigable by seagoing vessels." (1807) 21 Op. Atty. Gen. 513.

Collision between foreign vessels at sea.—Where a collision at sea occurred between two vessels of different foreign nations, and no law of either country is proved as a fact, the case must be governed by the provisions of the statute of the United States. Thommasen v. Whitwill (C. C. 1882), 12 Fed. 801.

Effect of nonobservance of rules.—Where a ship at the time of collision was acting in violation of a statutory rule, the burden is on her to show, not merely that her fault might not have been one of the causes of the collision, but that it could not have been. Yang-Tsze Ins. Ass'n v. Furness, Withy & Co. (C. C. A. 1914), 215 Fed. 859.

The nonobservance of the statutory rules of navigation is itself a fault which charges the vessel with damages, where it appears that but for this fault the collision would have been avoided. The City of New York (D. C. 1883), 15 Fed. 624.

Weight of foreign decisions construing rules.—To maintain close conformity between the admiralty courts of England and the United States in the interpretation of the navigation rules, as well as because of the eminent ability of the judges composing them, the admiralty decisions of the higher English courts are given high consideration as precedents by the admiralty courts of the United States. The Gov. Ames (1911), 187 Fed. 40, 109 C. C. A. 94; writ of certiorari denied, Smith v. Davis (1911), 32 Sup. Ct. 525, 225 U. S. 725, 56 L. Ed. 631.

1375. Definitions of sailing vessel, steam vessel, and under way.— * * * In the following rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam, whether under sail or not, is to be considered a steam-vessel.

The word "steam-vessel" shall include any vessel propelled by machinery.

A vessel is "under way" within the meaning of these rules when she is not at anchor, or made fast to the shore, or aground. * * * *Sec. 1, act of Aug. 19, 1890 (26 Stat. 320).*

Notes of Decisions.

"Steam vessel."—The provision that the word "steam vessel" shall include any vessel propelled by machinery has no application in determining the liability for a collision occurring before the act went into effect. The Captain Weber (1898), 89 Fed. 957, 959, 32 C. C. A. 452.

"Under way."—A sailing vessel lying to in a fog, but having some of her sails up, is "under way." Burrows v. Gower (D. C. 1902), 119 Fed. 616.

1376. Meaning of "visible."— * * * The word "visible" in these rules when applied to lights shall mean visible on a dark night with a clear atmosphere. * * * *Sec. 1, act of Aug. 19, 1890 (26 Stat. 321).*

1377. Compliance with rules concerning lights.—The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such

time no other lights which may be mistaken for the prescribed lights shall be exhibited. *Art. 1, sec. 1, act of Aug. 19, 1890 (26 Stat. 321).*

Notes of Decisions.

Decisions under rules of 1885.—See The Algiers (D. C. 1889), 38 Fed. 526.

Vessel carrying misleading lights.—Where a schooner's green light was insufficient, and she had a lantern on her afterhouse and burned torches to warn an approaching steamer, the latter was not in fault for mistaking her for a pilot boat. La Champagne (1894), 60 Fed. 299, 3 C. C. A. 624, reversing (D. C. 1890) 43 Fed. 444.

Burden of proving visibility.—Where, in case of a collision at sea at night, the defense of inevitable accident is raised, and the main issue is whether the weather was such that the lights of one vessel could be seen in time by the other to enable her by due nautical skill to keep out of the way, the burden of proof is upon libelants to show, not only that their lights were burning, but also that the weather was such that they could be seen a sufficient distance to avoid the collision. The Florence P. Hall (D. C. 1882), 14 Fed. 408.

Evidence as to visibility.—When several persons on watch, attentive to their duties, can see no lights on an approaching vessel during a considerable period when they ought to be seen, the defect will be ascribed to the other vessel, even when the precise reason why the lights are not seen does not appear; and specially so where circumstances appear that might have caused obscuration of the lights. Albertsen *v.* The Monmouthshire (D. C. 1890), 44 Fed. 607.

1378. Lights of steam vessels under way.—A steam-vessel when under way shall carry—(a) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than forty feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivison (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance. *Art. 2, sec. 1, act of Aug. 19, 1890 (26 Stat. 321).*

See also 1383, post.

Notes of Decisions.

Vessel held in fault for having defective screens.—See The North Star (C. C. 1871), Fed. Cas. No. 10,331; The Santiago De Cuba (D. C. 1870), Fed. Cas. No. 12,332, modifying decree of (C. C. 1873), Fed. Cas. No. 12,333.

Right of navy vessel to mask lights.—A vessel of the Navy in time of war is not excused from fault in masking her lights in obedience to the orders of the commander of the squadron, since there is no statutory authority for such order. Watts v. U. S. (D. C. 1903), 123 Fed. 105.

Evidence as to lights.—On an issue as to whether a steamship, before a collision, showed a white light at her masthead, the positive testimony of witnesses that the light was properly burning there immediately before and after the collision is not outweighed by testimony of witnesses on the other vessel that they did not see the light, nor by the suggestion that the light was so hung as to render it liable to be obscured by the foretop-mast staysail. In re Dampskibsselskabet Thingvalla (1891), 48 Fed. 764, 1 C. C. A. 87, affirming decree (D. C. 1890), 42 Fed. 331.

Evidence held insufficient to show that a masthead light was not placed at a height above the deck of 46 feet, the width of the beam. Id.

The conclusion that a steamer had a defective lookout drawn from a failure to see the lights of a bark is not overthrown by the fact that the steamship's side lights were not seen from the bark, where it was possible that with the heeling of the steamship, and the bagging of her fore trysail in the position in which it was set, her green light was concealed from the bark. Jensen v. The Belgenland (D. C. 1880), 5 Fed. 86; decree affirmed, The Belgenland (1885), 5 Sup. Ct. 860, 114 U. S. 355, 29 L. Ed. 152.

1379. Lights of a steam-vessel towing another vessel.—A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than six feet apart, and when towing more than one vessel shall carry an additional bright white light six feet above or below such light, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a), excepting the additional light, which may be carried at a height of not less than fourteen feet above the hull.

Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam. *Art. 3, sec. 1, act of Aug. 19, 1890 (26 Stat. 321).*

1380. Lights of vessels not under control and of telegraphic vessels.—(a) A vessel which from any accident is not under command shall carry at the same height as a white light mentioned in article two (a), where they can best be seen, and if a steam-vessel in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all around the horizon at a distance of at least two miles; and shall by day carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, two black balls or shapes, each two feet in diameter.

(b) A vessel employed in laying or in picking up a telegraph cable shall carry in the same position as the white light mentioned in article two (a), and if a steam-vessel in lieu of that light, three lights in a vertical line one over the other not less than six feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a [illegible] visible all around the horizon, at a distance of at least two [illegible] shall carry in a vertical line, one over the other, not less [illegible] can best be seen, three shapes not less than

two feet in diameter, of which the highest and lowest shall be globular in shape and red in color, and the middle one diamond in shape and white.

(c) The vessels referred to in this article, when not making way through the water, shall not carry the side-lights, but when making way shall carry them.

(d) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and can not therefore get out of the way.

These signals are not signals of vessels in distress and requiring assistance. Such signals are contained in article thirty-one. *Art. 4, sec. 1, act of Aug. 19, 1890 (26 Stat. 322).*

Notes of Decisions.

Construction with other rules.—Art. 15, cl. "e," prescribing fog signals for a vessel unable to get out of the way through not being under command or unable to maneuver as required by the rules, must be read in connection with this article, and when so read does not apply to a vessel lying to but not in any way disabled. Burrows *v.* Gower (D. C. 1902), 119 Fed. 616, 617.

Sailing vessel in light wind.—Clause "a" of this article refers to vessels in some way disabled, and does not apply to a brigantine which was simply moving very slowly in a light wind, though she had not complete steerageway for all maneuvers, but sufficient to keep her course. The Cheruskia (D. C. 1899), 92 Fed. 683.

1381. Lights of sailing vessels under way, and of vessel being towed.—A sailing vessel under way and any vessel being towed shall carry the same lights as are prescribed by article two for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry. *Art. 5, sec. 1, act of Aug. 19, 1890 (26 Stat. 322).*

See also 1383, post.

Notes of Decisions.

Ignorance of law.—A whale ship which had been twice refitted at San Francisco after act Apr. 29, 1864, enacting the first navigation rules, was passed, was in fault for not carrying colored lights, though her master never heard of the act. The Ontario (D. C. 1871), Fed. Cas. No. 10,543.

Position of lights.—A sail vessel is in fault in presenting a confusion of lights to a steamer, where due to want of proper screens or faulty positions. The Huntsville (C. C. 1871), Fed. Cas. No. 6915.

A ship is in fault in having her colored lights placed abaft her mizzen rigging, so as to be obscured from a vessel approaching ahead. The Shakespeare (D. C. 1870), Fed. Cas. No. 12,700; The Johanne Auguste (D. C. 1884), 21 Fed. 134.

It is a fault for the side lights of a schooner to be so placed that when one stood at the stem of the vessel he could see both the red and the green lights at the same time, without moving his head. Clendinin *v.* The Alhambra (D. C. 1880), 4 Fed. 86.

The location of a schooner's lights upon the sides of her forward deckhouse, instead of in the rigging, is not to be approved. The Samuel H. Crawford (D. C. 1881), 6 Fed. 906.

A bark carrying her side lights on the mizzen rigging is charged with the burden of showing clearly that they would not be obstructed by her sails. The Caro (D. C. 1884), 23 Fed. 734.

It is a fault of a sailing vessel to have her side lights so placed that to the extent at least of one point on either side of directly ahead such lights were obscured by the foresail. The Iberia (D. C. 1902), 117 Fed. 718; decree affirmed (1903), 123 Fed. 865, 59 C. C. A. 806.

Presumption as to lights.—The supposition is not to be indulged that a schooner, in good repair and sailed by her master on shares, carried her red light so that it would show across her bows to a steamer whose course she was approaching from the port side. An alleged fact of this character must be clearly proved. American Manuf'g Co. *v.* The Maverick (D. C. 1896), 75 Fed. 845.

That the lights of a schooner were not seen by an approaching steamer, that it may have been possible for the schooner's forestay sail to swing so far to port as

to obscure her port light, and that this position would, in the condition of the wind, have best aided her progress, is not sufficient to raise a presumption that such was its position, as against the positive testimony of her master that it was trimmed flat, aided by the presumption that the schooner would not so adjust her sails as to hide her lights. The Gate City (D. C. 1898), 90 Fed. 314.

Liability for failure to exhibit proper lights.—The absence of a required light is immaterial, where, from the situation of the vessels, its presence could not have averted, or its absence contributed to, the collision. The Robert Graham Dunn (1895), 70 Fed. 270, 17 C. C. A. 90, affirming The Robert Graham Dunn (D. C. 1894), 63 Fed. 167; The D. P. (D. C. 1867), Fed. Cas. No. 4,056.

The sail vessel will be held solely in fault for a collision, where she carried only a white light, which led the steamer to believe that she was another steamer whose side lights had not yet come into view, where the steamer was properly maneuvered on such erroneous supposition. The Scotia (1871), 81 U. S. (14 Wall.) 170, 20 L. Ed. 822, affirming (C. C. 1870) Fed. Cas. No. 12,513.

Vessels have a right to assume in the absence of knowledge to the contrary that other vessels are complying with statutory regulations. The Ariadne (C. C. 1870), Fed. Cas. No. 525; Id. (D. C. 1868), Fed. Cas. No. 524.

A sail vessel not having her lights properly screened is equally in fault with a steamer which sighted the sail vessel two miles off and failed to avoid her. The Alabama (C. C. 1881), 10 Fed. 394.

A vessel having the right of way in the nighttime, and not having the statutory lights, is presumed to be in fault with respect to a collision with a vessel that should have seen her and given way. Chapin v. The Hattie Ross (D. C. 1866), Fed. Cas. No. 2,598; The Ontario (D. C. 1871), Fed. Cas. No. 10,543.

Recovery by vessel not carrying proper lights.—Where a collision on the high seas between a foreign vessel and a vessel of the United States was caused by the neglect of the latter to carry the lights required by the acts of Congress, her owner can not recover against the foreign vessel. The Scotia (C. C. 1870), Fed. Cas. No. 12,513.

Neglect by a vessel, having the right of way, to show the regulation lights, does not relieve another vessel from observing the rules of navigation, and using all practicable precautions to avoid a collision. Swift v. Brownell (C. C. 1875), Fed. Cas. No. 13,695.

That the lights on a schooner are so placed that one standing at her bow can see both of them at the same time will not absolve from fault a steamer colliding with her by reason of starting her engines (after once stopping them) at a time when a change of the schooner's lights indicated action on her part which was uncalled for and improbable. Clendinin v. The Alhambra (D. C. 1880), 4 Fed. 86.

A steamer failing to see lights on a sailing vessel which were clearly visible from the steamer's position is not absolved from responsibility merely because the lights were somewhat faultily placed. The Samuel H. Crawford (D. C. 1881), 6 Fed. 906.

Where a bark exhibited signals which were proper only for a pilot boat, and failed to show a sufficient green light, according to the rules governing vessels at sea, and the defendant steamer turned from her course for the purpose of meeting the supposed pilot boat, and, while using due caution, a collision occurred, the bark can not recover. The Wisconsin (C. C. 1885), 25 Fed. 283, affirming (D. C. 1885) 23 Fed. 831.

Evidence held to show that proper lights were burning.—See The Sirius (1897), 81 Fed. 415, 26 C. C. A. 467; [C. S. p. 8291].

Vessel held in fault for improper lights.—See the Wanata (1877), 95 U. S. 600, 24 L. Ed. 461; Carleton v. The Charles L. Jeffrey (1893), 55 Fed. 685, 5 C. C. A. 246; [C. S. p. 8291].

Side lights intersecting across the bow.—See Carleton v. The Charles L. Jeffrey (1893), 55 Fed. 685, 5 C. C. A. 246.

1382. Lights of small vessels under way.—Whenever, as in the case of small vessels under way during bad weather, the green and red side-lights can not be fixed, these lights shall be kept at hand, lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them [illegible] and so that the green light shall not be seen on the port side nor the starboard side, nor, if practicable, more than two points their respective sides.

To make the use of these portable lights more certain and easy the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens. *Art. 6, sec. 1, act of Aug. 19, 1890 (26 Stat. 322).*

1383. Lights of small vessels and of rowing boats.—Steam vessels of less than forty, and vessels under oars or sails of less than twenty tons gross tonnage, respectively, and rowing boats, when under way, shall not be required to carry the lights mentioned in article two (a), (b), and (c), but if they do not carry them they shall be provided with the following lights:

First. Steam vessels of less than forty tons shall carry—

(a) In the fore part of the vessel, or on or in front of the funnel, where it can best be seen, and at a height above the gunwale of not less than nine feet, a bright white light constructed and fixed as prescribed in article two (a), and of such a character as to be visible at a distance of at least two miles.

(b) Green and red side-lights constructed and fixed as prescribed in article two (b) and (c), and of such a character as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from right ahead to two points abaft the beam on their respective sides. Such lanterns shall be carried not less than three feet below the white light.

Second. Small steamboats, such as are carried by seagoing vessels, may carry the white light at a less height than nine feet above the gunwale, but it shall be carried above the combined lantern mentioned in subdivision one (b).

Third. Vessels under oars or sails of less than twenty tons shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

Fourth. Rowing boats, whether under oars or sail, shall have ready at hand a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision.

The vessels referred to in this article shall not be obliged to carry the lights prescribed by article four (a) and article eleven, last paragraph. *Art. 7, sec. 1, act of Aug. 19, 1890 (26 Stat. 322) as amended by act of May 28, 1894 (28 Stat. 82).*

1384. Lights of pilot vessels.—Pilot vessels when engaged on their station on pilotage duty shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side.

A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot-vessels when not enguged on their station on pilotage duty shall carry lights similar to those of other vessels of their tonnage. *Art. 8, sec. 1, act of Aug. 19, 1890 (26 Stat. 323).*

Additional lights for steam pilot vessels were prescribed by act of Feb. 19, 1900, post, 1385.

Notes of Decisions.

"Engaged on her station on pilotage duty."—A pilot boat waiting for ships wanting pilots, although miles off the port to which she belongs, is a "pilot vessel engaged on her station on pilotage duty." The Haverton (C. C. 1887), 31 Fed. 563; appeal dismissed, Devere v. The Haverton (1890), 11 Sup. Ct. 35, 137 U. S. 145, 34 L. Ed. 603.

Lights of pilot boat at anchor.—A pilot boat at anchor is not required to show the lights prescribed by this section, but must show the single white light prescribed by sec. 7849. The Wanata (D. C. 1870), Fed. Cas. No. 17,138.

Signal offering pilot service.—The statute does not prescribe any signal to be used on a pilot boat in making an offer of pilot service; the light required to be carried by a sailing pilot vessel at night being only used to prevent collision, and incidentally to give notice of the character of such craft. The Ullock (D. C. 1884), 19 Fed. 207.

Evidence sufficient to show lights were burning.—A finding, on the testimony of the officers and crew of a pilot vessel, that she was showing proper lights at the time of collision, will not be reversed because the officers of the other vessel, notwithstanding a vigilant lookout, failed to see them. La Normandie (1893), 58 Fed. 427, 7 C. C. A. 285, affirming decree The Normandie (D. C. 1890), 43 Fed. 151.

Effect of failure to exhibit light.—The fact that a sailing pilot boat did not carry the masthead light required, besides the flare-up light, does not render the pilot boat liable for collision, when otherwise not in fault, with a steamer on which it was attempting to place a pilot, where she was seasonably seen by the steamship, and those in charge of the navigation of the steamship were not misled for a moment as to the character of the boat, and lowered a light over the rail on the lee side as a signal to the pilot to approach the ship. The City of Washington (1875), 92 U. S. 31, 23 L. Ed. 600.

Evidence held, to show that a collision between a steamer and a pilot boat was not due to the want of the masthead light on the pilot boat; so that it was not thereby precluded from recovering full damages. The City of Washington (C. C. 1874), Fed. Cas. No. 2,771, affirming (D. C. 1872) Fed. Cas. No. 2,770, and judgment affirmed (1875), 92 U. S. 31, 23 L. Ed. 600.

The burden is on the pilot boat to prove that the absence of the masthead light which she should have carried did not contribute to the collision. The City of Washington (D. C. 1872), Fed. Cas. No. 2,770.

A pilot can not claim compensation under the State compulsory pilot laws where he did not show the required flash until after he got abaft the steamer's beam, and it was not seen. The Mascotte (D. C. 1889), 39 Fed. 871, 876.

1385. Lights of steam pilot vessels.—That a steam pilot vessel, when engaged on her station on pilotage duty and in waters of the United States, and not at anchor, shall, in addition to the lights required for all pilot boats, carry at a distance of eight feet below her white masthead light a red light, visible all around the horizon and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles, and also the colored side lights required to be carried by vessels when under way.

When engaged on her station on pilotage duty and in waters of the United States, and at anchor, she shall carry in addition to the lights required for all pilot boats the red light above mentioned, but not the colored side lights.

When not engaged on her station on pilotage duty, she shall carry the same lights as other steam vessels. *Sec. 1, act of Feb. 19, 1900 (31 Stat. 30).*

That this Act shall be construed as supplementary to article eight of the Act approved June seventh, eighteen hundred and ninety-seven, entitled "An Act to adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States," and to article eight of an Act approved

August nineteenth, eighteen hundred and ninety, entitled "An Act to adopt regulations for preventing collisions at sea." *Sec. 2, act of Feb. 19, 1900 (31 Stat. 31).*

For art. 8, sec. 1, act of Aug. 19, 1890, see 1384, ante, and for art. 8 of sec. 1, act of June 7, 1897, see 1419, post.

See notes to first paragraph, sec. 1 of said act of Aug. 19, 1890, ante, 1374.

1386. Lights of fishing vessels and fishing boats.—Fishing vessels and fishing boats, when under way and when not required by this article to carry or show the lights hereinafter specified, shall carry or show the lights prescribed for vessels of their tonnage under way.

(a) Open boats, by which is to be understood boats not protected from the entry of sea water by means of a continuous deck, when engaged in any fishing at night, with outlying tackle extending not more than one hundred and fifty feet horizontally from the boat into the seaway, shall carry one all-round white light.

Open boats, when fishing at night, with outlying tackle extending more than one hundred and fifty feet horizontally from the boat into the seaway, shall carry one all-round white light, and in addition, on approaching or being approached by other vessels, shall show a second white light at least three feet below the first light and at a horizontal distance of at least five feet away from it in the direction in which the outlying tackle is attached.

(b) Vessels and boats, except open boats as defined in subdivision (a), when fishing with drift nets, shall, so long as the nets are wholly or partly in the water, carry two white lights where they can best be seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than fifteen feet, and so that the horizontal distance between them, measured in a line with the keel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be in the direction of the nets, and both of them shall be of such a character as to show all around the horizon, and to be visible at a distance of not less than three miles.

Within the Mediterranean Sea and in the seas bordering the coasts of Japan and Korea sailing fishing vessels of less than twenty tons gross tonnage shall not be obliged to carry the lower of these two lights. Should they, however, not carry it, they shall show in the same position (in the direction of the net or gear) a white light, visible at a distance of not less than one sea mile, on the approach of or to other vessels.

(c) Vessels and boats, except open boats as defined in subdivision (a), when line fishing with their lines out and attached to or hauling their lines, and when not at anchor or stationary within the meaning of subdivision (h), shall carry the same lights as vessels fishing with drift nets. When shooting lines, or fishing with towing lines, they shall carry the lights prescribed for a steam or sailing vessel under way, respectively.

Within the Mediterranean Sea and in the seas bordering the coasts of Japan and Korea sailing fishing vessels of less than twenty tons gross tonnage shall not be obliged to carry the lower of these two lights. Should they, however, not carry it, they shall show in the same position (in the direction of the lines) a white light, visible at a distance of not less than one sea mile on the approach of or to other vessels.

(d) Vessels when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—

First. If steam vessels, shall carry in the same position as the white light mentioned in article two (a) a tri-colored lantern so constructed and fixed as to show a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on each bow to two points abaft the beam on the starboard and port sides, respectively; and not less than six nor more than twelve feet below the tri-colored lantern a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all around the horizon.

Second. If sailing vessels, shall carry a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all around the horizon, and shall also, on the approach of or to other vessels, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision.

All lights mentioned in subdivision (d) first and second shall be visible at a distance of at least two miles.

(e) Oyster dredgers and other vessels fishing with dredge nets shall carry and show the same lights as trawlers.

(f) Fishing vessels and fishing boats may at any time use a flare-up light in addition to the lights which they are by this article required to carry and show, and they may also use working lights.

(g) Every fishing vessel and every fishing boat under one hundred and fifty feet in length, when at anchor, shall exhibit a white light visible all around the horizon at a distance of at least one mile.

Every fishing vessel of one hundred and fifty feet in length or upward, when at anchor, shall exhibit a white light visible all around the horizon at a distance of at least one mile, and shall exhibit a second light as provided for vessels of such length by article eleven.

Should any such vessel, whether under one hundred and fifty feet in length or of one hundred and fifty feet in length or upward, be attached to a net or other fishing gear, she shall on the approach of other vessels show an additional white light at least three feet below the anchor light, and at a horizontal distance of at least five feet away from it in the direction of the net or gear.

(h) If a vessel or boat when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall in daytime haul down the day signal required by subdivision (k); at night show the light or lights prescribed for a vessel at anchor; and during fog, mist, falling snow, or heavy rain storms make the signal prescribed for a vessel at anchor. (See subdivision (d) and the last paragraph of article fifteen.)

(i) In fog, mist, falling snow, or heavy rain storms, drift-net vessels attached to their nets, and vessels when trawling, dredging, or fishing with any kind of drag net, and vessels line fishing with their lines out, shall, if of twenty tons gross tonnage or upward, respectively, at intervals of not more than one minute make a blast; if steam vessels, with the whistle or siren, and if sailing vessels, with the foghorn, each blast to be followed by ringing the bell. Fishing vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals; but if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.

(k) All vessels or boats fishing with nets or lines or trawls, when under way, shall in daytime indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen. If vessels or boats at anchor have their gear out, they shall, on the approach of other vessels, show the same signal on the side on which those vessels can pass.

The vessels required by this article to carry or show the lights hereinbefore specified shall not be obliged to carry the lights prescribed by article four (a) and the last paragraph of article eleven. *Art. 9, sec. 1, act of Aug. 19, 1890 (26 Stat. 323), as amended by act of Jan. 19, 1907 (34 Stat. 850–851).*

This article, as originally enacted, prescribed the lights for fishing vessels when under way, at anchor, in fog, etc. It superseded provisions on the same subject of act of Mar. 3, 1885 (28 Stat. 82), sec. 1, art. 10 (23 Stat. 439). It was repealed by act of May 28, 1894, and thereafter said act of Mar. 3, 1885, sec. 1, art. 10, was reenacted and continued in force by act of Aug. 13, 1894 (28 Stat. 281), which provided that art. 10 of act of Mar. 3, 1885, entitled "An act to adopt the revised international regulations for preventing collisions at sea," so far as said article related to lights for fishing vessels, should be reenacted and continued in force, anything in act of May 28, 1894, entitled "An act to amend an act approved Aug. 19, 1890, entitled 'An act to adopt regulations for preventing collisions at sea,'" to the contrary notwithstanding. This enactment therefore had the effect of reviving said art. 10, sec. 1, of act of Mar. 3, 1885, which remained in force until repealed by sec. 2, act of Jan. 19, 1907 (34 Stat. 852), and was superseded by the statute set forth in the above item.

Sec. 3 of said act of Jan. 19, 1907, provided that the act should take effect on Jan. 1, 1908.

1387. Lights of vessels being overtaken.—A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of twelve points of the compass, namely, for six points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side-lights. *Art. 10, sec. 1, act of Aug 19, 1890 (26 Stat. 324).*

Notes of Decisions.

Construction with other statutes.—This section superseded R. S. 4234, requiring a sail vessel to show a torch on the quarter on which a steam vessel is approaching her, so far as the high seas and the coast waters are concerned. The State of California (1892), 49 Fed. 172, 1 C. C. A. 224, reversing (D. C. 1889), 46 Fed. 877.

Necessity for exhibiting light.—By article 2 of the international regulations of 1885 for preventing collisions at sea, a sailing vessel is forbidden to display a flare-up light to an approaching vessel, except when she is being overtaken by such vessel. The Algiers (D. C. 1889), 38 Fed. 526.

Where the steamship was crossing the course of a brigantine, and not overtaking her, no flare-up lights were required. The Cheruskia (D. C. 1899), 92 Fed. 683.

The requirement applies to a schooner which is being overtaken by a steam vessel. The Kaiserine Maria Theresa (D. C. 1903), 125 Fed. 145; decree reversed, The Kaiserin Maria Theresa (1906), 149 Fed. 97, 78 C. C. A. 681; certiorari denied, Palson *v.* North German Lloyd (1907), 27 Sup. Ct. 786, 204 U. S. 671, 51 L. Ed. 673.

A schooner can not be charged with fault because she did not show a flare-up light to a steamer approaching from forward of her beam, but such action would, on the contrary, have been a fault. Brigham *v.* Luckenbach (D. C. 1905), 140 Fed. 322.

Sufficiency of light exhibited.—An 8-inch wick torch not kept in any place where it was easily accessible, and being in such a condition that it was not easily lit and being readily blown out when lit on account of a gale blowing, is not a flare-up light within the meaning of this section. The Kaiserin Maria Theresa (1906), 149 Fed. 97, 98, 78 C. C. A. 681; certiorari denied, Palson *v.* North German Lloyd (1907), 27 Sup. Ct. 786, 204 U. S. 671, 51 L. Ed. 673.

A white light in the stern of a schooner consisting of a globe lantern, unscreened, is sufficient. The John Bossert (1909), 168 Fed. 1021, 93 C. C. A. 671, affirming decree (D. C. 1906), 148 Fed. 903.

Lookout astern.—If an overtaken vessel elect to use a flare-up light, instead of a set screen light, it is her duty at least to maintain an efficient lookout astern, and to display the flare-up light as soon as an overtaking vessel can be seen. The Bernicia (D. C. 1903), 122 Fed. 886.

1388. Lights of vessels at anchor or aground.—A vessel under one hundred and fifty feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile.

A vessel of one hundred and fifty feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.

A vessel aground in or near a fair-way shall carry the above light or lights and the two red lights prescribed by article four (a). *Art. 11, sec. 1, act of Aug. 19, 1890 (26 Stat. 324).*

Notes of Decisions.

Light of pilot boat at anchor.—A pilot boat at anchor is not required to show a white light at her masthead, and a flare-up light every 15 minutes required by 1374, ante, but must show the light provided for by this section. The Wanata (1877), 95 U. S. 600, 24 L. Ed. 461, affirming (D. C. 1870), Fed. Cas. No. 17,138.

1389. Additional flare-up light or detonating signal.—Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that can not be mistaken for a distress signal. *Art. 12, sec. 1, act of Aug. 19, 1890 (26 Stat. 325).*

Notes of Decisions.

Decisions under R. S. 4234.—See The Narragansett (C. C. 1881), 11 Fed. 918, affirming Brainard v. The Narragansett (D. C. 1880), 3 Fed. 251; [C. S. p. 8290].

Necessity for exhibiting a flare-up light.—Where a schooner's side lights were burning brightly, but set in the curve of her bow, did not throw their light abaft the beam, she was in positive fault in failing to light and exhibit a torch when she knew a steamer was approaching on a course crossing her own. The Algiers (C. C. 1886), 28 Fed. 240, affirming (D. C. 1884), 21 Fed. 343.

The navigation rules do not make it obligatory on a vessel to use a flare-up light unless the circumstances are such that prudence would require it. The Excelsior (D. C. 1900), 102 Fed. 652; decree affirmed. The Robert Graham Dunn (1901), 107 Fed. 994, 47 C. C. A. 120; writ of certiorari denied, Morgan's L. & T. R. R. & S. S. Co. v. The Robert Graham Dunn (1901), 22 Sup. Ct. 933, 183 U. S. 697, 46 L. Ed. 395.

Effect of failure to exhibit flare-up.—The failure of the schooner to show a torch is not a contributive fault, where the steamer's lookout saw the schooner at least as early as the torch ought to have been shown. The Leopard (D. C. 1873), Fed. Cas. No. 8,263.

1390. Lights of ships of war and convoys, and owners' signals.—Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal-lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by ship-owners, which have been authorized by their respective Governments and duly registered and published. *Art. 13, sec. 1, act of Aug. 19, 1890 (26 Stat. 325).*

1391. Black ball for steam vessel under sail.—A steam-vessel proceeding under sail only but having her funnel up, shall carry in day-time, forward, where it can best be seen, one black ball or shape two feet in diameter. *Art. 14, sec. 1, act of Aug. 19, 1890 (26 Stat. 325).*

1392. Sound signals during fog and bad weather.—All signals prescribed by this article for vessels under way shall be given:

First. By "steam vessels" on the whistle or siren.

Second. By "sailing vessels" and "vessels towed" on the fog horn.

The words "prolonged blast" used in this article shall mean a blast of from four to six seconds' duration.

A steam vessel shall be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn, to be sounded by mechanical means, and also with an efficient bell. (In all cases where the rules require a bell to be used a drum may be substituted on board Turkish vessels, or a gong where such articles are used on board small seagoing vessels.)

A sailing vessel of twenty tons gross tonnage or upward shall be provided with a similar fog horn and bell.

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely:

(a) A steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

(b) A steam vessel under way, but stopped, and having no way upon her, shall sound, at intervals of not more than two minutes, two prolonged blasts, with an interval of about one second between.

(c) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, one blast; when on the port tack, two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

(d) A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds.

(e) A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to maneuver as required by the rules, shall, instead of the signals prescribed in subdivisions (a) and (c) of this article, at intervals of not more than two minutes, sound three blasts in succession, namely: One prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

Sailing vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals, but if they do not, they shall make some other efficient sound signal at intervals of not more than one minute. *Art. 15, sec. 1, act of Aug. 19, 1890 (26 Stat. 325), as amended by sec. 1, act of June 10, 1896 (29 Stat. 381).*

Notes of Decisions.

Necessity for sounding fog signals.—Where the answer alleged "that there was a heavy vapor or mist at the time, and the night was very thick," and that the other vessel did not sound a foghorn, or use any other signal required by law under the circumstances, this constitutes a conclusive admission that claimant's vessel was bound to sound a foghorn. The Horace B. Parker (1896), 71 Fed. 989, 18 C. C. A. 406.

A schooner sailing before a 60-mile wind on a dark and rainy night must sound fog signals. Merchants' & Miners' Transp. Co. *v.* Hopkins (1901), 108 Fed. 590, 48 C. C. A. 128.

A sail vessel under way must sound a foghorn when there is fog enough by day to shut out the view of the sails or hull, or at night the lights, of a vessel within the range of the sound of the horn. Dolmer *v.* The Monticello (C. C. 1870), Fed. Cas. No.

3971, affirming The Monticello (D. C. 1867), Fed. Cas. No. 9,739.

When, by reason of smoke, the side lights of an approaching steamer can not be seen, fog signals should be sounded. The Ping-On v. Diethen (C. C. 1882), 11 Fed. 667.

A vessel is required to sound fog signals not only when she is actually enveloped in a fog but also when she is so near it that it is necessary that her position should be known to any vessel that may happen to be within it. The Perkiomen (D. C. 1886), 27 Fed. 573, 574.

A war vessel can not be relieved from fault for failing to sound fog signals while navigating in a dense fog at night, on the ground that the omission was by order of her commander, made in the exercise of his discretion, there being at the time no statutory authority for such order. Watts v. U. S. (D. C. 1903), 123 Fed. 165.

Frequency of signals.—The signal must be sounded as often as once in five minutes, and as much oftener as the case shall require. The Chancellor (D. C. 1870), Fed. Cas. No. 2,580.

At the time of a collision at sea between a steamship and a schooner in a dense fog the steamship was proceeding at a speed of 10 or 11 knots, her maximum speed being 12 or 13 knots. It also appeared that the schooner was sounding her fog signal only at intervals of two minutes, instead of one minute, as required by the navigation rules, and the presumption of fault arising from such violation of the rules was not met by any evidence to show that such fault could not have contributed to the collision. Held, that the steamer was in fault for excessive speed, and the schooner in failing to obey the rules in respect to fog signals, and the damages must be divided. The Frank S. Hall (D. C. 1902), 116 Fed. 559.

Proper signal for sailing vessel.—The act of Congress having made the use of a foghorn obligatory on sailing vessels under way in a fog, the court will not consider whether a bell did in fact give notice to an approaching steamer as soon as a foghorn would have done. The Pennsylvania (1873), 86 U. S. (19 Wall.) 125, 22 L. Ed. 148, affirming (D. C. 1870) Fed. Cas. No. 10,947.

Signals of vessel lying to.—A sailing vessel moving slowly when in fog, but constantly changing her position, must blow a foghorn and not ring a bell, and since Congress has made the use of a foghorn obligatory, it is out of place for the court to inquire whether in fact a bell would have given notice as soon as a foghorn would have so done. The Pennsylvania (1873), 19 Wall. 125, 135, 22 L. Ed. 148; Burrows v. Gower (D. C. 1902), 119 Fed. 616, reversing decrees The Pennsylvania (C. C. 1872), Fed. Cas. No. 10,950, and (D. C. 1870), Fed. Cas. No. 10,947; contra, The Alfredo (C. C. 1887), 32 Fed. 240, affirming (D. C. 1887) 30 Fed. 842.

Clause "e" of this article must be read in connection with art. 4, cl. "a," which deals with a vessel "which from any accident is not under command," and the signals required by such clause are to be given by vessels not under command and therefore unable to get out of the way, not by sailing vessels lying to but not in any way disabled. Burrows v. Gower (D. C. 1902), 119 Fed. 616, 617.

Defective or insufficient whistle or horn.—A sailing vessel must be provided with a mechanical foghorn, one sounded by the breath not being sufficient. The Martello v. The Willey (1894), 14 Sup. Ct. 723, 727, 153 U. S. 64, 38 L. Ed. 637 [c. s. p. 8301].

The owners of a sailing vessel can not substitute, for the foghorn which she is required by the sailing regulations to carry, an instrument blown by steam, and in their opinion more efficient than the foghorn. The Parthian (1893), 55 Fed. 428, 5 C. C. A. 171, affirming (D. C. 1891), 48 Fed. 175, and The Harry and The Fred (D. C. 1892), 49 Fed. 681.

Where a sailing vessel was provided with a mechanical foghorn in good order, and a good mouth horn, she was not in fault for a collision occuring in a fog after her mechanical horn had become disabled, where the mouth horn was being properly sounded. The Trave (1895), 68 Fed. 330, 15 C. C. A. 485, reversing (D. C. 1893), 55 Fed. 117; certiorari denied, Law v. The Trave (1895), 16 Sup. Ct. 1203, 163 U. S. 692, 41 L. Ed. 309.

Failure of a sailing vessel, which tested a mechanical foghorn before sailing for Cuba, to test the same, after a long stay at Havana, before starting on the return voyage, or at any time until shortly before collision, when it was found to be out of condition, so that a mouth horn had to be used, held to show such a defect in the equipment of the vessel as to place her in fault for collision with a steamer which failed to hear the mouth horn. Stahl v. The Niagara (1898), 84 Fed. 902, 28 C. C. A. 528, affirming (D. C. 1896), 77 Fed. 329.

A steamer which left port with her steam whistle so out of repair that it could not be used, so she was compelled to use a foghorn, was unseaworthy. The Minnesota (D. C. 1911), 189 Fed. 706.

Effect of failure to sound proper signal. Where a ship at the time of a collision fails to give the statutory signals,

it is presumed that the fault, if not the sole cause, was a contributory cause, of the disaster, and the burden rests on the ship of showing, not merely that her fault might not have been one of the causes, but that it could not have been. The Pennsylvania (1873), 19 Wall. 125, 136, 22 L. Ed. 148.

Failure of a bark to change from bell to foghorn, on weighing anchor in a fog, before gathering headway, is not a contributing fault, where the colliding steamer was going at an excessive speed. The Obdam (1894), 60 Fed. 637, 9 C. C. A. 167.

A sail vessel becalmed in fog is not culpable for omitting to use foghorns or other warnings, which would not have been of any avail. The Bay State (C. C.), Fed. Cas. No. 1,150, reversing The Bay State (D. C. 1848), Fed. Cas. No. 1,148.

The neglect of a sail vessel under way in a fog to sound a foghorn being established, she must show affirmatively that the horn, if blown, could have produced no effect. The Leo (C. C. 1873), Fed. Cas. No. 8,254.

Effect of misjudging direction of fog signals.—Where a steamer is properly officered and manned, and her officers and lookout are attentive and alert, and locate a whistle according to the best judgment attainable at the time, if her previous speed was moderate, and on first hearing the whistle in a definite direction, apparently near, she at once steers away from its apparent direction, and immediately stops and reverses her engines at full speed, she does all that is possible on her part to avoid collision, and is not liable, though her officers made an error of five points in locating the direction of the whistle. The Lepanto (D. C. 1884), 21 Fed. 651.

Weight of failure to hear fog signals as evidence that they were not sounded.—The finding of the trial court, on the testimony of the officers and crew of a vessel, that she was sounding her fog horn and showing lights at the time of an impending collision will not be reversed on appeal merely because the officers of the other colliding vessel, however alert, failed to hear or see such signals through the dense fog. La Normandie (1893), 58 Fed. 427, 7 C. C. A. 285, affirming decree The Normandie (D. C. 1890), 43 Fed. 151.

The distance at which a fog horn can be heard varies so greatly with the direction and the particular conditions of the fog and atmosphere that the fact that the fog signals of a schooner were not heard by an approaching steamer until two or three minutes before collision, while the whistle of the steamer was heard on board the schooner for half an hour previously, is entitled to little weight in determining whether the horn was sounded. The Columbia (D. C. 1900), 104 Fed. 105.

1393. Speed of vessels in fog and bad weather.—Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. *Art. 16, sec. 1, act of Aug. 19, 1890 (26 Stat. 326).*

Notes of Decisions.

Nature of duty to maintain only moderate speed.—It is the duty of vessels to maintain a moderate speed in a fog, irrespective of statute, and this duty is specially incumbent on sailing vessels, which are not readily maneuvered. The Oceania Vance (D. C. 1914), 217 Fed. 973.

Conditions requiring reduction of speed.—If the failure of a steamer to see the lights of a sailing vessel resulted from the thickness of the atmosphere, she was in fault for not reducing speed. The Belgenland (C. C. 1881), 9 Fed. 126, affirming (D. C. 1880) 5 Fed. 86, and judgment affirmed (1885), 5 Sup. Ct. 860, 114 U. S. 355, 29 L. Ed. 152.

When, by reason of smoke, the side lights of an approaching vessel can not be seen from a steamer, it is the duty of the steamer to slacken her speed, or stop until the course of the other vessel can be ascertained. The Ping-On *v.* Blethen (C. C. 1882), 11 Fed. 607.

In a condition of the weather which causes a thickness of the atmosphere down near the water, so as seriously to obstruct the visibility of lights, a steamer should go at a reduced speed. The Pennland (D. C. 1885), 23 Fed. 551.

Evidence held to show that there was a fog at the time and place of collision so dense that the two vessels could not see

each other until within 250 yards, and that a vessel was therefore in fault for maintaining full speed. The Eagle Point (D. C. 1902), 114 Fed. 971; decree reversed (1903), 120 Fed. 449, 56 C. C. A. 599; writ of certiorari denied. The Eagle Point v. Liverpool B. & R. P. Steam Nav. Co. (1903), 23 Sup. Ct. 850, 189 U. S. 510, 47 L. Ed. 923.

What is moderate speed.—The only rule by which to determine whether a given rate of speed of a steamer is moderate or excessive in view of the particular circumstances is that such speed only is lawful as will permit the steamer seasonably and effectually to avoid a collision by slackening speed or by stopping and reversing within the distance at which an approaching vessel can be seen. Adams v. The Bolivia (1891), 49 Fed. 169, 1 C. C. A. 221, reversing (D. C. 1890), 43 Fed. 173; [C. S. p. 8303].

The rules of navigation which require every steamship in a fog to go at a moderate speed do not define the speed which depends on the circumstances of each case. The Pennsylvania (1873), 19 Wall. 125, 133, 22 L. Ed. 148.

A steamer is bound to use only such precautions during a fog as will enable her to stop in time to avoid collision after the approaching vessel comes in sight, provided the latter is going at the moderate speed required by law. The Umbria (1897), 17 Sup. Ct. 610, 166 U. S. 404, 41 L. Ed. 1053, affirming decree (D. C. 1890), 40 Fed. 893.

When dense fog obscures a waterway through which there is a well-defined track for moving vessels, prudence requires vessels then moving therein to continue with extreme caution, availing of such sights and sounds as they can make out till they reach some anchorage to which they can withdraw from the regular track, leaving the thoroughfare unobstructed by their presence. The Persian (1910), 181 Fed. 439, 104 C. C. A. 187, reversing decree (D. C. 1908), 159 Fed. 788.

The moderate speed required of steamers in a fog is something materially less than the vessel's ordinary full speed. It has reference to all the circumstances affecting the steamer's ability to keep out of the way, including her own power in backing, and requires a reduction of speed according to the density of the fog. Whenever the fog is sufficient to increase materially the dangers of navigation, a given speed may be moderate for a swift vessel, which would be excessive for a slow one having less power to stop and back quickly. The State of Alabama (D. C. 1883), 17 Fed. 847.

Where the full speed of a steamer was 10½ or 11 knots, a reduction of from 1 to 1½ knots in a fog still leaves the speed excessive. The reduction, even in a moderate fog, should be at least to two-thirds of full speed. The Cheruskia (D. C. 1899), 92 Fed. 683.

Sailing vessels.—In case of a fog, it is as much the duty of a sail vessel to go at a moderate rate of speed as it is the duty of a steamer. The Chattahoochee (1899), 19 Sup. Ct. 491, 495, 173 U. S. 540, 43 L. Ed. 801; The Johns Hopkins (C. C. 1882), 13 Fed. 185.

Entering fog at excessive speed.—A steamer is bound to reduce speed as soon as she enters a fog bank. The Saale (1894), 63 Fed. 478, 11 C. C. A. 302, affirming (D. C. 1894), 59 Fed. 716; Neally v. The Michigan (1894), 63 Fed. 280, 11 C. C. A. 187, reversing (D. C. 1894), 63 Fed. 295, and certiorari denied (1894), 15 Sup. Ct. 1041, 159 U. S. 262, 40 L. Ed. 142.

A steamship with tow carrying sail, which saw an approaching bank of fog five or six minutes before entering it, but did not signal the tow to take in sail until after entering the fog, and did not slacken speed even after hearing the foghorn of an approaching schooner, and was going at the rate of between 8 and 9 knots when the tow collided with the schooner, was at fault for the collision. Donnell v. Boston Towboat Co. (1898), 89 Fed. 757, 32 C. C. A. 331.

Speed held moderate—Steam vessels.—Three and one-half knots, which was as slow as a steamer could go against a head wind and a head sea. The Johns Hopkins (C. C. 1882), 13 Fed. 185. Four or five miles an hour, half the usual rate of speed. The Lorenzo D. Baker (D. C. 1885), 24 Fed. 814. Four to six knots on the part of a tug with tows navigating at sea at night in a fog. The Patience (D. C. 1908), 167 Fed. 855. Four and one-half knots. The Lepanto (D. C. 1884), 21 Fed. 651.

Sailing vessels.—Three or 3½ knots an hour, which was barely sufficient to give her steerageway. Pennell v. U. S. (D. C. 1908), 162 Fed. 64. Three and one half knots an hour. Palmer v. Merchants' & Miners' Transp. Co. (D. C. 1907), 154 Fed. 683. About 4 miles an hour, against a heavy sea, in much frequented waters, for a schooner capable of much greater speed, which was well under control. The Mount Hope (1898), 84 Fed. 910, 29 C. C. A. 335, affirming (D. C. 1897), 79 Fed. 119. Four knots on the part of a sailing vessel, which has a speed of 10 knots an hour, loaded, and requires 4 knots an hour for steerageway sufficient to give her

master thorough control of her to tack, wear, and handle her, as occasion may require, near the entrance of New York Harbor. The Martello (C. C. 1889), 39 Fed. 505, reversing (D. C. 1888), 34 Fed. 71; decree reversed. The Martello v. The Willey (1894), 14 Sup. Ct. 723, 153 U. S. 64, 38 L. Ed. 637. Under shortened sail. The Atlanta (D. C. 1890), 41 Fed. 639.

Speed held immoderate—Steam vessels.—Four miles an hour in a dense fog and rough sea, on a much frequented part of the Atlantic coast. The Pottsville (D. C. 1882), 12 Fed. 631; etc. [C. S. p. 8304–6].

Sailing vessels.—Seven miles per hour in dense fog southeast of Nantucket shoals. The Chattahoochee (1899), 19 Sup. Ct. 491, 173 U. S. 540, 43 L. Ed. 801, affirming The Chattahoochee (1896), 74 Fed. 899, 21 C. C. A. 162; [C. S. p. 8306].

Excuses for immoderate speed.—Under article 16 of the international navigation rules, which provides that "every vessel shall in a fog, mist, falling snow or rain storms go at a moderate speed, having careful regard to the existing circumstances and conditions," a speed of 8 miles an hour by a steamship proceeding in the night and in a dense fog, 150 miles east of Sandy Hook, in the customary track of trans-Atlantic steamers, is not a moderate speed. Excessive speed can not be justified on the expressed opinion of her officers that a vessel could not be properly controlled at a lower rate of speed. The Eagle Point (1903), 120 Fed. 449, 56 C. C. A. 599, reversing decree (D. C. 1902) 114 Fed. 971, and writ of certiorari denied, The Eagle Point v. Liverpool, B. & R. P. Steam Nav. Co. (1903), 23 S. Ct. 850, 189 U. S. 510, 47 L. Ed. 923.

Excessive speed in a fog is not excused by the fact that the vessel is under contract to carry the United States mails in a specified time. The James Adger (C. C. 1856), Fed. Cas. No. 7,188.

The custom of ocean steamers to make a speed of more than 9 knots in a fog will not relieve one of them from legal liability, under the international rules, for a collision occurring under such circumstances. The Columbian (D. C. 1899), 91 Fed. 801.

Prudent navigation.—A vessel may be in fault for a collision in a fog which would not have occurred but for her being in the usual track of vessels leaving a port, where she was there without necessity, although, if it had been in the line of her voyage, she might have been within her right, and not chargeable with fault. The Admiral Schley (1904), 131 Fed. 433, 65 C. C. A. 417, affirming decree Consolidation Coal Co. v. The Admiral Schley (D. C. 1902), 115 Fed. 378, and decree affirmed on rehearing (1905), 142 Fed. 64, 73 C. C. A. 250; writ of certiorari denied, Consolidation Coal Co. v. American Mail S. S. Co. (1906), 26 Sup. Ct. 762, 201 U. S. 648, 50 L. Ed. 905.

Navigation after hearing signals of another vessel.—It is the duty of a vessel to stop in all doubtful cases, until both the position and course of the other is known. The Martello v. The Willey (1894), 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637, affirming The Martello (C. C. 1889), 39 Fed. 505; Bunge v. The Utopia (D. C. 1880), 1 Fed. 892, 915; The El Monte (D. C. 1902), 114 Fed. 796; Palmer v. Merchants' & Miners' Transp. Co. (D. C. 1907) 154 Fed. 683.

The requirement that a vessel shall stop her engines so soon as a fog signal is heard apparently forward of her beam is imperative; the captain has no discretion as under the former rule. The Beaver (D. C. 1912), 197 Fed. 866.

Change of course.—There is no rigid rule that, where two steamships are approaching each other in a fog, so as to involve risk of collision, neither shall change her helm until the signals of the other give a clear indication of her direction. Each case must depend on its own circumstances, which may afford reasonable ground for believing what the direction may be. The Umbria (1897), 17 Sup. Ct. 610, 166 U. S. 404, 41 L. Ed. 1053, reversing (1892), 3 C. C. A. 534, 53 Fed. 288.

A steamer having knowledge of the approach of another vessel in a fog is in fault if she changes her course in ignorance of the true course of the other, and does not slacken speed or stop and reverse. The Hammonia (D. C. 1871), Fed. Cas. No. 6,005. The Louisiana (D. C. 1868), Fed. Cas. No. 8,537.

If the sound of a signal in a fog comes apparently from a definite direction, a steamer is justified in steering away from it; but if it seem near, she is also bound at her peril, to stop and reverse at once. If she does not do so, she must, prima facie, answer according to the event. The Lepanto (D. C. 1884), 21 Fed. 651.

In fog so thick that vessels can not be seen within a quarter of a mile of each other, when fog signals are heard almost ahead and near (in this case within three-quarters of a mile), steamers proceeding at about full speed are bound at once to stop and reverse, and not to change their courses without knowing the position or direction of the other. The Britannic (D. C. 1889), 39 Fed. 395.

A sailing vessel, on learning of the approach of a steamer on her lee beam in a

fog, should luff so as to aid in avoiding the collision, since such maneuver was one of the ordinary practices of seamen. The Patria (D. C. 1899), 92 Fed. 411.

Effect of violation of rule.—Where a steamer was in fault for a collision with a schooner, by reason of her excessive speed in a fog at a place where she had reason to apprehend danger, any doubts as to fault in the schooner contributing to her injury will be resolved in her favor. The Columbian (1900), 100 Fed. 991; The Pallanza (1911), 189 Fed. 43, 110 C. C. A. 607.

A steamship, which violates article 16 of the International Rules requiring her to stop her engines on hearing the fog signal of another vessel ahead, can only avoid liability for a following collision by showing that the fault could not have contributed to the collision. The Beaver (1915), 219 Fed. 134, 135 C. C. A. 32, affirming judgment (D. C. 1912), 197 Fed. 866.

1394. Ascertainment of risk of collision.—* * * Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist. * * * *Sec. 1, act of Aug. 19, 1890 (26 Stat. 326).*

Notes of Decisions.

Effect of change of bearing.—This section is not a rule of navigation, but merely a suggestion of one circumstance which denotes that there is danger of collision; and a steamer is not justified in assuming that there is no risk because there is an appreciable change in the compass bearing of the lights of a sailing vessel seen at night, which would manifestly be an unwarranted assumption under some circumstances. Wilder's S. S. Co. v. Low (1901), 112 Fed. 161, 50 C. C. A. 473.

1395. Sailing vessels approaching one another.—When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel. *Art. 17, sec. 1, act of Aug. 19, 1890 (26 Stat. 326).*

Notes of Decisions.

When rule becomes applicable.—The rule contained in subdivision A of this article is only applicable when sailing vessels are approaching each other in such a way that there is danger of collision, unless the course of one or the other is changed, and in that case it is made the duty of the vessel which is running free either to change her course or to keep out of the way of the vessel which is close-hauled. Stout v. Weedin (D. C. 1899), 95 Fed. 1002, 1004.

Change of course after vessels are in sight which changes burden.—A change of course by one of two approaching vessels after they come within view of each other, by which a danger of collision is first created, may make it the duty of the other vessel, under the sailing rules, to keep out of the way, though, had the original courses been maintained, she would have been entitled to the right of way. The Mary Buhne (D. C. 1899), 95 Fed. 1002.

When a vessel is close-hauled.—A vessel hove to, and making both headway and leeway, is a vessel close hauled, within the meaning of the rules of navigation. The Ontario (D. C. 1871), Fed. Cas. No. 10,543; The Ada A. Kennedy (D. C. 1888), 33 Fed. 623.

Evidence held to show that the vessel with the wind on her port side was sailing free, not close-hauled, and therefore obliged

to keep out of the way of an approaching vessel sailing free with the wind on the starboard side. Law *v.* The Rolf (1892), 50 Fed. 478, 1 C. C. A. 534, affirming The Rolf (D. C. 1891), 47 Fed. 220.

A ship close-hauled, and sailing within 6½ points of the wind, is not "running free," and is the privileged vessel, where a crossing vessel is admittedly running free. The Queen Elizabeth (D. C. 1900), 100 Fed. 874.

Evidence held to show that the vessel libeled was close-hauled, not sailing free, and on the starboard tack and therefore entitled to keep her course as against libelant's vessel, which was on the port tack, whether the latter was close-hauled or sailing free. The Margaret B. Roper (D. C. 1900), 103 Fed. 886; affirmed (1901), 111 Fed. 623, 49 C. C. A. 503.

When vessel has the wind aft.—A vessel has the "wind aft" when it is not more than 2½ points from directly aft. The Gov. Ames (1911), 187 Fed. 40, 109 C. C. A. 94; writ of certiorari denied, Smith *v.* Davis (1911), 32 Sup. Ct. 525, 223 U. S. 725, 56 L. Ed. 631.

Inability to determine course of other vessel.—Where it is doubtful which vessel has the wind free, the one on the port tack must give way in time. Poole *v.* The Washington (D. C. 1851), Fed. Cas. No. 11,271.

A vessel sailing free, which mistakes the course of another close-hauled, and causes a collision by luffing, will be held liable. Aumach *v.* The Queen of the South (D. C. 1864), Fed. Cas. No. 657a.

A vessel on the starboard tack, nearly close-hauled with the wind baffling, and perhaps at times one or two points free, need not give way to one on the port tack, close-hauled, on crossing courses. The Mary C. (D. C. 1873), Fed. Cas. No. 9,201.

A sailing vessel may be excused from fault in failing to avoid a vessel which is in fact privileged, when, though exercising due vigilance, she is unable to determine on what course the other is sailing and which is the privileged vessel, but not when the failure is due to insufficient lookout, which does not discover the other vessel in time for her course to be determined. The Queen Elizabeth (D. C. 1900), 100 Fed. 874.

Presumptions and burden of proof.—The vessel which was bound to keep out of the way has the burden of showing, by a fair preponderance of proof, that the collision was due to the fault of the other vessel. The Gypsum Prince (1895), 67 Fed. 612, 14 C. C. A. 573, reversing decree (D. C. 1893), 57 Fed. 859; The Freddie L. Porter (C. C. 1881), 8 Fed. 170; The Rabboni (D. C. 1891), 53 Fed. 948; decree reversed (C. C. 1892), 53 Fed. 952, which was again modified (1897), 81 Fed. 239, 26 C. C. A. 379.

The fact that one of two vessels sailing on crossing courses was struck by the other and sunk raises no presumption that the survivor was the one in fault for the collision. The Margaret B. Roper (D. C. 1900), 103 Fed. 886; decree affirmed (1901), 111 Fed. 623, 49 C. C. A. 503.

1396. Steam vessels meeting end on.—When two steam-vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels, which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the side-lights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead. *Art. 18, secs. 1, act of Aug. 19, 1890 (26 Stat. 326).*

1397. Steam vessels crossing.—When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard

side shall keep out of the way of the other. *Art. 19, sec. 1, act of Aug. 19, 1890 (26 Stat. 327).*

Notes of Decisions.

Rule not applicable in fog.—This rule does not apply where the vessels, though crossing, can not see each other or ascertain their respective locations and bearings because of fog. The Grenadier v. The August Korff (D. C. 1896), 74 Fed. 974.

1398. Steam and sailing vessels meeting.—When a steam-vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing-vessel. *Art. 20, sec. 1, act of Aug. 19, 1890 (26 Stat. 327).*

Notes of Decisions.

Vessels bound to keep out of way.—An ocean tug with three barges in tow is required to avoid a schooner, the tow being regarded as a single vessel. The Gladys (1906), 144 Fed. 633, 75 C. C. A. 455, reversing decree (D. C. 1905), 135 Fed. 601.

A ship in tow of a tug, but having her sails set to assist the tug, must keep out of the way of an approaching schooner. The Peru and The Relief (D. C. 1898), 91 Fed. 426.

Extent of steamer's duty.—A steamer need not change her course where she sees the lights of a sailing vessel in such position that she has no reasonable ground to apprehend a collision. The Scotia (1871), 81 U. S. (14 Wall.) 170, 20 L. Ed. 822, affirming (C. C. 1870), Fed. Cas. No. 12,513.

A steamer which, meeting a schooner, in broad daylight, beating up the Jersey coast, so shapes her course as to pass within 30 or 40 feet of the sail vessel, is liable for a collision caused by the failure of the schooner, in a moment of apparent peril, to keep her course. The Benefactor (1880), 102 U. S. 214, 26 L. Ed. 157, affirming (C. C. 1877) Fed. Cas. No. 1,298 and (D. C. 1876) Fed. Cas. No. 1,297.

The rule that a steamer must keep out of the way of a sailing vessel requires that she shall give a wide berth, and, if she comes so near as to cause seamen of ordinary skill and courage to believe collision inevitable, she is liable, even though the sailing vessel commits a fault under the stress of fear. The Chatham (1892), 52 Fed. 396, 3 C. C. A. 161, affirming (D. C. 1890), 44 Fed. 384.

A steamer meeting a schooner in open sea at night, on a nearly opposite course, which did not, on perceiving the schooner's green light nearly straight ahead, allow sufficient margin for passing, or for the usual variation in the schooner's course through yawing or leeway, is liable. Henderson v. The City of St. Augustine (1895), 68 Fed. 393, 15 C. C. A. 488, affirming (D. C. 1892), 52 Fed. 237.

It is the duty of a steamer sighting a sailing vessel ahead at sea to watch with the highest diligence her course and movements so as to be able to adopt such timely measures of precaution as may be necessary to prevent a collision. Oceanic S. S. Co. v. Simpson Lumber Co. (1911), 186 Fed. 764, 108 C. C. A. 634.

Excuses for failure of steamer to keep out of the way.—A steamer, seeing a ship's light off her port bow, ported her helm as soon as the light began to close in upon her, then stopped her engine and backed, and a collision occurred. Held, that the officers of the steamer were not negligent. The Scotia (1871), 81 U. S. (14 Wall.) 170, 20 L. Ed. 822, affirming (C. C. 1870), Fed. Cas. No. 12,513.

The fact of having a tow upon a hawser does not absolve a steamer from the duty of keeping clear of an approaching sail. American Mfg. Co. v. The Maverick (1898), 84 Fed. 906, 28 C. C. A. 562, affirming (D. C. 1896), 75 Fed. 845.

A steamship is not required to maintain a speed so low as to enable her to avoid collision with other vessels which are navigating without displaying proper lights. The Kaiserin Maria Theresa (1906), 149 Fed. 97, 78 C. C. A. 681; writ of certiorari denied, Palson v. North German Lloyd (1907), 27 Sup. Ct. 786, 204 U. S. 671, 51 L. Ed. 673.

Where the bark held her course, and might have been seen from the steamship by proper vigilance, a mere speculative explanation of the steamship's presumptive culpability can not be accepted. The Belgenland (C. C. 1881) 9 Fed. 126, affirming (D. C. 1880) 5 Fed. 86; decree affirmed (1885), 5 Sup. Ct. 860, 114 U. S. 355, 29 L. Ed. 152.

Presumptions and burden of proof. A steamer which collided with a sailing vessel is prima facie chargeable with fault. The Java (C. C. 1878), Fed. Cas. No. 7,233, affirming (D. C. 1872), Fed. Cas.

No. 7,232; Perkins *v.* The Hercules (D. C. 1880), 1 Fed. 925; The Pennland (D. C. 1885), 23 Fed. 551.

Effect of steamer's failure to keep out of the way.—Where the steamer did not discern the sailing vessel until it was close at land, so that it could not keep out of the way, it is solely liable. The Sea Gull (1874), 90 U. S. (23 Wall.) 165, 23 L. Ed. 90.

1399. Which vessel is to keep her course and speed when two meet.—Where, by any of these rules one of two vessels is to keep out of the way the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.) *Art. 21, sec. 1, act of Aug. 19, 1890 (26 Stat. 327), as amended by act of May 28, 1894 (28 Stat. 82).*

Arts. 27 and 29 of these rules, referred to at the end of said amendatory provision, are set forth, 1405, 1407, post.

Notes of Decisions.

When rule applies.—This rule does not apply to cases where the vessels, though crossing, can not see each other or ascertain their respective locations and bearings because of fog. The Grenadier *v.* The August Korff (D. C. 1896), 74 Fed. 974.

What constitutes change of course.—A variation of half a point in a sailing vessel closehauled or hove to—in which case she is regarded the same as a vessel under way and closehauled—does not constitute a change of course, within the rule requiring a privileged vessel to maintain her course. The Columbian (C. C. A. 1900), 100 Fed. 991.

Where a schooner coming up the Jersey coast, on seeing the light of a steamer, heaves her lead, and comes up into the wind, and, after the steamer changes her course to avoid the schooner, fills away again, directly across the steamer's course, she is in fault for changing her course. The Virgo (C. C. 1876), Fed. Cas. No. 16,975.

A pilot boat under reefed sails, with helm lashed to leeward, and alternately luffing up and falling off, must unlash her helm, and keep a steady course, on the approach of another vessel. The Transit (D. C. 1869), Fed. Cas. No. 14,137.

A privileged vessel, sailing by the wind and following it around, is changing her course. The Johanne Auguste (D. C. 1884), 21 Fed. 134.

Special circumstances requiring or permitting privileged vessel to change course.—The privileged vessel is justified in changing her course when in the opinion of the officer in command, in the exercise of good judgment and seamanship, a collision will otherwise be unavoidable because of the failure of the burdened vessel to take timely action to keep out of the way, The Havre (C. C. 1879), Fed. Cas. No. 6,233, reversing (D. C. 1867), Fed. Cas. No. 6,232; The Zampa (D. C. 1902), 113 Fed. 541; The Charles A. Campbell (D. C. 1905), 142 Fed. 996.

A privileged vessel is justified in maintaining her course as against a burdened vessel, in the absence of some clear indication that the latter will fail in her duty to keep out of the way. The Martello (C. C. 1889), 39 Fed. 505; decree reversed, The Martello *v.* The Willey (1894), 14 Sup. Ct. 723, 153 U. S. 64, 38 L. Ed. 637; The Pierre Corneille (D. C. 1904), 133 Fed. 604.

A sailing vessel is under no duty to disregard the rule requiring her to hold her course, merely because, being in a dense fog, the bearing of an approaching steamer, as ascertained by her fog signals, does not perceptibly change. La Normandie (1893), 58 Fed. 427, 7 C. C. A. 285, affirming decree (D. C. 1890), 43 Fed. 151.

A schooner was at fault for failure to attempt to avert the collision by luffing as soon as the steamer's signals were heard, in thick weather, so close that a collision could not be avoided by the action of the steamer alone. The Patria (1901), 107 Fed. 157, 46 C. C. A. 211, affirming decree (D. C. 1899), 92 Fed. 411.

A schooner can not be held in fault for a collision with a steamer because after she had been placed in a position of peril through the fault of the steamer, and after collision had become inevitable, she changed her course for the purpose of easing the blow. Merchants' & Miners' Transp. Co. *v.* Hopkins (1901), 108 Fed. 890, 48 C. C. A. 128.

The special circumstance that will excuse the privileged one of two crossing vessels from maintaining her course and

speed must be a clearly immediate danger, and the departure no more than is necessary. Yang-Tsze Ins. Ass'n v. Furness, Withy & Co. (C. C. A. 1914), 213 Fed. 859.

A sailing vessel, discovering the lights of a steamer nearly ahead, on a dark and cloudy night, has no right afterwards to change her course, on the supposition that she has not been seen by the steamer. The Scotia (C. C. 1864), Fed. Cas. No. 12,512.

A change of course by a sailing vessel having the right of way, after the other vessel had crossed her bows, and when there was no necessity for doing so to avoid collision, was not a change in extremis, but a fault, rendering her liable. The Pangussett (D. C. 1881), 9 Fed. 109.

A sailing vessel is bound to change her course, if she is in immediate danger and can thereby avoid collision, and is in fault for not doing so when she has sufficient time and opportunity after the course of a steamer is clearly fixed and visible. The Nacoochee (D. C. 1885), 22 Fed. 855.

The rule requiring a sailing vessel meeting a steamer to hold her course is a broad and generous one, intended to put the burden of avoiding a collision upon the steamer; and, if the sailing vessel departs from the injunction, the burden is on her to show some reasonable excuse therefor. A disregard of the rule, not demanded by a clearly existing exigency, should not be excused. Therefore she will not be held in fault for adhering to her course, although the steamer seems to be maneuvering in an uncertain and dangerous way. The Gate City (D. C. 1898), 90 Fed. 314.

Where a steamer was approaching upon a schooner's lee beam in a fog, and the master of the schooner had notice of the imminence of collision, and that the steamer was backing, about two minutes before collision, it was his duty to luff, as he might have done, in order to aid in avoiding a collision. The Patria (D. C. 1899), 92 Fed. 411.

Whether or not the master of a schooner gave a proper order as to change of course immediately before a collision with a steamer, brought about by the latter's fault in going at an excessive speed in a fog, is immaterial in a suit for the collision, where the error, if one, was one made in extremis, and in any event no change then made could have averted the collision. Palmer v. Merchants' & Miners' Transp. Co. (D. C. 1907), 154 Fed. 683.

The failure of a sailing vessel to change her course when collision with a steam vessel seems inevitable, if an error, is one in extremis and does not impute fault. The Prinz Oskar (D. C. 1914), 216 Fed. 233; decree affirmed (C. C. A. 1915), 219 Fed. 483.

Effect of wrongful change of course.—A privileged vessel, which disregards her duty to keep her course, except upon ample justification, must be held in fault for a collision which might otherwise not have occurred. Marshall v. The Adriatic (1883), 107 U. S. 512, 2 Sup. Ct. 355, 27 L. Ed. 497; The St. Johns (D. C. 1888), 34 Fed. 814; The Queen Elizabeth (D. C. 1900), 100 Fed. 874; decree reversed (1903), 122 Fed. 406, 59 C. C. A. 345; writ of certiorari denied (1903), 23 Sup. Ct. 855, 190 U. S. 560, 47 L. Ed. 1184.

Where a sailing vessel by her unnecessary deviation from her course renders a collision with a steamer unavoidable, the steamer can not be charged with liability. The Georg Dumois (1907), 153 Fed. 833, 83 C. C. A. 15.

Presumptions and burden of proof.—Where signals are exchanged between a steamship and a schooner approaching each other at night in a fog, the steamer has a right to rely on the sailing vessel keeping her course; and if it is changed, and a collision follows, the burden is on the schooner to prove that the change of course did not contribute to the collision. Donnell v. Boston Towboat Co. (1898), 89 Fed. 737, 32 C. C. A. 331.

The burden of proof on the steamer to show that the sail vessel changed her course, where set up as a defense, is not sustained where no satisfactory conclusion as to the real state of the facts can be arrived at from the evidence. The Lizzie Major (D. C. 1876), Fed. Cas. No. 8122.

Where the fault of the burdened vessel was the primary cause of a collision, she must produce reasonably clear evidence to sustain a plea of contributory fault on the part of the privileged vessel on the ground that the latter, in trying to avoid the threatened collision, departed from her course. The William Churchill (D. C. 1900), 103 Fed. 690.

While there is a presumption that the privileged one of two meeting vessels, which came into collision, obeyed the law and kept her course, yet, when such presumption is overthrown, and her fault is clearly established, and is in itself sufficient to account for the collision, she can only avoid full liability by proving the fault of the other vessel beyond reasonable doubt. The Eagle Wing (D. C. 1905), 135 Fed. 826.

The burden of showing that a vessel, which was navigated in obedience to the rules, could have avoided a collision due to the fault of the other, rests on the

latter. The Putney Bridge (D. C. 1915), 219 Fed. 1014.

Weight of evidence.—Direct testimony on a libel for collision between a steamer and a brig, going to show that the brig kept properly on her course until the collision became inevitable, will not be controlled by inferences arising out of the wound in the steamer. Fincke *v.* The Fairbanks (1869), 9 Wall. 420, 421, 19 L. Ed. 708.

Where the positive testimony of two witnesses that an approaching vessel changed her course just prior to a collision is uncontradicted, a court is not authorized to reject it merely because no particular reason appears why such change of course should have been made. The Mary Buhne (D. C. 1899), 95 Fed. 1002.

1400. Vessel to avoid crossing ahead.—Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. *Art. 22, sec. 1, act of Aug. 19, 1890 (26 Stat. 327).*

1401. Steam vessels to slacken speed, etc.—Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. *Art. 23, sec. 1, act of Aug. 19, 1890 (26 Stat. 327).*

Notes of Decisions.

Conditions requiring steamer to slacken speed, stop, or reverse.—A steamer need not slacken her speed nor change her course where she sees the lights of a sailing vessel and has no reasonable ground to apprehend a collision. The Scotia (1871), 81 U. S. (14 Wall.), 170, 20 L. Ed. 822, affirming (C. C. 1870), Fed. Cas. No. 12,513.

A steamer is not obliged to stop and back until there is risk of collision; and where there was no risk until a ship altered her wheel, and the situation then was one in extremis, and caused by the wrong maneuver of the ship, the failure of the steamer to stop sooner, and her failure to back at any time, were no faults. The Blue Jacket *v.* Tacoma Mill Co. (1892), 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469, distinguishing The Manitoba (1887), 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095.

Where a steamship and a sailing vessel are approaching each other, it will be presumed the latter will pursue the customary course, and in case of danger of collision it is the duty of the steamer to reduce her speed, and a failure to do so will render her liable in case of collision. The Harrisburgh (C. C. 1881), 9 Fed. 169.

A steam vessel in a narrow channel, which is but little under control of her helm, owing to the retarding influence of the mud in which her bottom is dragging, is bound, when approaching a sailing vessel in the nighttime nearly end on, at a combined speed of at least 9 knots, to slacken her speed. The Blenheim (C. C. 1883), 17 Fed. 608, affirming (D. C. 1882), 14 Fed. 797.

A steamer which, finding herself crossing the course of a schooner on the port tack, and about four lengths from her, attempts to avoid her by merely porting hard, is in fault for not also reversing. The Schmidt *v.* The Reading (C. C. 1890), 43 Fed. 815, affirming (D. C. 1890), 43 Fed. 398.

A steamer is bound to check her speed as soon as she discovers that she is not shaking off the sail vessel's lights by changing her helm. Dyer *v.* National Steam Nav. Co. (D. C. 1869), Fed. Cas. No. 4,224.

Where there is danger of collision prompt backing, as well as stopping the engines, is incumbent on the steamer, and any delay in ordering the engines reversed is at her risk. The State of Alabama (D. C. 1883), 17 Fed. 847.

Uncertainty as to course of other vessel.—It is the duty of a steamer when the lights of an approaching vessel are fluctuating, or for any reason there appears to be uncertainty as to her course, to slacken speed, and, if necessary, stop, neither proceeding nor changing course until the course of the other vessel has been ascertained. Wilder's S. S. Co. *v.* Low (1901), 112 Fed. 161, 50 C. C. A. 473.

The steamer must slacken speed, stop, or reverse, on discovering a sail vessel, until she learns her course. The Adriatic (C. C. 1879), Fed. Cas. No. 91; Id. (D. C. 1877), Fed. Cas. No. 89.

Effect of steamer's failure to slacken, stop, or reverse.—Failure of a steamer to slow up when lights of an approaching brig indicated that the vessels were on crossing courses casts doubt on the claim of the steamer that she starboarded to pass under brig's stern, but was prevented by luffing of brig. The A. M. Hathaway (D. C. 1885), 25 Fed. 926.

A steamer that fails to stop and reverse, when risk of collision is obvious takes on herself the risk of the departure from the rule. The City of Atlanta (D. C. 1886), 26 Fed. 456.

Presumptions and burden of proof.—Navigation at a very high rate of speed imposes upon a steamer the duty of proportionately increased vigilance, and the avoidance of every alternative in navigation which involves or increases the risk of collision. Where there is risk of collision with a sailing vessel, the burden of proof is upon the steamer to justify her in violating the rule requiring her to slacken speed in such cases. The Alaska (D. C. 1884), 22 Fed. 548.

1402. Overtaking vessel.—Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way. *Art. 24, sec. 1, act of Aug. 19, 1890 (26 Stat. 327).*

Notes of Decisions.

When a vessel is an overtaking vessel.—An overtaking vessel is one coming up astern of the proper range of the leading vessel's colored side lights; that is more than two points abaft of a beam. The State of Alabama (D. C. 1883), 17 Fed. 847.

Extent of overtaking vessel's duty.—An overtaking schooner knowing her liability to misstay was in fault in following another so closely as to render it necessary for her to tack when the other did, and liable for a collision occurring when she misstayed across the bows of the other. Smith *v.* The Stephen Bennett (1893), 54 Fed. 207, 4 C. C. A. 289, affirming (D. C. 1890) 42 Fed. 336.

It is not only the duty of the vessel last leaving the port to take steps to avoid collision with the vessel ahead of it, but it is the duty of such vessel to take steps seasonably. Simpson *v.* Spreckles (D. C. 1882), 13 Fed. 93, 94.

Excuses for failure of overtaking vessel to keep out of the way.—An overtaking vessel, in avoiding the one ahead, can presume that she will keep her course as required by the rules. The Hortensia (D. C. 1877), Fed. Cas. No. 6,706.

A schooner would be blameless for colliding with a barge which so suddenly stopped in the schooner's course, and so near to its bow, that it was impossible to avoid it. The Helen (D. C. 1913), 204 Fed. 653, 656.

Presumptions and burden of proof.—Where a tug with a tow saw a schooner a quarter of a mile ahead, on nearly the same course, and overtook and passed her, but the tow, which was on a 200-fathom line, did not see the schooner until within 200 feet, and struck her directly astern, negligence must be inferred on the part of both tug and tow, unless there is evidence to warrant a finding that the schooner in some way brought about the collision. The Nathan Hale (1902), 113 Fed. 865, 51 C. C. A. 489.

A vessel overtaking another is required to keep out of the way of that vessel, and steps to avoid collision must be taken in season; and the burden of proof, in case of an accident, is on the overtaking vessel to show diligence on her part and negligence on the part of the other vessel. Simpson *v.* Spreckels (D. C. 1882), 13 Fed. 93.

Though the overtaken sailing vessel fail to exhibit a torch, as required, the burden is still upon the overtaking vessel to show that she used all reasonable diligence to avoid the other. The City of Merida, 24 Fed. 229.

1403. Steam-vessels in narrow channel.—In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way

or mid-channel which lies on the starboard side of such vessel. *Art. 25, sec. 1, act of Aug. 19, 1890 (26 Stat. 327).*

1404. Fishing vessels to be avoided.—Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing vessels or boats. *Art. 26, sec. 1, act of Aug. 19, 1890 (26 Stat. 327).*

Notes of Decisions.

"Fairway" defined.—The word "fairway" is water on which vessels of commerce habitually move; the word "thalweg" from which it is apparently derived, having reference more particularly to navigable channels as boundaries. Johnnsson *v.* American Tugboat Co. (1915), 147 P. 1147, 85 Wash. 212.

1405. Obedience to and construction of steering rules.—In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. *Art. 27, sec. 1, act of Aug. 19, 1890 (26 Stat. 327).*

Notes of Decisions.

Circumstances requiring deviation from rule.—The rule that in construing and obeying rules of navigation due regard must be had to all dangers of navigation, etc., applies only where there is some special cause rendering a departure necessary to avoid immediate danger. The Maggie J. Smith (1887), 8 Sup. Ct. 159, 161, 123, U. S. 349, 31 L. Ed. 175.

Exceptions to the international rules, provided for by this rule should be admitted with great caution, and only when imperatively required by the particular circumstances. Therefore, under all ordinary circumstances, a vessel discharges her full duty and obligations to another by a faithful and literal observance of these rules. The Oregon (1895), 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, reversing decree (D. C. 1891), 45 Fed. 62.

Where nonobservance of a statutory regulation by a steamer is the cause of collision, she can not be excused from liability because her master acted with honest judgment under the circumstances. The H. F. Dimock (1896), 77 Fed. 226, 23 C. C. A. 123.

A double collision at sea, one between a schooner and a barge in tow, and a resulting collision between two other tows, held due solely to the fault of one of the tugs, which, on meeting another tug with two tows, which were being overtaken by a schooner, passed to the port of such tug and tows, although her own tows were sagging in that direction on account of the wind and failed to make sufficient allowance for such sagging, the result being that *the schooner was* pocketed and compelled in extremis to change her course. The Richmond (1907), 155 Fed. 112, 83 C. C. A. 572, affirming decree (D. C. 1906), 143 Fed. 996.

Where a steamer was approaching upon a schooner's lee beam in a fog, and the master of the schooner had notice of the imminence of collision and that the steamer was backing, about two minutes before collision, it was his duty to luff, as he might have done, in order to aid in avoiding a collision. The Patria (D. C. 1899), 92 Fed. 411.

Taking on pilot.—A steamer and a pilot boat which have agreed to come to a standstill, so that the pilot boat's yawl may bring a pilot to the steamer, are not navigating on independent courses, and the statute creates no presumption that one is the privileged and one is the burdened vessel, and defines no course of navigation to be followed by either. It is a case of special circumstances in which the vessels are cooperating in an agreed maneuver, and each is bound to act prudently toward the agreed end. The Monterey (1908), 161 Fed. 95, 88 C. C. A. 259, reversing decree (D. C. 1907), 153 Fed. 935.

While it is the rule that on the exchange of signals for a pilot between a steamship and a pilot boat it is the duty of both vessels to cooperate in maneuvers required for the transfer of the pilot without unnecessary risk, and of the steamer to stop her headway in due season and to the extent necessary to such safe transfer, a pilot boat is not justified in assuming in the night that the steamer has fully stopped at any particular point, and where

acting on such assumption in turning she unnecessarily takes a course across the bows of the steamer and strikes her, she is in fault for the collision; and the steamer is not in fault because, having stopped her engines in due time, she was still under a slight headway at the time of collision. The Anagar (1903), 123 Fed. 473, 59 C. C. A. 277, reversing decree (D. C. 1902), 115 Fed. 440, and writ of certiorari denied, Virden v. The Anagar (1904), 24 Sup. Ct. 854, 193 U. S. 673, 48 L. Ed. 842.

A vessel at sea upon pilotage ground is subject to the usual rules of navigation, as respects a pilot boat whose signal offering services she has not answered, and whose services she does not desire. She is not in fault for observing the usual rules in endeavoring to keep away from the pilot boat, though the latter may be navigating for the purpose of coming within hailing distance; nor for not guarding against dangerous maneuvers of the pilot boat that could not be foreseen or expected. It is not a legal fault to give no answer to a pilot's flash light, offering her services, there being no rule or fixed custom requiring an answer. The Cambusdoon (D. C. 1887), 30 Fed. 704.

When a pilot is to be taken on board a steamer at sea, it is the duty of the steamer when she gets sufficiently near the pilot boat to permit the latter to undertake the immediate maneuvers necessary to approach the steamer, to stop her own headway, and leave the execution of these maneuvers and the subsequent details of transferring the pilot to the judgment of the pilot boat. The Alaska (1888), 9 Sup. Ct. 461, 130 U. S. 201, 32 L. Ed. 922, affirming decree (C. C. 1887), 33 Fed. 107, which affirmed decree The Columbia (D. C. 1886), 27 Fed. 704; The City of Washington (D. C. 1872), Fed. Cas. No. 2,770; The Agnella (D. C. 1912), 198 Fed. 147; decree affirmed (1913), Walaas v. Johnson, 204 Fed. 440, 122 C. C. A. 626.

After a pilot boat has put off a pilot in a skiff for a schooner, it is the duty of the schooner to wait for the skiff, and the duty of the pilot boat to keep out of the way of the schooner; and the pilot boat is in fault and responsible for damages which may ensue from a collision between the pilot boat and schooner while so waiting. The Leo (D. C. 1888), 34 Fed. 140.

It being shown to be the custom, it was not a fault of a pilot boat to put herself in the path of a steamer, and lower her yawl to put a pilot on board of the steamer. The City of Washington (C. C. 1874), Fed. Cas. No. 2,771.

A pilot boat attempted to launch her yawl when ahead of the steamship, so that it would go down the latter's lee side, while the pilot boat crossed the steamer's bow, to go down her windward side, and round under her stern, to pick up the yawl. Held, that no such invariable custom was proved of boarding vessels in that manner as to excuse the pilot boat for attempting it at night, and in a gale which rendered that method hazardous. The Columbia (D. C. 1886), 27 Fed. 704, decree affirmed The Alaska (1888), 9 Sup. Ct. 461, 130 U. S. 201, 32 L. Ed. 923.

A steamer which saw a torch burned ahead or a little on her port bow, slightly above which appeared, at intervals, a white light which she mistook for the lights of a pilot boat, was not in fault for maintaining her speed under the belief that the latter would maneuver to bring to on her lee side. Sewall v. La Champagne (1894), 60 Fed. 299, 8 C. C. A. 624, reversing (D. C. 1890), 43 Fed. 444.

Action in extremis.— Where the master of a vessel, who is a navigator of experience and good judgment, is confronted with a sudden peril, caused by the action of another vessel, so that he is justified in believing that collision is inevitable, and he exercises his best judgment in the emergency, his action, even though unwise, can not be imputed to his vessel as a fault. The Queen Elizabeth (1903), 122 Fed. 406, 59 C. C. A. 345, reversing decree (D. C. 1900), 100 Fed. 874; and writ of certiorari denied Holmes v. The Queen Elizabeth (1903), 23 Sup. Ct. 855, 190 U. S. 560, 47 L. Ed. 1184; Chapin v. The Hattie Ross (D. C. 1866), Fed. Cas. No. 2598; The Zampa (D. C. 1902), 113 Fed. 541.

The act of the mate of a schooner in exhibiting a lantern which was mistaken for a stern light did not render the schooner liable as for a contributory fault, where it was done in extremis, when the steamer was bearing down directly upon the schooner at high speed, apparently without seeing her. The Furnessia (1907), 154 Fed. 348, 83 C. C. A. 120, affirming decree (D. C. 1905), 137 Fed. 955.

Where a steamer was approaching a sailing vessel on converging courses, and the navigator of the steamship on a collision appearing imminent, starboarded the helm, throwing the steamship across the bow of the sailing vessel, and did not stop or reverse the engines until it was too late to prevent a collision, such maneuver could only be excused as an error in extremis and was unavailable where the steamship's officers were negligent in failing to observe the sailing vessel earlier and so to navigate the steamship as to

avoid a collision. The Noreuga (D. C. 1914), 211 Fed. 355.

Presumptions and burden of proof.—The burden of showing the existence of special circumstances rendering a departure from a rule necessary is on the steamer claiming it. The Alaska (D. C. 1884), 22 Fed. 548, 553.

1406. Sound signals.—The words "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam-vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."

Three short blasts to mean, "My engines are going at full speed astern." *Art. 28, sec. 1, act of Aug. 19, 1890 (26 Stat. 328).*

Notes of Decisions.

For decisions prior to enactment of rules see 1505, post.

Failure to signal or reply.—This article is expressly made optional. Failure to indicate or to reply at sea, being no breach of the rule or of any proved custom, is not a fault. The Lepanto (D. C. 1884), 21 Fed. 651.

Signals in fog.—A steamship is authorized to use the signals prescribed in this rule only to communicate with a vessel which she has in sight, and not with a vessel which is invisible because of fog. The Parthian (1893), 55 Fed. 426, 5 C. C. A. 171, reversing decree (D. C. 1891), 48 Fed. 175.

Assenting to faulty maneuver.—A vessel assenting by signal to a faulty maneuver is equally liable in case of loss resulting therefrom. The Albemarle (C. C. 1871), Fed. Cas. No. 135.

Evidence as to meaning intended by signal.—In a collision case between steamers governed by the international rules, it is proper to exclude a statement by the captain of one of the vessels as to what information he intended to convey by a signal of one whistle, as the meaning thereof is conclusively determined by the rules. The Lisbonense (1892), 53 Fed. 293, 3 C. C. A. 539, reversing decree (D. C. 1891), 47 Fed. 122.

1407. Negligence in avoiding collisions.—Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. *Art. 29, sec. 1, act of Aug. 19, 1890 (26 Stat. 328).*

Notes of Decisions.

I. Lookout.
II. Precautions required by ordinary practice.
III. Special circumstances.

I. Lookout.

Necessity of lookout.—A vessel having the right of way must keep a proper lookout and use proper seamanship to avoid collision. The Mary C. (D. C. 1873), Fed. Cas. No. 9,201.

A vessel which comes into the wind, for the purpose of shortening sail without first having made a careful survey to discover approaching vessels, is at fault. The Starlight (D. C. 1874), Fed. Cas. No. 13,310.

Where a vessel, whose duty it is to keep off, is known to respond tardily to her wheel, she is especially bound to maintain a vigilant lookout. The Manhattan *v.* The Agnes Manning (D. C. 1890), 44 Fed. 110.

Competency of lookout.—The fact that the lookout on a yacht was a Central American Indian incapable of speaking English did not impair his efficiency as a lookout, nor in itself constitute a contributing fault on the part of the yacht for a collision brought about by improper navigation by the other vessel. The Fred Richards (1910), 180 Fed. 707, 104 C. C. A. 646.

It is a fault rendering a steamship liable for collision, to have as the only lookout in a dense fog, in a frequented part of the Atlantic coast, a boy of 16 years, who has been upon the water but a few weeks. The Pottsville (D. C. 1882), 12 Fed. 631.

Performance of other duties.—The man at the wheel is not a sufficient lookout. The Metamora (1906), 144 Fed. 936, 75 C. C. A. 576; The New Orleans (D. C. 1875), Fed. Cas. No. 10,179; The Golden Grove (D. C. 1882), 13 Fed. 674.

The man blowing the fog horn on a sail vessel is a proper lookout. The Nacoochee v. Moseley (1890), 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687, reversing (C. C. 1886), 28 Fed. 462; The Hansa (D. C. 1872), Fed. Cas. No. 6,037.

That the mate of a schooner, who was acting as lookout and sounding her fog horn in a dense fog, was burdened with too many duties, is not sufficient to charge the schooner with contributory fault for a collision with a steamer, brought about by the clear fault of the steamer, where all of his work was done and properly done. The Pallanza (1911), 189 Fed. 43, 110 C. C. A. 607.

One who had been dividing his attention between looking out and reefing sail was not a vigilant lookout. The Twenty-One Friends (D. C. 1887), 33 Fed. 190.

Number of men on lookout.—In a case where, besides a man forward, stationed as a lookout, there were two persons on watch in the pilot house of a large ocean steamer, the lookout was sufficient. The Johns Hopkins (C. C. 1882), 13 Fed. 185.

A steamer and a schooner were approaching in a clear night on opposite courses. When the vessels were a few lengths apart, the schooner was first seen by the steamer, though, as her lights were burning brightly, she should have been seen 1¼ miles away. A steamer which had only one man on look out and three men on deck had a defective lookout. The Manhattan v. The Agnes Manning (D. C. 1890), 44 Fed. 110.

Position of lookout.—No fixed position is established by law as the place where the lookout must be in the forward part of a vessel under way, but he must have a free vision over each bow and ahead of the vessel. The Kallisto (D. C. 1877), Fed. Cas. No. 7,600.

A lookout on the bridge without any in the bow is insufficient. Neally v. The Michigan (1894), 63 Fed. 280, 11 C. C. A. 187, reversing (D. C. 1894), 63 Fed. 295; certiorari denied (1894), 15 Sup. Ct. 1011, 39 U. S. 262, 40 L. Ed. 142; The Patria (D. C. 1899), 92 Fed. 411.

A war vessel proceeding at sea, in the night and in a dense fog, at a speed of 6 knots, showing no lights and sounding no fog signals, was required to exercise the utmost vigilance, and to maintain lookouts as far forward and as near the water as possible, as well as at a height above the water and aloft; and she was in fault where she had only the lookouts usually maintained in clear weather, being one at each end of the bridge and two further aft—those on the bridge being 94 feet from the stem and 37 feet above the water. Watts v. U. S. (D. C. 1903), 123 Fed. 105.

Where there were three experienced mariners on the poop deck, with an unobstructed view all round, the absence of a lookout will not be held to contribute to the collision. The Ping On v. Blethen (C. C. 1882), 11 Fed. 607.

A tug whose tow collided with a bark was not in fault for having her lookout in the pilot house, when it was only 15 feet from the stem, and a lookout stationed on the deck in front would have been in danger of being swept off by the sea. The Caro (D. C. 1884), 23 Fed. 734.

It is a fault for the lookout of a vessel to leave his post after reporting the light of another vessel. Wilder's S. S. Co. v. Low (1901) 112 Fed. 161, 50 C. C. A. 473; The Havre (D. C. 1867) Fed. Cas. No. 6,232.

Excuses for failure to keep proper lookout.—A custom of the sea not to have a lookout in the daytime or while reefing is not a reasonable one, and does not justify the absence of a lookout in case of a vessel beating off shore close behind another. Thorp v. Hammond (1870), 79 U. S. (12 Wall.) 408, 20 L. Ed. 419; id. (N. Y. 1871), 42 How. Prac. 314.

A steamship, navigating the Atlantic on a dark but clear night, which was obliged by the coldness of the weather and the freezing of the spray to remove the lookouts from their proper places forward to the bridge, but which kept a good lookout from there, can not be held in fault for a collision with a schooner which she overtook, and which exhibited no stern light, because she did not reduce her speed so as to enable her to avoid the collision after coming near enough to make out the schooner. The Kaiserin Maria Theresa (1906), 149 Fed. 97, 78 C. C. A. 681, reversing decree The Kaiserin Maria Theresa (D. C. 1903), 125 Fed. 145; and writ of certiorari denied, Pulson v. North German Lloyd (1907), 27 Sup. Ct. 786, 204 U. S. 671, 51 L. Ed. 673.

Effect of insufficient lookout.—A burdened vessel which fails, through the inexcusable absence of her lookout, to maintain it steadily, and thus causes a collision, is liable. The Robert Graham Dun (1895), 70 Fed. 270, 17 C. C. A. 90, affirming (D. C. 1894) 63 Fed. 167.

Failure of a steamer to see a sailing vessel, which she ought to have discovered, in time to give her sufficient room, is a fault rendering the steamer liable if it results from insufficient lookout. The Bel-

genland (C. C. 1881, 9 Fed. 126, affirming (D. C. 1880) 5 Fed. 86, affirmed (1885) 5 Sup. Ct. 860, 114 U. S. 355, 29 L. Ed. 152.

The absence of a competent lookout casts the burden upon the vessel of showing that it did not contribute to the collision. The Ancon (D. C. 1879), Fed. Cas. No. 348.

No fault can be found with a bark for not displaying a torch over her stern toward the steamer seen approaching, if the display of an additional light from the bark would have been of no avail for want of a proper lookout on the steamer. The Oder (D. C. 1881), 8 Fed. 172; reversed (C. C. 1882), 13 Fed. 272.

The excuse that a vessel is unable to determine (by reason of the darkness and the direction of the wind), from the lights of the other vessel, on what course she is sailing, and which is the privileged vessel, can not be invoked where, by reason of the inefficiency of her lookout, she failed to discover the approaching vessel until the two were in close proximity, and she had no time to study the situation. The Queen Elizabeth (D. C. 1900), 100 Fed. 874.

Failure to discover vessel insufficiently or improperly lighted.—The vessel bound to give way is in fault if by diligence and attention her lookout might have discovered a vessel that had not proper lights. The Ontario (D. C. 1871), Fed. Cas. No. 10,543.

If the light actually exhibited should have been seen by those in charge of the steamer in time to avoid the collision, and the failure to see such light contributed to cause the collision, the loss will be apportioned between both vessels. The Roman (D. C. 1882), 12 Fed. 219.

Where collision occurred between bark becalmed without colored lights and steamer, both were held in fault. Naunton v. The Oregon (D. C. 1867), Fed. Cas. No. 10,057.

Insufficiency of lookout not contributory cause of collision.—The fact that a lookout was improperly stationed, or engaged in other duties, or even absent, is not a fault where the other vessel was seen and reported as soon as possible. The Blue Jacket v. Tacoma Mill Co. (1892), 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; The Georg Dumois (1907), 153 Fed. 833, 83 C. C. A. 15.

Whether the absence of a lookout at the bow of a sailing vessel was a contributing fault to a collision is a question of fact, and, where both the district and circuit courts have found in the same way thereon, every presumption is in favor of the decree, and it will not be reversed except for manifest error. The S. B. Wheeler (1874), 87 U. S. (20 Wall.), 385, 22 L. Ed. 385.

Negligence by a vessel having the right of way in not seasonably discovering an approaching vessel will not charge the former with fault, unless such negligence contributed to the collision. The Starlight (D. C. 1874), Fed. Cas. No. 13,310; Palmer v. Merchants' & Miners' Transp. Co. (D. C. 1907), 154 Fed. 683.

Presumptions arising from insufficient lookout.—Independently of the question whether or not the want of a proper lookout contributed to a collision, the fact of negligence in that respect necessarily weighs with great force against the vessel thus negligent, in determining questions of fact in dispute, where the testimony can not be reconciled. The Samuel Dillaway (1899), 98 Fed. 138, 38 C. C. A. 675.

Where a lookout is shown to have been absent from his post for a large part of the critical time during which the vessels were approaching each other, and was therefore unable to observe a considerable portion of the essential occurrences in controversy, the presumptions arising from this lack of vigilance are of very substantial importance; especially where it appears that the master of the vessel, instead of being in command of the deck, was himself at the wheel. In such case, if the vessel is unable to sustain the burden of showing fault in the other party, such inability must be laid to her own misfortune or negligence. The City of Augusta (1897), 80 Fed. 297, 25 C. C. A. 430.

Where a vessel had no lookout and failed to station one, although the officer in charge saw the lights of another vessel ahead 10 minutes before collision, but was unable to make them out distinctly, every doubt will be resolved against such steamer in an action for the collision. Wilder's S. S. Co. v. Low (1901), 112 Fed. 161, 50 C. C. A. 478.

A vessel which had no lookout except the mate, who was stationed on the forward part of the poop, and was blowing the fog horn and navigating the ship has the burden of showing that the want of a proper lookout did not contribute to the collision. McCabe v. Old Dominion S. S. Co. (D. C. 1887), 31 Fed. 234.

II. Precautions Required by Ordinary Practice.

Navigation in fog.—See notes to 1393, ante.

Number of crew on deck.—Vessels sailing during a dense fog are bound to have on deck all the disposable part of their crew, to aid in keeping a lookout. Jones v. The Hanover (D. C. 1851), Fed. Cas. No. 7,466.

The fact that a bark has but one man at her wheel in a fog is no proof of negligence or want of seamanship. The Hansa (D. C. 1872), Fed. Cas. No. 6,037.

If the number of officers and crew of a vessel on deck when a collision is impending is sufficient to perform all the duties required of her, it is immaterial that more are not there. La Normandie (1893), 58 Fed. 427, 7 C. C. A. 285, affirming decree (D. C. 1890), 43 Fed. 151.

It can not be held a fault contributing to a collision that men were not stationed ready to make a change in the sails of a small schooner in case of emergency, where a change of course could not have been made in time to avoid collision after the approaching steamer was seen. The Columbia (D. C. 1900), 104 Fed. 165.

That a vessel was one man short of her full complement of seamen and had no intermediate lookout between the lookout forward and the officer on the bridge held not a contributing cause of a collision in a fog. Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co. (1912), 197 Fed. 703, 117 C. C. A. 97.

Failure of a competent and experienced mate of a schooner to call the master from below, when approaching, on crossing courses, a steamer whose light was clearly seen, was no fault; the duty of the schooner to keep her course being clear. American Mfg. Co. v. The Maverick (D. C. 1896), 75 Fed. 845.

Incompetent helmsman.— Where, in an action for collision between a steamer and a schooner, the evidence of the officers of each as to the courses of the other and their courses could not be harmonized with the happening of the collision, and the wheel of the schooner was controlled by a young man, whose evidence showed that he had no knowledge of navigation, it will be held that the collision resulted from the fault of the schooner's helmsman. The Tallahassee (1903), 125 Fed. 1005, 60 C. C. A. 271, affirming judgment The Senator Sullivan (D. C. 1902), 117 Fed. 176.

Tug with tow.— The navigation of a tug with tows at sea involves such danger of collision that the utmost care is required on the part of those in charge. The Samuel Dillaway (1899), 98 Fed. 138, 38 C. C. A. 675; The Gladys (1906), 141 Fed. 653, 73 C. C. A. 455, reversing decree (D. C. 1905), 135 Fed. 601. [C. S. p. 3326].

Lashing wheel.— The fact that a schooner had no one at the helm, which was lashed, or that she was insufficiently manned, can not be held a fault contributing to a collision with a steamship in a fog at night, when in any event it would have been her duty to keep her course, and she did this. The Columbian (C. C. A. 1900), 100 Fed. 981, reversing (D. C. 1899), 91 Fed. 801.

The sinking of a schooner pilot boat at sea in the night by being run down by a steamer held due solely to the fault of the pilot boat in so changing her course as to cross the steamer's bow, and in leaving the wheel lashed while the pilot went below, leaving no lookout. The Monterey (D. C. 1907), 153 Fed. 935; decree reversed (1908), 161 Fed. 95, 88 C. C. A. 250.

Duty after sighting approaching vessel.— **The pilot of a privileged vessel was at fault for not continuing to watch an approaching burdened vessel whose course was such that she would pass only a short distance to leeward.** Lane v. The A. Denike (C. C. 1868), Fed. Cas. No. 8045.

The omission of the master of a schooner to warn the man at the wheel of the approach of a steamer is immaterial, when such omission results in no change of course, and clearly does not contribute to the collision. Perkins v. The Hercules (D. C. 1880), 1 Fed. 925.

It is the duty of the officer of the deck, after a light is reported ahead, to keep it in view and watch its movements, and the effect of the movement of his own vessel with reference to it, and he is not justified, after changing his course so as in his opinion to avoid it, in placing himself where he can no longer see the light. The Pangussett (D. C. 1881), 9 Fed. 109.

While it is the duty of a steam vessel to avoid a sailing vessel, it is no less the duty of the latter to afford the steamer all the means and signals the law custom, and common prudence prescribe to enable her to make this avoidance; and if in any respect she fails therein, and thereby produces the disaster, she must either bear the whole loss, or her share thereof, as her fault was the sole or partial cause of the collision. The Golden Grove (D. C. 1882), 13 Fed. 674.

Evidence of usage of seamen.— **Where, in case of collision, a disputed question of navigation arises in regard to which neither the sailing regulations prescribed by law nor the rules of the court regulating the practice in admiralty have made provision, evidence of experts as to the general usage regulating such matters is admissible.** The City of Washington (1876), 92 U. S. 31, 23 L. Ed. 600.

Vessel held not to have neglected any proper precaution. The speed of a steamer in fair weather in open sea, being the usual rate, held not an element in the collision, where she stopped so soon as the necessity was apparent. Brennan v. The Virgo (C. C. 1876), Fed. Cas. No. 1851.

III. Special Circumstances.

Taking on pilot.—A pilot boat at night, receiving a reply to her flash light indicating that the steamer desired a pilot, changed her course to put a pilot aboard. Her course was crossing that of the steamer, and when nearly ahead she lowered her yawl, with a lantern on board, to take a pilot to the steamer. Her movements were clearly seen from the steamer, and she held her course, crossing from starboard to port. The steamer did not stop, but starboarded, and collided with and sank the pilot boat. Held, that the steamboat was in fault in starboarding, and in not stopping to receive the pilot. The City of Washington (1875), 92 U. S. 31, 23 L. Ed. 600, affirming (C. C. 1874) Fed. Cas. No. 2,771 and (D. C. 1872) Fed. Cas. No. 2,770.

Inevitable accident.—Inevitable accident occurs only when the collision results from natural causes, without any fault of the owners or the crews of either vessel. Killam *v.* The Eri (C. C. 1871), Fed. Cas. No. 7,765.

A collision between a steam vessel and a sailing vessel in a fog can not be justified on the plea of inevitable accident, unless it appears that both parties have endeavored, by all means in their power, with due care and a proper display of nautical skill, to prevent the collision. The Nacoochee (D. C. 1885), 22 Fed. 855.

Maneuvers in extremis.—An error committed by the vessel required to keep her course, after the collision is inevitable, will not impair her right to recover for the injuries resulting from the collision, if she was otherwise without fault. The Fairbanks (1869), 76 U. S. (9 Wall.) 420, 19 L. Ed. 708.

Where one vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent the recovery of full damages. The Maggie J. Smith (1887), 8 Sup. Ct. 159, 162, 123 U. S. 349, 31 L. Ed. 175.

1408. Special rules for harbors, rivers, and inland waters by local authorities.—Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters. *Art. 30, sec. 1, act of Aug. 19, 1890 (26 Stat. 328).*

Notes of Decisions.

Validity of State and municipal regulations.—Part of a river not within the territorial limits of a city, though part of its harbor, is not affected by a rule of navigation for the harbor ordained by the city, under the authority of this section. Elcoate *v.* Plymothian (D. C. 1894), 63 Fed. 631; decree modified, The Victory (1895), 68 Fed. 395, 15 C. C. A. 490.

A regulation of State harbor commissioners making it unlawful for a vessel to move at a greater speed than four miles per hour in the harbor governs the movements of a United States transport under this section. Southern Railway *v.* U. S. (1910), 45 Ct. Cl. 322.

1409. Distress signals.—When a vessel is in distress and requires assistance from other vessels or from the shore the following shall be the signals to be used or displayed by her, either together or separately, namely:

In the daytime—

First. A gun or other explosive signal fired at intervals of about a minute.

Second. The international code signal of distress indicated by N. C.

Third. The distance signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball.

Fourth. A continuous sounding with any fog-signal apparatus.

At night—

First. A gun or other explosive signal fired at intervals of about a minute.

Second. Flames on the vessel (as from a burning tar barrel, oil barrel, and so forth).

Third. Rockets or shells throwing stars of any color or description, fired one at a time, at short intervals.

Fourth. A continuous sounding with any fog-signal apparatus. *Art. 31, sec. 1, act of Aug. 19, 1890 (26 Stat. 328), as amended by act of May 28, 1894 (28 Stat. 82).*

1410. Observance of regulations for rivers, harbors, and inland waters.—That the following regulations for preventing collision shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and are hereby declared special rules duly made by local authority: * * * *Sec. 1, act of June 7, 1897 (30 Stat. 96).*

That sections forty-two hundred and thirty-three and forty-four hundred and twelve (with the regulations made in pursuance thereof, except the rules and regulations for the government of pilots of steamers navigating the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and except the rules for the Great Lakes and their connecting and tributary waters as far east as Montreal), and forty-four hundred and thirteen of the Revised Statutes of the United States, and chapter two hundred and two of the laws of eighteen hundred and ninety-three, and sections one and three of chapter one hundred and two of the laws of eighteen hundred and ninety-five, and sections five, twelve, and thirteen of the Act approved March third, eighteen hundred and ninety-seven, entitled "An Act to amend the laws relating to navigation," and all amendments thereto, are hereby repealed so far as the harbors, rivers, and inland waters foresaid (except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico, and their tributaries) are concerned. *Sec. 5, act of June 7, 1897 (30 Stat. 103).*

See "Historical Note" at the head of this chapter.

Notes of Decisions.

For decisions prior to enactment of rules see 1470, post.

Local customs.—A local custom can not prevail against a statutory rule of navigation. Palmer v. New York & L. C. Transp. Co. (1854), 76 Hun, 181, 27 N. Y. Supp. 561.

Vessels subject to rules.—Ferryboats must observe the usual rules of navigation when not so near their slips that observance of such rules will occasion embarrassment in entering. The Baltimore (D. C. 1888), 34 Fed. 660.

Right to rely on obedience to rules by other vessel.—An approaching vessel in a situation of danger has a right to expect that other vessels will move according to the rules governing them in their relative positions. The Golden Rod (D. C. 1912), 194 Fed. 515.

Waters within municipal limits.—The rights granted to the town of Huntington, on Long Island, so far as relates to navigable waters within the town, were subject to the general sovereignty and jurisdiction of the government under which the town existed, to which general jurisdiction the State of New York and the United States have legally succeeded, and the laws of the United States regulating navigation are applicable to and binding on all craft on that portion of Great South Bay within the town, the same as upon vessels on navigable waters elsewhere. The Stella B. (D. C. 1910), 183 Fed. 507.

Enforcement of rules by State courts.—The common law courts of a State should give the navigation rules the same construction as they are given by the Federal courts sitting in admiralty, and given the force of binding enactments, not mere prudential regulations. Chesley v. Nantasket Beach Steamboat Co. (1901), 179 Mass., 469, 61 N. E. 50.

The State courts are required to take judicial notice of and to enforce the general statutes of Congress regulating navigation, without any formal proof, even if the point be not urged by counsel. Carlin v. New York, N. H. & H. R. Co. (1911), 130 N. Y. Supp. 828, 71 Misc. Rep. 521.

Effect of violation of rules.—Where one vessel is clearly proven in fault, the other is not to be held guilty on mere presumptions or suggestions arising from the fact that a collision occurred. The D. H. Miller (1890), 76 Fed. 877, 22 C. C. A. 597, applying The Oregon (1895), 15 Sup. Ct. 804, 158 U. S. 186, 39 L. Ed. 943.

When a vessel has committed a positive breach of statute, she must show, not only that her fault probably did not contribute

to the disaster, but that it could not have done so. The Ludvig Holberg (1895), 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620, affirming decree (C. C. 1890), 43 Fed. 117. [C. S. p. 8330.]

A vessel whose violation of the rules was sufficient to account for a collision can not escape liability by casting doubt on the navigation of the other vessel, but in order to hold her liable in whole or in part must clearly prove her negligence. Pierce *v.* The J. R. P. Moore (D. C. 1890), 45 Fed. 267. [C. S. p. 8331.]

Where a vessel has violated a known rule of navigation, and that violation of duty may have contributed to the disaster, the burden is on her to prove that such fault did not contribute to the collision. The Clara (1893), 55 Fed. 1021, 1023, 5 C. C. A. 390; Dougherty *v.* The Franconia (D. C. 1880), 3 Fed. 397; Blanchard *v.* New Jersey Steamboat Co. (1874), 59 N. Y. 292.

Where measures of precaution required by the rules have been neglected which would have rendered the collision less probable, it is no excuse that it could not have been prevented at the moment it occurred. Nelson *v.* The Goliah (D. C. 1868), Fed. Cas. No. 10,106.

1411. Sailing vessel, steam vessel, and under way defined.— * * * In the following rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel.

The word "steam-vessel" shall include any vessel propelled by machinery.

A vessel is "under way," within the meaning of these rules, when she is not at anchor, or made fast to the shore, or aground. * * * *Sec. 1, act of June 7, 1897 (30 Stat. 96).*

Notes of Decisions.

Boats in tow, exclusively under the control of a steam tug, are to be considered vessels under steam. The Pennsylvania (D. C. 1869), Fed. Cas. No. 10,946.

Every vessel propelled by machinery is considered a "steam vessel," within the meaning of the navigation rules. The Nimrod (D. C. 1909), 173 Fed. 520.

Vessel under way.—A bark and tug on the anchorage grounds while the bark was weighing her anchor, but had not yet raised it from the ground, and the tug was merely holding the bark against the tide, were not under way. The Aller (1896), 73 Fed. 875, 20 C. C. A. 79, affirming (D. C. 1893), 59 Fed. 491.

A steam vessel lying with her nose against the bank of a stream, and holding her position against the current by the movement of her wheel, is a vessel "under way" and not entitled to the rights of an anchored vessel. The Ruth (1911), 186 Fed. 87, 108 C. C. A. 199, affirming decree (D. C. 1910), 178 Fed. 749.

A vessel, although her headway is killed in the water, is considered "under way," and subject to the navigation rules, unless she is at anchor or tied to the shore, or aground. The Nimrod (D. C. 1909), 173 Fed. 520.

A vessel whose engines have been stopped and reversed to check her headway, preliminary to making an anchorage, and who had lost her steerage way, and was not under command of her helm, and who just prior to a collision had started her engine working astern, and had just commenced to make sternway, was a vessel under way. The Kaga Maru (D. C. 1903), 123 Fed. 139, 144.

A vessel engaged in making fast to tows is "under way." The George W. Elder (D. C. 1913), 203 Fed. 523.

1412. "Visible" defined.— * * * The word "visible" in these rules, when applied to lights, shall mean visible on a dark night with a clear atmosphere. * * * *Sec. 1, act of June 7, 1897 (30 Stat. 96).*

Notes of Decisions.

Burden of proof as to lights.—In a case of collision the libelant must show, by a preponderance of the evidence, that a necessary light was set and burning. Philadelphia & R. Ry. Co. *v.* River & Harbor Imp. Co. (1910), 183 Fed. 109, 105 C. C. A. 401, reversing decree River & Harbor Improvement Co. *v.* Philadelphia & R. Ry Co. (D. C. 1910), 180 Fed. 954; Middlesex Quarry Co. *v.* The Albert Mason (D. C. 1880), 2 Fed. 821.

The burden of proof is on the vessel whose lights are attacked to show by clear proof that her lights were properly placed and burning at and just before the collision. The Conoho (D. C. 1885), 24 Fed. 758.

Weight of evidence as to lights.—Where there is great conflict of evidence as to

lights being visible, the contemporaneous evidence afforded by the acts of those in charge of vessels, who, looking for colored lights, can see none, and maneuver their vessels accordingly, is entitled to great weight. The Amboy (D. C. 1884), 22 Fed. 555.

Where competent officers are in their places attentive to their duties, and navigating their vessel in accordance with what can be seen, their testimony that a light was not perceived, which must have been seen if properly burning, is entitled to superior credit, if not outweighed by other circumstances. The Westfield (D. C. 1889), 38 Fed. 366.

The failure of those in charge of one of two vessels to see or observe the lights of the other prior to collision does not disprove their existence; and can not be accepted to outweigh the positive testimony of the officers and crew of the other vessel that the lights were properly set, and were seen to be burning up to within five minutes before the collison, and, where it is shown that a vessel was equipped with lamps of an approved style, bought from a reputable dealer, the court will be slow to find that they were inefficient, or that those navigating the vessel failed to light and keep them burning on a dark and stormy night, when they were sailing in a locality where there was a probability of encountering other vessels. The Richmond (D. C. 1902), 114 Fed. 208.

The testimony of the men engaged in navigating a schooner, which was sunk by collision with a tug at night, that the schooner's side lights were burning, is not weakened by the fact that they also testify that they looked at the lights after the tug was seen approaching, such act being a natural one with careful navigators; and their positive testimony to the fact will outweigh the negative testimony of those navigating the tug that they did not see the schooner's lights, especially where their position on the tug was not a favorable one for the purpose. Brigham v. Luckenbach (D. C. 1905), 140 Fed. 322.

Subsequent experiments.—Testimony in regard to experiments to determine the position of a vessel's lights, and whether they could have been seen by the officers and crew as claimed, when the vessel was in a shattered condition from a collision, or after she had been rebuilt and materially changed, is not entitled to great weight, especially where the experiments were made by the adverse party without notice to the owners or crew, and when they were not present. The Richmond (D. C. 1902), 114 Fed. 208.

1413. Compliance with rules concerning lights.—The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited. *Art. 1, sec. 1, act of June 7, 1897 (30 Stat. 96).*

Notes of Decisions.

Absence of lights after sundown.—The absence of lights on a canal boat just after sundown, when they would not have afforded any aid in discovering her, is not a fault. The Tillie (C. C. 1876), Fed. Cas. No. 14,049.

Evidence held to show that it was so dark, half an hour after sunset, as to render a tug in fault for not carrying the statute lights, on account of which an approaching steamer misjudged the tug's course. The Pleasant Valley (D. C. 1874), Fed. Cas. No. 11,236.

Where there was no darkness sufficient to prevent an approaching vessel from seeing a vessel in tow of a tug, failure of the tug to carry lights showing that she had a tow was not a fault causing the collision. The City of Troy (D. C. 1878), Fed. Cas. No. 2,769.

Strict compliance with statutory requirements. The rule requiring lights may as well be disregarded altogether as to be only partially complied with, and in a way which fails to be of any real service in indicating to other vessels the position and course of the one carrying them. The Titan (C. C. 1885), 23 Fed. 413.

Change of position of lights.—The law forbids the carrying of any other signal lights than those mentioned and forbids, by necessary implication, any change in the position of the lights it provides for. The Manhasset (D. C. 1888), 34 Fed. 420.

Vessel held in fault for exhibiting improper lights.—Schooner showing flash and white stern lights which were mistaken for those of a pilot boat. Perry v. The Neasmore (C. C. 1892), 50 Fed. 616, modifying (D. C. 1890) 41 Fed. 437.

A vessel showing only a white light, mistaken for a vessel at anchor. The Conoho (D. C. 1885), 24 Fed. 758.

A schooner carrying a white light and no green side light, which was mistaken for a vessel being overtaken. The Excelsior

(C. C. 1889), 39 Fed. 393, affirming (D. C. 1887) 33 Fed. 554.

A dredge carrying a light in her bow in addition to her masthead light. The Arthur (D. C. 1901), 108 Fed. 557.

Effect of failure to exhibit required lights.—The want of proper lights is immaterial where their absence did not occasion or contribute to the disaster. The Northern Warrior (D. C. 1870), Fed. Cas. No. 10,325.

A vessel's failure to comply with statutory regulations for preventing collision, such as the law prescribing lights, is not a bar to a recovery for a collision. At most it only raises a presumption of negligence, and the question is for the jury. Hoffman *v.* Union Ferry Co. (1872), 47 N. Y. 176, 7 Am. Rep. 435; Id. (1877), 68 N. Y. 385.

The want of proper lights upon the injured vessel will not prevent a recovery if the persons in charge of the other vessel knew the true state of the facts, and with reasonable care could have avoided the collision. Silliman *v.* Lewis (1872), 49 N. Y. 379.

1414. Lights of steam-vessels under way.—A steam-vessel when under way shall carry—

(a) On or in front of the foremast, or, if a vessel without a foremast, then in the fore part of the vessel, a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A sea-going steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a).

These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

(f) All steam-vessels (except sea-going vessels and ferry-boats), shall carry in addition to green and red lights required by article two (b), (c), and screens as required by article two (d), a central range of two white lights; the after-light being carried at an elevation at least fifteen feet above the light at the head of the vessel. The head-light shall be so constructed as to show an unbroken light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after-light so as to show all around the horizon. *Art. 2, sec. 1, act of June 7, 1897 (30 Stat. 96).*

Notes of Decisions.

Range lights of coasting steamers.—A coasting steamer not rigged for sails, which navigates narrow channels, is in fault in not carrying the central range of two white lights required by the rules, and in showing instead a single white masthead light. In narrow channels and rivers this range of lights is essential in order to in-

...steer her course accurately to approach ... The Cepolo (D. C. 1885), 24 ... C. 748.

Obstruction of lights. A tug is bound to ... her colored lights in such a position ... at her tow will not obscure them, as ... vessels ... at a distance requiring the ... with the colored lights are designed ... afford, and is in fault for failure to do ... Port of Portland v. U. S., 219 U. S. 121, 176 ... 806, [on] C. C. A. 336, affirming (D. C. ... 1085), 161 Fed. 193; Marshall v. The Conway (D. C. 1880), 2 Fed. 785. [C. S. p. 3314.]

This section is not complied with when a ... voluntarily puts herself in a situation in which her lights will continue for ... time to be covered over a considerable part ... of the arc in which other vessels are liable ... to see them. The Scotsman (D. C. 1880), 4 Fed. 68.

A tug which had placed herself on the ... side of a large car float in stress of ... weather, long forced thereby to leave a ... wharf and attempt to reach another, in ... which position the colored lights of the tug ... were hid from a ferryboat, approaching ... from the other side, by the intervening ... mass, was not, under the circumstances, negligent. The Manhasset (D. C. 1888), 34 Fed. 108.

Side lights carried on the after turret of a ... vessel of considerably inboard so that the light from them was broken by a vessel ... mid-ships and fore rigging and by the ... sail loads do not comply with the ... statute. Carleton v. U. S. (1874), 10 Ct. Cl. 485.

Effect of failure to have lights properly burning. The omission of one vessel to comply with the requirements as to lights will not excuse a vessel approaching it from the exercise of all due and reasonable care to prevent a collision. The Continental (1874), 11 Wall. 345, 358, 20 L. Ed. 801, reversing (C. C. 1870), Fed. Cas. No. 3,141.

Where the red light of a tug disappeared from the view of a ferryboat which had the tug on its starboard hand, the ferryboat was not in fault for not avoiding the tug. Ronan v. The Orange (D. C. 1891), 46 Fed. 411.

Noncompliance by a vessel with the provisions of the navigation laws in regard to lights is negligence which will defeat a recovery for injuries to it from a collision with another vessel, if the absence of the proper lights in any way contributed to the injury; but, where the evidence tends to show that the collision resulted solely from other causes, the question of contributory negligence becomes one of fact. Whitehall Transp. Co. v. New Jersey Steamboat Co. (1873), 51 N. Y. 369.

Presumptions and burden of proof.—A vessel having the right of way in the nighttime, and not having the statute lights, is presumed to be in fault in respect to a collision with a vessel that should have seen her and given way. The American Eagle (D. C. 1870), Fed. Cas. No. 301, and the burden is on the vessel which failed to carry the proper lights to show the other might, nevertheless, by ordinary care and skill, have avoided the collision. The Continental (C. C. 1870), Fed. Cas. No. 3,141.

In an action for injury by a steamer to a schooner, where the only proof was that the collision occurred on a dark night, and the defendant demurred to the plaintiff's evidence, but produced none himself, the presumption was that the steamer had complied with the law requiring her to keep certain lights on board, though, had defendant introduced evidence, and then failed to prove that the lights and lookout were kept in their place, it might have reasonably been inferred that they were not so kept. Union S. S. Co. v. Nottingham (Va. 1866), 17 Grat. 115, 91 Am. Dec. 378.

1415. Lights of a steam vessel towing another vessel. A steam vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than three feet apart, and when towing more than one vessel shall carry an additional bright white light three feet above or below such lights, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a) or the after range light mentioned in article two (f).

Such steam vessel may carry a small white light abaft the funnel or after-mast for the towed vessel to steer by, but such light shall not be visible forward of the beam. (*Art. 3, sec. 1, act of June 7, 1897 (30 Stat. 97).*

Sec. 1 act of June 7, 1897, above, contains no art. 4.

Notes of Decisions.

Position of lights.—Where a tugboat has no foremast on which to carry the required lights, she must carry them in some other manner so as to meet the requirements of visibility. The Jesse Williamson, Jr. (C. C. 1879), Fed. Cas. No 7,296.

A tug with tows in the night in a harbor did not comply with this article, where, although having two towing lights, they were suspended from either end of a horizontal crosspiece on the flagstaff, about a yard in length, and such failure to observe the rule was a serious fault, which renders the tug liable for damage caused by a collision between her tow and another vessel. Foster *v.* Merchants' & Miners' Transp. Co. (D. C. 1905), 134 Fed. 964.

Usage contrary to statute.—An alleged usage of tugs to carry the two vertical towing lights when not towing would not justify a ferryboat in assuming that a tug carrying such lights had no tow. Lehigh Val. Coal Co. *v.* The Senator D. C. Chase and The Commodore Perry (D. C. 1890), 46 Fed. 874.

Effect of failure to carry proper towing lights.—A tug with tows carrying but one vertical light will be held in fault without speculating whether the absence of the proper light increased the danger of collision. Elliott *v.* The Volunteer (C. C. 1870), Fed. Cas. No. 4,398.

1416. Lights of sailing vessels under way or being towed.—A sailing-vessel under way or being towed shall carry the same lights as are prescribed by article two for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry. *Art. 5, sec. 1, act of June 7, 1897 (30 Stat. 97).*

Notes of Decisions.

Vessels required to carry lights.—Barges that have neither sails nor masts are not "sail vessels," within this article. U. S. *v.* Miller (D. C. 1886), 26 Fed. 95.

Lights hidden by sails.—If one of the lights of a sailing vessel is so obscured by her sails as to mislead an approaching steamer, and a collision ensues, the sailing vessel is in fault. The Vesper (D. C. 1881), 9 Fed. 569.

Lights of sailing vessel in tow.—Rule 11 of the pilot rules, relating to the lights to be carried by barges and canal boats when towed alongside, does not apply to sailing vessels, which are governed by this article. The Merrill C. Hart (1911), 188 Fed. 49, 110 C. C. A. 187, affirming decree (D. C. 1908), 162 Fed. 371.

Car float in tow.—Since a car float is not required by the rules of navigation to carry any light, one which was rigged with colored lights, but was being towed backward under the necessities of the occasion, thereby hiding her colored lights, and which had a white light on the end which was moving forward, was not, under the circumstances of the case, guilty of negligence in the matter of lights. The Manhasset (D. C. 1888), 34 Fed. 408.

Lights burning only dimly.—Suffering her red and green lights to become so obscured by oil and smoke as not to be distinguishable other than as colorless lights, so that an approaching steamer is misled thereby, is a fault which will render a sailing vessel liable for resulting collision. The Narragansett (C. C. 1881), 11 Fed. 918.

1417. Lights of a small vessel under way in bad weather.—Whenever, as in the case of vessels of less than ten gross tons under way during bad weather, the green and red side-lights can not be fixed, these lights shall be kept at hand, lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens. *Art. 6, sec. 1, act of June 7, 1897 (30 Stat. 97).*

1418. Lights of rowboats.—Rowing boats, whether under oars or sail, shall have ready at hand a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision. *Art. 7, sec. 1, act of June 7, 1897 (30 Stat. 98).*

1419. Lights of pilot vessels.—Pilot-vessels when engaged on their station on pilotage duty shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side nor the red light on the starboard side.

A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the mast-head, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot-vessels, when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage. *Art. 8, sec. 1, act of June 7, 1897 (30 Stat. 98).*

Additional lights for steam pilot-vessels were prescribed by sec. 1, act of Feb. 19, 1900 (31 Stat. 30). Sec. 2 of said act of Feb. 19, 1900, ante, 1385, provided that sec. 1 thereof should be supplementary to both this article and art. 8, sec. 1, of act of Aug. 19, 1890, ante, 1384.

Notes of Decisions.

Pilot boat at anchor.—This article applies to sailing pilot vessels when under way and not to pilot boats when lying at anchor. | The Wanata v. Avery (1877), 95 U. S. 699, 669, 24 L. Ed. 461.

1420. Lights of fishing vessels, rafts, etc.—(a) Fishing-vessels of less than ten gross tons, when under way and when not having their nets, trawls, dredges, or lines in the water, shall not be required to carry the colored side-lights; but every such vessel shall, in lieu thereof, have ready at hand a lantern with a green glass on one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

(b) All fishing-vessels and fishing-boats of ten gross tons or upward, when under way and when not having their nets, trawls, dredges, or lines in the water, shall carry and show the same lights as other vessels under way.

(c) All vessels, when trawling, dredging, or fishing with any kind of drag nets or lines, shall exhibit, from some part of the vessel where they can be best seen, two lights. One of these lights shall be red and the other shall be white. The red light shall be above the white light, and shall be at a vertical distance from it of not less than six feet and not more than twelve feet; and the horizontal distance between them, if any, shall not be more than ten feet. These two lights shall be of such a character and so placed in lanterns of such construction as to be visible all round the horizon, the white light a distance of not less than three miles and the red light of not less than two miles.

(d) Rafts, or other water craft not herein provided for navigating by sail power, horse power, or by the current of the river, shall carry one of these red

white lights, which shall be placed in such manner as shall be prescribed by the Board of Supervising Inspectors of Steam Vessels. *Art. 9, sec. 1, act of June 7, 1897 (30 Stat. 98).*

Notes of Decisions.

Scow belonging to dredge.—Clause (d) of this article and the inspectors' rules made thereunder for Atlantic and Pacific coast inland waters apply to a scow forming part of the equipment of a dredge engaged in deepening the channel of the river and bay of Mobile, and being used in the channel at night. National Dredging Co. *v.* Monsen (1903), 126 Fed. 930, 61 C. C. A. 460; writ of certiorari denied, Monsen *v.* National Dredging Co. (1904), 24 Sup. Ct. 851, 193 U. S. 669, 48 L. Ed. 840.

Wrecking vessels.—Two wrecking vessels anchored over a wreck, if governed by this section, should have exhibited only one light, or, if they exhibit two, they should have been similarly placed, not one higher than the other. The Austin (D. C. 1868), Fed. Cas. No. 663.

1421. Lights of vessels being overtaken.—A vessel which is being overtaken by another, except a steam vessel with an after range-light showing all around the horizon, shall show from her stern to such last-mentioned vessel a white light or a flare-up light. *Art. 10, sec. 1, act of June 7, 1897 (30 Stat. 98).*

Notes of Decisions.

Excuse for failure to exhibit light.—Where the sailing vessel injured, owing to a sudden and unexpected change in the colliding steamer's course, had no time to show a light, and where the steamer, had it had a sufficient lookout, might have avoided the collision, the latter can not claim a division of damages. The Hypodame (1867), 73 U. S. (6 Wall.) 216, 18 L. Ed. 794.

1422. Lights of vessels at anchor.—A vessel under one hundred and fifty feet in length when at anchor shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile.

A vessel of one hundred and fifty feet or upwards in length when at anchor shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry. *Art. 11, sec. 1, act of June 7, 1897 (30 Stat. 98).*

Notes of Decisions.

Necessity for carrying anchor light.—A schooner anchored near the navigable part of a river or where vessels are frequently passing, and navigation is difficult is bound to maintain the usual anchor light, and will be in fault, in case of collision, by her neglect to do so. The Isaac Bell (D. C. 1881), 9 Fed. 842; The Henry Warner (D. C. 1886), 29 Fed. 601.

A dredge lawfully fixed in a channel for improving it is to be considered as a vessel at anchor, and is under obligation to use the same precautions to guard against collisions that a vessel at anchor is in respect to the exhibition of lights. The Bailey Gatzert (1910), 179 Fed. 44, 102 C. C. A. 612, affirming decree (D. C. 1909), 170 Fed. 101.

A steam launch made fast to a boom projecting 60 feet from the side of a man of war need not exhibit a light. The Dimitri Donskoi (D. C. 1894), 60 Fed. 111.

"Fairway."—A "fairway," in the sense of this article, is navigable water on which vessels of commerce habitually move. As to vessels of light draught, it embraces water inside of buoys, where sail vessels of light draught usually navigate, and not merely the ship channel. The Oliver (D. C. 1885), 22 Fed. 848.

Vessel aground.—A vessel aground is in circumstances similar to a vessel at anchor, and a steamer aground should exhibit the signal light required of steamers at anchor. The Ant (D. C. 1882), 10 Fed. 294.

Additional precautions.—On an ordinarily clear night, the maintaining of a proper anchor light is the only precaution to warn other vessels of her presence that

an anchored vessel need take. The Oregon (1895), 15 Sup. Ct. 804, 811, 158 U. S. 186, 39 L. Ed. 943.

Strict observance of requirement.—The failure to display the exact statutory light by a vessel at anchor is not sufficient contributory negligence to prevent recovery of damages for a collision occasioned by the reckless navigation of another vessel. The Scottish Bride v. The Anthony Kelly (C. C. 1871), Fed. Cas. No. 12,551.

This article is imperative and must be effectively obeyed. The Oliver (D. C. 1885), 22 Fed. 848, 851.

An anchored barge, which was run into by a steamer shortly after act of Feb. 19, 1895, prescribing one anchor light instead of two, will not be held in fault for having two lights, when the steamer saw only one, and therefore could not have been misled by the other. Phinney v. The Le Lion (D. C. 1898), 84 Fed. 1011.

The provision of this article which requires a vessel of 150 feet or upwards in length when at anchor to carry two lights, one at the forward part and the other at or near the stern at a lower height, to indicate the length of the vessel and the direction in which she is pointing is of great importance and must be strictly observed, and, if violated, a loss caused by a collision resulting must be borne by the vessel so violating it. The Santiago (D. C. 1908), 160 Fed. 742.

Proper lights for certain vessels.—Two wrecking vessels anchored over wreck, if governed by this section, should have exhibited only one light, or, if they exhibited two, they should have been similarly placed, not one higher than the other. The Austin (D. C. 1868), Fed. Cas. No. 663.

A steamer, though with a tow, should exhibit the single light required by the tenth rule when either at anchor or aground. The Ant (D. C. 1882), 10 Fed. 294, 301.

But see 1443, post, and notes.

Position of light.—In this article the word "hull" includes the forecastle deck. The Europe (1911), 190 Fed. 475, 111 C. C. A. 307, affirming (D. C. 1909), 173 596.

A schooner at anchor is in fault where her light is in such position that it is hidden from view by her sails. The City of New York (C. C. 1871), Fed. Cas. No. 2,759.

Weight of evidence.—Evidence that a light was hung in the rigging of an anchored schooner at dark, and that it was burning 20 or 30 minutes before she was struck and sunk by a passing steamer at about 11 o'clock, is not sufficient to establish that it was burning at the time of the collision, against the positive testimony of the lookout and two officers of the steamer, who were at the wheel and in good position to see, all of whom testified that there was no light on the schooner, and she was not seen until they were within 200 feet. The John H. Starin (1903), 122 Fed. 236, 58 C. C. A. 600, reversing decree (D. C. 1902), 113 Fed. 419; and writ of certiorari denied, Gurney v. The John H. Starin (1903), 23 Sup. Ct. 854, 190 U. S. 559, 47 L. Ed. 1,184.

Testimony that a light was set on a scow anchored in the Delaware river at night, that it was burning five hours before the scow was struck by a tug, and also four hours afterward, held not sufficient to establish the fact that it was burning at the time of collision against the positive testimony of the master of the tug, who was at the wheel, the lookout, who was apparently attentive to his duties, and two other hands, that there was no light on the scow at the time of the collision, nor when they passed her again two hours later, and therefore insufficient to establish the fault of the tug for the collision. Philadelphia & R. Ry. Co. v. River & Harbor Imp. Co. (1910), 183 Fed. 109, 105 C. C. A. 401, reversing decree River & Harbor Improvement Co. v. Philadelphia & R. Ry. Co. (D. C. 1910), 180 Fed. 954.

Collision between vessel with proper anchor light and moving vessel.—A tug is solely in fault for a collision in the night with a dump scow anchored in a proper place and displaying a proper anchor light. River & Harbor Improvement Co. v. Philadelphia & R. Ry. Co. (D. C. 1910), 180 Fed. 954; decree reversed, Philadelphia & R. Ry. Co. v. River & Harbor Improvement Co. (1910), 183 Fed. 109, 105 C. C. A. 401.

A steamship which came into collision with an anchored scow and pile driver which were being used in the construction of a Government beacon was solely in fault in the absence of clear proof that the lights on the scows were improperly placed and misled her. The Raithmoor (D. C. 1911), 186 Fed. 849.

Effect of failure to carry light. A vessel is not liable to seizure for failure to exhibit a light while at anchor at night, where its light was accidentally extinguished only for a short time, and without negligence of the owners. The Eclipse (D. C. 1878), Fed. Cas. No. 4,269.

An approaching vessel which sees only a white light on the other vessel, and regulates her movements on the assumption that such vessel is at anchor, is not in fault in case of collision, but the other vessel is solely liable. The Conoho (D. C. 1885), 24 Fed. 758.

Where a steamboat is pursuing her usual course, at her usual speed, by night, in ordinary weather, and runs into a vessel lying at anchor without an anchor light, the steamboat is not liable, if she reversed as soon as the other was visible. The Westfield (D. C. 1889), 38 Fed. 366.

The fact that the riding lights of a vessel at anchor were not at the exact height prescribed by the rules will not render her liable for a collision where the lights were clearly visible for the required distance, and the failure of the moving vessel to see them was due solely to the negligence of her navigators. The Europe (1911), 190 Fed. 475, 111 C. C. A. 307, affirming (D. C. 1909), 175 Fed. 576.

1423. Additional flare-up light or detonating signal.—Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that can not be mistaken for a distress signal. *Art. 12, sec. 1, act of June 7, 1897 (30 Stat. 99).*

Notes of Decisions.

Necessity of displaying a flare-up.—A vessel at anchor in the night time seeing the lights of an approaching vessel, and having no reason to suppose that her own lights, properly set and burning brightly, can not be seen, need not display a torch. The Oregon (1895), 15 Sup. Ct. 804, 811, 158 U. S. 186, 39 L. Ed. 943; Engstrom v. The Howard B. Peck (D. C. 1891), 48 Fed. 334.

1424. Lights of ships of war and convoys, and owners' signals.—Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by shipowners, which have been authorized by their respective Governments, and duly registered and published. *Art. 13, sec. 1, act of June 7, 1897 (30 Stat. 99).*

1425. Black ball for steam vessel under sail.—A steam-vessel proceeding under sail only, but having her funnel up, may carry in daytime, forward, where it can best be seen, one black ball or shape two feet in diameter. *Art. 14, sec. 1, act of June 7, 1897 (30 Stat. 99).*

1426. Sound signals for fog or bad weather.—All signals prescribed by this article for vessels under way shall be given:

1. By "steam-vessels" on the whistle or siren.

2. By "sailing-vessels" and "vessels towed" on the fog horn.

The words "prolonged blast" used in this article shall mean a blast of from four to six seconds duration.

A steam-vessel shall be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn; also with an efficient bell.

A sailing-vessel of twenty tons gross tonnage or upward shall be provided with a similar fog horn and bell.

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely:

(a) A steam-vessel under way shall sound, at intervals of not more than one minute, a prolonged blast.

(c) A sailing-vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, one blast; when on the port tack, two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

(d) A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds.

(e) A steam-vessel when towing, shall, instead of the signals prescribed in subdivision (a) of this article, at intervals of not more than one minute, sound three blasts in succession, namely, one prolonged blast followed by two short blasts.

A vessel towed may give this signal and she shall not give any other.

(f) All rafts or other water craft, not herein provided for, navigating by hand power, horse power, or by the current of the river, shall sound a blast of the fog horn, or equivalent signal, at intervals of not more than one minute. *Act. 15, sec. 1, act of June 7, 1897 (30 Stat. 99).*

Notes of Decisions.

Necessity for sounding fog signals.—In fog or thick weather a vessel at anchor is bound to ring a bell; but on an ordinarily clear night with no immediate danger impending a proper anchor light supplies every needful precaution. The Oregon (1895), 15 Sup. Ct. 804, 811, 158 U. S. 186, 39 L. Ed. 943.

No fog signals need be sounded from canal boats forming a large tow. The John E. Berwind (1891), 49 Fed. 956, 1 C. C. A. 483, reversing The James Berwind (D. C. 1891), 44 Fed. 693.

A dredge provided with a steam whistle, and knowing that the tug which had her in tow was not sounding proper towing signals, should sound her own whistle. The City of Alexandria (D. C. 1887), 31 Fed. 427.

A tug which tows a bark on a long hawser astern in fog should indicate the presence of her tow astern by signals. The Ludwig Holberg (D. C. 1888), 36 Fed. 914; The Whitney (D. C. 1897), 77 Fed. 1001.

Vessels entering in the night a thick smoke should sound fog signals, and are in fault for failure to do so where, though they could not see the smoke, its presence, when the wind was from that direction, was known to all navigators. The Archey and The Gracie (D. C. 1900), 106 Fed. 984, decree affirmed (1901), 105 Fed. 985, 46 C. C. A. 67.

Tows. A tow of canal boats is not required to sound fog signals in a fog. If any signal is required from it as a matter of prudence, it belongs to the tug to see that it is given. Hutchins v. Pennsylvania R. Co. (D. C. 1899), 93 Fed. 510.

Moored vessels. A vessel moored at a dock in a fog is not required to sound fog signals. The P. R. R. No. 5 (1910), 181 Fed. 894, 104 C. C. A. 343; The Albany (D. C. 1900), 91 Fed. 805; Wright & Cobb Lighterage Co. v. New England Nav. Co. (D. C. 1913), 189 Fed. 809, decree affirmed (C. C. A. 1913), 204 Fed. 762.

A tug which tied up for the night in a dense fog, with her tow of eight boats, at the end of a pier in North River, where they lay without giving any signals to warn other vessels of their presence, held solely in fault for a collision between one of her tows and a fireboat passing in response to an alarm. New York, O. & W. Ry. Co. v. Cornell Steamboat Co. (1911), 193 Fed. 380, 113 C. C. A. 306.

A barge tied up at the end of a pier during a fog should sound some kind of signals to warn vessels of her presence. The Jersey Central (1915), 221 Fed. 625, 137 C. C. A. 349.

A vessel moored for the night, according to her custom, alongside a well known dock, and not projecting beyond the wharf into the channel, and run into by a steamer passing in the fog, is not in fault because she had no lights set and sounded no signals. City of New York v. The Express (D. C. 1891), 48 Fed. 323; decree affirmed, The Express (1893), 61 Fed. 513, 9 C. C. A. 598.

A tug which tied up to a breakwater during a fog should sound fog signals, especially when the signals of another tug were heard approaching. The McCaldin Brothers (D. C. 1902), 117 Fed. 779.

Waters in which signals must be sounded. The statutory rule requiring steam vessels under way in a fog to sound signals applies to all such vessels moving in waters which they have not the exclusive right to occupy, and in which other vessels may be met. The Princeton (1895), 67 Fed. 537, 14 C. C. A. 527, reversing (D. C. 1894), 61 Fed. 116.

A steam tug moving in a slip in a fog is not required to sound her steam whistles as a signal to a steamer moving outside. The Shady Side (C. C. 1879), Fed. Cas. No. 12,692.

Frequency of signals. Bells must be rung at shorter intervals than two minutes by vessels at anchor in crowded harbor in

dense fog. Brush *v.* The Plainfield (D. C. 1879), Fed. Cas. No. 2,058.

A bark at anchor in a fog so dense that objects could not be distinguished fifty feet away should ring her bell oftener than once every three or four minutes. The Ophelia (D. C. 1891), 44 Fed. 941.

Fog bell.—There is no statute nor harbor regulation fixing the size of the fog bell to be used on scows permanently anchored in New York Harbor, but the sufficiency of such bell is to be determined by the rule that reasonable care must be exercised in its selection, having reference to the locality and dangers to be encountered and the vessels to be warned. A bell seven inches in diameter and height, to be rung by hand, was insufficient on a scow stationed 850 feet off the piers in East River, in the track of steam vessels of all kinds. The Annex No. 5 (D. C. 1902), 117 Fed. 754.

Passing signals in fog.—Article 18, post, 1430, which requires steam vessels, when approaching each other end on or nearly so, to pass on the port side of each other, and to signify such intention by a short blast of the whistle, does not apply to vessels in a fog, unless they can see each other. The George F. Randolph (D. C. 1912), 200 Fed. 96.

Improper fog signals.—A steamer which runs through a dense fog with a whistle blowing so feebly and imperfectly that it gives no notice of her proximity to neighboring vessels, is at fault, and one of her crew, who has been injured in a collision with an approaching vessel not in fault, may recover of the steamer employing him, damages for such injury. The Luray (D. C. 1885), 24 Fed. 751.

It was not a fault for a schooner, when a steamer was in full view bearing down on her, to give several blasts on her foghorn to attract attention, instead of a single blast to indicate she was on the starboard tack, especially where the improper signals were not heard on the steamer. The Everett (D. C. 1910), 182 Fed. 702.

Effect of failure to sound fog signals.—A fisherman in a boat, anchored during a fog near the channel of an inlet, and making no signals, can not recover for collision with a steamer making proper signals. Chesley *v.* Nantasket Beach Steamboat Co. (1901), 61 N. E. 50, 179 Mass. 469.

In an action for injuries sustained while a passenger on defendant's ferry crossing East River, owing to a collision between the ferry and another vessel in a fog, the failure to sound the fog whistle of the ferry was prima facie negligence. Schlotterer *v.* New York & B. Ferry Co. (1902), 78 N. Y. S. 202, 75 App. Div. 330.

Evidence as to thickness of fog, etc.—On the question whether an anchored vessel was negligent in not ringing the fog bell during a snow, the fact that numerous other vessels anchored in the same vicinity were not ringing them is entitled to weight, as tending to show that the weather was not thick enough to require it. The Minnie (D. C. 1898), 87 Fed. 780.

1427. Speed of ships in fog and bad weather.—Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam-vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. *Art. 16, sec. 1, act of June 7, 1897 (30 Stat. 99).*

Notes of Decisions.

Purpose of rule.—The requirement that steamers in a fog go at moderate speed is not an arbitrary enactment, but a statutory recognition and application in a special case of the universal rule which requires prudence and caution under circumstances of danger, nor was the statute designed to sanction or permit an immoderate speed in sailing vessels where the circumstances demand cautious navigation. The act was doubtless passed with reference to steamers particularly on account of the special temptation to continue on at a high rate of speed and sacrifice sailing vessels to their own comparative immunity. The Rhode Island (D. C. 1883), 17 Fed. 554, 558.

What is moderate speed.—"Moderate speed" means moderated speed, reduced speed, less than usual speed. Clare *v.* Providence & S. S. Co. (C. C. 1884), 20 Fed. 535, 536.

Moderate speed is such speed as under existing conditions will enable her to stop before coming into collision with another vessel after the latter can be seen, assuming that the other vessel also observes the rule. The Cascade (D. C. 1910), 178 Fed. 726; judgment affirmed (1911), 190 Fed. 729, 111 C. C. A. 457.

A steam vessel in a dense fog is bound to observe unusual caution and to maintain only such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could see through the fog. The Bailey Gatzert (D. C. 1909), 170 Fed. 101; decree affirmed (1910), 179 Fed. 44, 102 C. C. A. 612.

Where two vessels were both under headway at the time of a collision between them in a fog, which occurred despite all efforts to avoid it after they became visible to each other, one or both must have been in fault for excessive speed. The No. 4 (1908), 161 Fed. 847, 88 C. C. A. 665.

Necessity for reducing speed.—Where the use of electric lights on a bridge has the effect of dazzling the eyes of pilots so that lights can not be distinguished, the space of water so illuminated should be passed over at moderate speed, as in cases of fog. The A. Demerest (D. C. 1886), 25 Fed. 921.

Necessity of anchoring or tying up.—There is no absolute rule that a vessel must lay to during a fog. Her duty in this respect is a question of prudence under the circumstances. Van Dyke v. The Bridgeport (D. C. 1888), 35 Fed. 159; Hoffman v. Union Ferry Co. (1877), 68 N. Y. 385.

That a ship put to sea in tow of a tug in a fog does not charge her with liability for a collision where it is not shown to have proximately contributed thereto. The Celtic Monarch (D. C. 1910), 175 Fed. 1,006.

A tug with tows on a hawser held not in fault for navigating near the Battery during a fog which had arisen since she started with her tow. The Port Johnson Towing Co. No. 7 (D. C. 1915), 229 Fed. 267.

Excuses for immoderate speed.—A steamer which enters a narrow thoroughfare in a dense fog, instead of waiting for the fog to lift, can not excuse herself for maintaining a dangerous rate of speed [illegible] the ground that it was necessary to maintain her steerage way and [illegible] The H. F. Dimock (1896), 77 Fed. 226, 23 C. C. A. 123.

Effect of excessive speed.—Fault can not be imputed to a steamer for previous speed in a fog, where shortly before collision she had been running "dead slow." The Ludvig Holberg (1875), 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620, affirming decree [illegible] 13 Fed. 117, 120; The [illegible] (D. C. 1910), 180 Fed. 863.

A steamer proceeding at an excessive speed in a fog must be held in fault for a collision in which she was injured, unless it is clearly shown that her speed could not have contributed thereto. The Yarmouth (D. C. 1900), 100 Fed. 667.

Speed held moderate.—Four and three-quarter miles an hour with the tide, which rate is barely sufficient for steerage way. The Luray (D. C. 1885), 24 Fed. 751.

Half speed, seven knots, in a snowstorm at night, when the lights of approaching vessels are visible one-third or one-half mile distant, within which distance the steamer is able to stop, back, or slacken speed so as to effectually avoid collision. The Alliance (D. C. 1889), 39 Fed. 476.

Four and one-half miles an hour in Mobile River in a dense fog. The James A. Carney (D. C. 1911), 192 Fed. 216; decree affirmed, Nelson v. Bay S. S. Co. (C. C. A. 1913), 203 Fed. 975.

Sailing vessel.—Six knots at edge of fog where schooner was reducing sail as she entered the dense fog. The Chelsea (D. C. 1905), 135 Fed. 616; decree affirmed (1906), 144 Fed. 1,021, 74 C. C. A. 680.

Speed held immoderate.—Such speed that the vessel could not stop or turn in time to avoid collision after the other could be seen. The Etruria (1906), 147 Fed. 216, 77 C. C. A. 442, reversing decree (D. C. 1905), 139 Fed. 925. [C. S. p. 8347.]

Three or four knots by the land against a strong flood tide in East River in a fog which prevented seeing more than 50 feet. The Bridgeport (C. C. 1870), Fed. Cas. No. 1,861.

Five or six knots by a tow with long hawsers in Upper New York Bay during a dense fog. The Matanzas (D. C. 1908), 166 Fed. 985; decree affirmed (1909), 170 Fed. 1020, 95 C. C. A. 671.

Five and one-third miles an hour in a dense fog, against the tide, in a narrow channel. The Luray (D. C. 1885), 24 Fed. 751.

Navigating with caution. Where a vessel stopped her engines on hearing the bell of an anchored vessel ahead in a dense fog, but on seeing one light concluded it was a small vessel, and increased her speed, colliding with the other, she was in fault. The Persian (1910), 181 Fed. 439, 104 C. C. A. 187, reversing decree (D. C. 1908), 159 Fed. 788.

The word "navigate" does not require that the vessels shall keep moving. The Plainfield (1913), 205 Fed. 73[illegible] 24 C. C. A. 24.

The duty to stop and navigate with caution is not limited to the hearing of fog signals, but applies when a vessel in a fog hears any signal indicating the proximity of a vessel forward of her beam. The Amagansett (1915), 220 Fed. 827, 136 C. C. A. 437.

A steamship which, after hearing the fog signal of a tug with tow and stopping, started ahead again before definitely locating the other, held in fault for the resulting collision. The Tillicum (D. C. 1914), 217 Fed. 976.

A tug, passing around the Battery and across the East River to Brooklyn after dark, in a fog, held solely in fault for a collision with the hawser tow of another tug on a crossing course in East River in the evening and in fog, where she assumed that the other tow was alongside, and navigated accordingly. The Port Johnson Towing Co. No. 7 (D. C. 1915), 229 Fed. 267.

In a fog the circumstances may require both vessels to stop, regardless of which has the other on her starboard side. Vernon v. International S. S. Co. (1914), 79 Wash. 22, 139 Pac. 645.

Deviation from course.—A steamer which deviates from her proper course, and continues at full speed in a fog, notwithstanding the known proximity of another vessel, as indicated by her fog horn, is guilty of fault in case of a collision between them. The Willamette (1895), 70 Fed. 874, 18 C. C. A. 366, affirming (D. C. 1894), 59 Fed. 797; decree modified (1895), 72 Fed. 79, 18 C. C. A. 373.

A steamship and a meeting schooner-rigged pilot boat both held in fault for a collision in a dense fog in the main ship channel entering New York Bay, for changing their courses after hearing each other's fog signals ahead. The Delaware (1914), 213 Fed. 214, 129 C. C. A. 558, reversing decree (D. C. 1913), 204 Fed. 996.

Navigating near ends of piers.—While a large steamship passing out from East River after 7 o'clock in the morning is not required to stop and anchor in the fairway because a dense fog closes in, it is her duty to navigate with great care, and not only to reduce speed, but also to keep sufficiently near the center of the river to avoid dangerous proximity to piers and ferry slips. The City of Lowell (1907), 152 Fed. 593, 81 C. C. A. 583, reversing decree (D. C. 1905) 139 Fed. 901.

While a vessel is not blamable in a dense fog at night, for going near to the piers and slips, she is bound to use a corresponding degree of caution, and ferryboats are bound to the same caution, and to use moderate speed in approaching and entering their slips. The Howard (D. C. 1887), 30 Fed. 280; Jenks v. The Midland (D. C. 1891), 48 Fed. 331.

It is the duty of a double-screw ferryboat which is unable to steer under slow headway operating in a fog, when known to be approaching a pier, where the presence of another vessel may reasonably be expected, to be under such control, as to speed, that she can stop in time to avoid a collision after approaching near enough so that the other vessel, if present, can be seen. The Cincinnati (D. C. 1899), 95 Fed. 302.

Mooring at pier end.—A vessel moored to a pier during a fog is not in fault in failing to give signals, nor because she used no stern line and her stern swung out somewhat from the pier, the slips adjacent not being used by ferryboats, and there being no occasion to expect vessels to enter, and it appearing from the course of the colliding vessel that the collision would not have been avoided had the other lain close to the end of the pier through her entire length. The Albany (D. C. 1898), 91 Fed. 805.

Effect of violation of rule.—The requirement of this article that "a steam vessel hearing apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over," is mandatory, and its violation creates a very strong presumption of fault, and casts upon the offender the burden of showing by clear testimony that his error did not contribute to an ensuing collision. The Georgic (D. C. 1910), 180 Fed. 863.

Question for jury in action at law.—In an action against a steamship company for damages caused by one of its vessels colliding with plaintiff's, held, under the evidence, a question for the jury whether defendant was negligent in not bringing its vessel to a stop until it could ascertain the location of plaintiff's. Vernon v. International S. S. Co. (1914), 79 Wash. 122, 139 P. 645.

1428. Ascertainment of risk of collision.— * * * Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist. * * * *Sec. 1, act of June 7, 1897 (30 Stat. 100).*

Notes of Decisions.

"Risk of collision" defined.—The term "risk of collision," has a different meaning from the phrase "immediate danger," and means "chance," "peril," "hazard," or "danger of collision"; and there is risk of collision whenever it is not clearly safe

to go on. The Philadelphia (D. C. 1912), 199 Fed. 299.

Time for precautions.—Precautions not reasonably taken furnish no defense to the charge of negligence, if the collision might have been prevented by earlier action. The Vanderbilt (1867), 73 U. S. (6 Wall.) 225, 18 L. Ed. 823; The Johnson (1869), 76 U. S. (9 Wall.) 146, 19 L. Ed. 610.

Precautions required by law to be taken when there is risk of collision must be taken in time to be effective against such risk, or they will constitute no defense to liability if collision occurs. The Westhall (D. C. 1899), 153 Fed. 1010.

Bearing of light remaining constant.—The fact that a green light seen off the port bow of a moving steamer did not change its bearing is sufficient to indicate that the other vessel was swinging across her course, so as to involve risk of collision, making it obligatory on the steamer to stop and reverse. The C. H. Seuff (D. C. 1887), 32 Fed. 237.

Time for determining rule applicable.—The rule of navigation applicable to approaching vessels depends upon the actual situation of the vessels at the time when the necessity for precaution begins. Everything prior to that is immaterial, except as it may give each some knowledge of the other's intention. The Aurania (D. C. 1886), 29 Fed. 98.

1429. Sailing-vessels approaching one another.—When two sailing-vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel. *Art. 17, sec. 1, act of June 7, 1897 (30 Stat. 100).*

Notes of Decisions.

Extent of burdened vessel's duty.—A change of course by the vessel sailing free to avoid one close-hauled does not relieve her from fault for a collision resulting from a change by the other vessel where she failed to watch the other and observe that the light did not broaden off after the change of course. Higgins v. The Gypsum Prince (D. C. 1893), 57 Fed. 859; decree reversed, The Gypsum Prince (1895), 67 Fed. 612, 14 C. C. A. 573.

Excuses for failure of burdened vessel to keep out of the way.—A sailing vessel will not be held in fault for a collision with a privileged vessel where all of her crew except the second mate were disabled by yellow fever, and he did all that could be done to avert the collision. The Southern Home (C. C. 1879), Fed. Cas. No. 13,187.

When a vessel is tacking and out of command, other sailing vessels must avoid her, regardless of whether they are sailing free or close-hauled. The A. G. Brooks (D. C. 1869), Fed. Cas. No. 98.

A vessel on the port tack, with hardly sufficient headway to give control, is yet in fault for colliding with one on the starboard tack, if the former could have gone clear by keeping strict watch and either going about or taking her boom on board. The Maud Webster (D. C. 1871), Fed. Cas. No. 9,303.

The burdened vessel is not in fault for a collision caused by a change of the privileged vessel's course after the other had taken proper precautions to keep out of the way. The Annie Lindsey (D. C. 1875), Fed. Cas. No. 422; affirmed (1881), 104 U. S. 185, 26 L. Ed. 716.

Where a vessel to leeward and ahead tacks across the bows of the other, too close for the latter to avoid the collision, she can not recover for her injuries, though after the tack she was privileged. The Alaska (D. C. 1874), Fed. Cas. No. 130.

When vessel is close-hauled. Vessels lying to are close-hauled and the one on the

port tack is bound to keep out of the way of the one on the starboard tack. The Mary Doane (D. C. 1875), Fed. Cas. No. 9,205.

Vessels sailing, one within seven points of the wind, and the other two points free, are neither close-hauled. The M. M. Chase (D. C. 1878), Fed. Cas. No. 9,684.

Presumptions and burden of proof.—In case of a collision between a vessel running free and one close-hauled, the former must show that all possible care and skill were used by her, and that the collision was the fault of the other vessel, or was inevitable. The Osseo (D. C. 1876), Fed. Cas. No. 10,607; reversed (C. C. 1879), Fed. Cas. No. 10,608.

Where a vessel having the right of way is injured by a collision, the burden of proof is upon the other vessel to show proper care; and if the testimony of her witness is contradicted, and is in conflict with the probabilities of the case, a decree will be entered against her. The Bessie Morris (D. C. 1882), 13 Fed. 397.

Where a collision happens between two sailing vessels, the one sailing close-hauled, the other with the wind free, the night being clear and the lights of both vessels seen, the legal presumption is prima facie that the fault was in the vessel sailing free. Carll *v.* The Erastus Wiman (D. C. 1884), 20 Fed. 245.

1430. Steam-vessels approaching one another.—Rule I. When steam-vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other.

But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.

The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own, and by night to cases in which each vessel is in such a position as to see both the side-lights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Rule III. If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle.

Rule V. Whenever a steam-vessel is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steam-vessel approaching from the opposite direction can not be seen for a distance of half a mile, such steam-vessel, when she shall have arrived within half a mile of such curve or bend, shall give a signal by one long blast of the steam-whistle, which signal shall be answered by a similar blast, given by any approaching steam-vessel that may be within hearing. Should such signal be so answered by a steam-vessel upon the farther side of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly.

When steam-vessels are moved from their docks or berths, and other boats are liable to pass from any direction toward them, they shall give the same signal as in the case of vessels meeting at a bend, but immediately after clearing the berths so as to be fully in sight they shall be governed by the steering and sailing rules.

Rule VIII. When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals.

The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.

Rule IX. The whistle signals provided in the rules under this article, for steam-vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each can be determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights. In fog, mist, falling snow or heavy rainstorms, when vessels can not so see each other, fog-signals only must be given. *Art 18, sec. 1, act of June 7, 1897 (30 Stat. 100–101).*

Notes of Decisions.

I. Vessels meeting end on (Rule I).
II. Vessels on crossing courses.
III. Alarm signals (Rule III).
IV. Signals on approaching bend (Rule V).
V. Signals on leaving dock (Rule V).
VI. Signals of overtaking vessel (Rule VIII).
VII. Signals in fog (Rule IX).

I. Vessels Meeting End On (Rule I).

Necessity for sounding signals.—A tug entering a harbor with four barges in tow, which took the left hand side of the channel, and when opposite a pier detached the first barge, and allowed it to proceed by its momentum toward the shore, across the course of an outgoing steamer, with which it came into collision, should have given a signal before attempting such maneuver. The Alabama (1903), 126 Fed. 332, 61 C. C. A. 238, modifying decree (D. C. 1902) 114 Fed. 214, and writ of certiorari denied, Grace v. McIlvaine (1904), 24 Sup. Ct. 851, 197 U. S. 559, 48 L. Ed. 840.

A vessel meeting two vessels which are substantially together, and which must necessarily both pass to the same side of her, may announce her intended course to both by one signal. Titus v. The James Bowen (D. C. 1892), 52 Fed. 510.

Determination of rule applicable.—The rules requiring whistles to be sounded are applicable rather to vessels meeting end on, or nearly end on; and the signals provided for are designed to apprise the other vessel of an intention to port or starboard, as the case may be. The Delaware (1896), 16 Sup. Ct. 516, 519, 161 U. S. 459, 40 L. Ed. 771.

Ascending and descending vessels approaching around a bend in a river where it was the custom for descending vessels to keep in the middle of the stream and for the ascending vessel to cross to the right bank to avoid the current are not meeting head on so as to render the rule for passing port to port applicable. The Esparta (1908), 160 Fed. 289, 87 C. C. A. 413.

Signals by stationary vessel.—An assenting response of two whistles, by a tug while stationary in the river making up her tow, to a previous signal of two whistles from another tug, imposes on the former no duty to move away to the left, and she is not liable for a collision, unless

fault in her management be proved. The William H. Payne (D. C. 1884), 20 Fed. 650; The George L. Garlick (D. C. 1884) Id. 647.

By vessel at anchor or aground.—A cross signal by a vessel known to have been aground does not authorize the conclusion that she is in motion so as to relieve the vessel colliding with her, from the presumption of negligence arising from the collision. The City of Macon (1903), 121 Fed. 686, 58 C. C. A. 434, affirming judgment (D. C. 1900), 100 Fed. 139, and writ of certiorari denied, Ocean S. S. Co. *v.* Crooks (1903), 23 Sup. Ct. 854, 190 U. S. 559, 47 L. Ed. 1,184.

Time for sounding signals.—Where two vessels under steam meeting end on neglect, until it is too late to avoid a collision, to comply with the rule requiring each to port her helm, it is no defense for either to prove that she ported her helm before the collision actually occurred. The America (1875), 92 U. S. 432, 23 L. Ed. 724.

It is a fault for a vessel to signal while the other vessel was coming around a point a mile distant, and before she had settled on her course while they were approaching head on, when the other vessel was seen to be coming on at full speed without changing her course; the other for taking the contrary course without notice, making the collision inevitable. The Trader (D. C. 1904), 129 Fed. 462.

It is a fault to give a signal to the other vessel, and then, without waiting for an answer, a contrary signal, intended for a distant vessel, but which misled the other. The Prudence (D. C. 1911), 190 Fed. 671.

Answer.—The requirement that the signal in answer to the exceptional signal of two whistles shall be given "promptly" is not complied with except by an immediate answer, before other maneuvers are taken, where no reason for delay appears. The B. B. Saunders (D. C. 1884), 19 Fed. 118; The Garden City (D. C. 1884), 529.

Vessel initiating passing agreement.—A vessel which initiated the passing agreement without being able to properly handle her unwieldy tow, in the narrow channel, is at fault for a resulting collision. Thames Towboat Co. *v.* Pennsylvania R. Co. (1908), 165 Fed. 617, 91 C. C. A. 455, affirming decree (D. C. 1907), 157 Fed. 305.

Space allowed for passing.—A tug with tow on hawser, meeting another tug, must turn not only herself, but her tow also, sufficiently to clear the other, and is in fault if she slackens speed and is unable to turn the tow. The Plover and The R. S. Carter (D. C. 1900), 100 Fed. 882.

Passing signals in narrow channel.—When steamers are approaching each other round a bend in a stream so as to involve risk of collision, neither should change her relative situation in the stream without timely notice to the other by signals. The Wm. H. Beaman (D. C. 1883), 18 Fed. 334.

An agreement by signal between large vessels to pass in the east channel of Hell Gate is not in itself a fault in either vessel. Old Colony Steamboat Co. *v.* The Mary McWilliams (D. C. 1891), 47 Fed. 333.

Effect of sounding signal.—Where vessels agree to pass port to port in a narrow channel each must keep on the starboard side of the channel. The Kate Irving (D. C. 1880), 2 Fed. 919; Union Ins. Co. *v.* The Bridgeport (D. C. 1887), 35 Fed. 222; Id. (C. C. 1888), 35 Fed. 224; Old Colony Steamboat Co. *v.* The Mary McWilliams (D. C. 1891), 47 Fed. 333.

Where a river steamer coming downstream sees a tug with barges coming up and about rounding a point, and thereupon blows two whistles, instead of taking the usual course to the right, she is bound to hug the left shore, and for a collision in mid-channel she alone is liable. The St. John (1893) 154 U. S. 586, 14 Sup. Ct. 1,170, 20 L. Ed. 645.

Defective whistle.—A vessel intending to sound a two-blast signal, whose whistle valve would not close so that only one continuous blast was sounded, was in fault for turning to port. The Acilia (1903) 120 Fed. 455, 56 C. C. A. 605, affirming decree (D. C. 1901) 108 Fed. 975.

A vessel is not in fault for failure to observe a weak signal given by an approaching steamer, which was not seen because of the interposition of another steamer. U. S. *v.* The Mineola (D. C. 1879) Fed. Cas. No. 15,779a.

Delay in maneuvering.—A vessel's delay in maneuvering in accordance with her own signals is at her own risk. The Galileo (D. C. 1885) 24 Fed. 386.

Agreement to pass starboard to starboard.—A steamboat which answers two whistles of another by the same signal can not be held in fault for starboarding her helm to pass to port. The St. John (C. C. 1870) Fed. Cas. No. 12,224; Id. (D. C. 1868) Fed. Cas. No. 12,223.

A steamer, in the absence of an imperative necessity, has no right to attempt to pass to the left until she has obtained by signal from the other, consent to such a movement. The E. H. Coffin (C. C. 1879) Fed. Cas. No. 4,310; Id. (D. C. 1877) Fed. Cas. No. 4,309.

A vessel signaling that she is going westward of a vessel meeting her head on, which is answered by the latter with a signal that she will go to the eastward,

is not negligent, although her proper course originally was to the eastward. Titus v. The James Bowen (D. C. 1892), 52 Fed. 510.

Circumstances justifying agreement.—A tug proceeding up Puget Sound with a large ship in tow on a line 600 feet long, having on her starboard, and within a mile, a shore toward which the tide was setting, and along which there were s' oals, was not guilty of a violation of the navigation rules in signaling her intention of passing a meeting steamer starboard to starboard where the shore on that side was 4 or 5 miles distant, and where the signal was given and assented to when the approaching steamer was a mile distant, coming nearly head on. The Lakme (1902), 118 Fed. 972, 55 C. C. A. 466.

An agreement to pass starboard to starboard held proper. The Wrestler (D. C. 1912), 198 Fed. 583.

The rule that, unless vessels meeting nearly "head to head" pass to the right, negligence will be presumed, does not apply when those in charge know of circumstances rendering it unsafe. Cooper v. Eastern Transp. Co. (1878), 75 N. Y. 116.

Circumstances requiring agreement.—Where two meeting vessels, by keeping their courses, would pass to the left of each other in safety, one of them, which insists on the naked right of passing to the right, and changes her course when 't is attended with danger, is in fault for a collision which results. The City of Macon (1899), 92 Fed. 207, 34 C. C. A. 302, affirming decree (D. C. 1898), 85 Fed. 236.

A steamboat approaching another on courses which will permit them to pass safely starboard to starboard has no absolute right to direct the other's course by sounding one whistle and turning to port. The America (D. C. 1869), Fed. Cas. No. 281.

Effect of sounding signals.—A vessel was in fault for announcing by signal a change to starboard which she knew, from her great draught, that she could not carry out. The Lisbonense (1892), 53 Fed. 293, 3 C. C. A. 539, reversing decree (D. C. 1891), 47 Fed. 122.

A transfer tug is in fault for a collision with a meeting vessel where, being in a position where careful navigation was required, owing to the number of vessels passing and the flood tide, she assented to the signal of two vessels which placed her in a situation where she was unable to avoid collision with one of them. The Transfer No. 9 (1901), 107 Fed. 533, 46 C. C. A. 450.

Effect of violation of rule.—In an action at law for a collision between steamers under such circumstances that their duties, respectively, were prescribed by the rules of the supervising inspectors, where a departure from the rules by plaintiff's vessel is alleged to have contributed to the collision, refusal of defendant's requests for instructions on the question whether such departure from the rule was justified, and leaving to the jury to determine whether, upon the whole, there was negligence in what was done or left undone, is erroneous, as ignoring the obligatory force of the rules. Belden v. Chase (1893), 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218.

The failure to give the passing signal to a vessel nearly, if not quite, half a mile to one side, because the captain did not think a steamer was within half a mile of him, and which was not the proximate cause of the injury, is not a fault. The Lord O'Neill (1895), 66 Fed. 77, 13 C. C. A. 337.

A violation of the rule will not charge a vessel, if the proximate cause of the collision was a faulty maneuver of the other vessel, and the violation of the rule was a remote, and not a contributory, cause. The Dents (C. C. 1886), 29 Fed. 525, affirming The Plymouth Rock (D. C. 1885), 26 Fed. 40.

II. Vessels on Crossing Courses.

Necessity for sounding signals.—A privileged vessel getting under way should not move across a narrow channel along which a burdened vessel is approaching so close as to be unable to turn and go under the privileged vessel's stern without having an agreement as to the courses to be taken. Grants v. Luckenbach (1914), 219 Fed. 653; 135 C. C. A. 355, affirming judgment The Jacob Luckenbach (D. C. 1913), 206 Fed. 226.

Where a tug with a tow on her port side had swung to starboard in getting under way, and then swung back across the course of a steamer on the port hand, the starboard hand rule did not apply and the tug was in fault for not giving signals as to its course. The Tugboat No. 6 (D. C. 1905), 148 Fed. 1007; decree affirmed (1906), 170 Fed. 308, 95 C. C. A. 502.

Effect of sounding passing signal. A boat, having accepted the two-whistle signal of a ferryboat approaching on the port side, and knowing that the ferryboat intended to pass down the river, and was compelled to turn to starboard on account of projecting pierheads, was bound to maintain her own course, so as to allow the ferryboat room to proceed. The Oregon (D. C. 1910), 180 Fed. 299.

Meaning of whistle signals by vessels on crossing courses.—As applied to vessels upon

crossing courses, when a single blast is given by the preferred steamer, it means nothing more than that she intends to comply with her legal obligations to keep her course, and throw on the other steamer the duty of avoiding her. The Delaware (1896), 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, affirming decree (D. C. 1894) 61 Fed. 525.

Simultaneous signals.—In the nighttime, when the puffs of steam that accompany steam whistles can not be seen so as to correct any imperfections in the hearing of simultaneous signals, pilots have no right to rely upon simultaneous signals as an answer to each other, under the inspectors' rules. They are not an equivalent to an answer, because attended by uncertainties in hearing to which an answer is not subject. The Nereus (D. C. 1885), 23 Fed. 448.

Excuses for failure to answer signal.—It is no excuse for failure to answer a signal that the vessel for which it was intended heard it, but did not understand that it was for her, other vessels being in the vicinity. It is her duty to understand and heed such signals, especially when the vessel giving them is on converging courses with her, on her starboard bow, and has the right of way. The City of Chester (1897), 78 Fed. 186, 24 C. C. A. 51.

Sounding cross signal.—With the starboard hand rule for crossing vessels must be considered the rule forbidding the giving of a cross or contradictory whistle, unless the vessel crossing whistles had the right to insist, at that moment, upon its own indication of course, and that vessel could, under the circumstances of the case, safely seek to initiate navigation by forcing the application of the rule upon the other vessel. The Senator Rice (D. C. 1914), 215 Fed. 149.

Agreement by signals contrary to starboard hand rule.—An agreement by signal, initiated by the privileged vessel, by which she was to pass under the other's stern, justified the latter in keeping her course and speed. The Edwin J. Berwind (1906), 144 Fed. 664, 75 C. C. A. 466.

The burden of proving an agreement to navigate contrary to rule is on the burdened vessel. The Scranton (1915), 221 Fed. 609, 137 C. C. A. 333.

Signal by burdened vessel contrary to rule.—If a burdened steamer by her signals invites a departure from the ordinary rules of navigation, she takes the risk both of her own whistles being heard, and, in turn, of hearing the response, if a response is made and of the success of the maneuver. Hamilton v. The John King (1891), 49 Fed. 469, 1 C. C. A. 319; The Admiral (D. C. 1889), 39 Fed. 574; Thames & M. Marine Ins. Co. v. The Friesland and The Bellarden (D. C. 1896), 76 Fed. 591.

Where the burdened one of two tugs approaching each other on crossing courses at night, and under difficult conditions of the tide, signaled her intention of crossing the bow of the other tug, when she could with greater safety have slackened speed and passed under her stern, she is chargeable with sole liability for a resulting collision by which one of the barges she had in tow was injured, the other tug being shown to have taken the best course possible to assist the maneuver after receiving the signal. Tice v. The Zouave and The Sea King (1899), 98 Fed. 747, 39 C. C. A. 258, reversing decree (D. C. 1898), 90 Fed. 440.

Assent by privileged vessel.—A vessel which assents by signal that another shall cross her bows can not urge the attempted maneuver as a fault, though it results in a collision. The Arthur M. Palmer (D. C. 1902), 115 Fed. 417.

Signal by privileged vessel contrary to rule.—A privileged vessel which undertook to change the ordinary course which she was expected to take must navigate cautiously, and she was solely in fault for a collision resulting from her inability to turn according to her signal. City of New York v. Shortland Bros. Co. (1904), 130 Fed. 1021, 64 C. C. A. 676; Shortland Bros. Co. v. City of New York (1904), 130 Fed. 1022, 64 C. C. A. 224, affirming decree (D. C. 1903), 129 Fed. 973.

Failure of privileged vessel to answer.—The failure of the privileged vessel to assent to a signal contrary to the rule is equivalent to a dissent which holds the burdened vessel bound to observe the starboard rule. The Eldorado (1896), 89 Fed. 1015, 32 C. C. A. 464, affirming decree (D. C. 1895), 68 Fed. 940.

A privileged vessel is not in fault for holding her course, though she failed to receive a response to her first signal of one whistle. The E. H. Coffin (C. C. 1879), Fed. Cas. No. 4,310; Id. (D. C. 1877), Fed. Cas. No. 4,309.

III. Alarm Signals (Rule III).

Necessity for sounding alarm signals.—In navigating a narrow stream choked with vessels on either hand the giving of prompt alarm signals is required. The James M. Thompson (D. C. 1882), 12 Fed. 189.

A vessel lying motionless to allow another to pass should sound danger signals to those approaching her. The Wesley A. Gove (D. C. 1886), 27 Fed. 311.

A vessel deeming the course proposed by the other vessel dangerous should sound

only the danger signals, not the assenting signal accompanied by the danger signal. The Bergen (D. C. 1901), 108 Fed. 555; affirmed (1904), 128 Fed. 920, 63 C. C. A. 646.

Signals unnecessary.—When two vessels were within five seconds of each other when the danger of collision arose, it was not negligence in the master of the tug not to have blown several short danger whistles. The Manhasset (D. C. 1888), 34 Fed. 408.

Effect of failure to sound alarm signals.—A vessel is not in fault for failing to sound alarm signals where all the facts are equally known to the other vessel, whose whistle valve had remained open so that no signal from the other vessel could have been heard. The Acilia (1903), 120 Fed. 455, 56 C. C. A. 605, affirming decree (D. C. 1901) 108 Fed. 975.

The failure to sound alarm signals does not relieve the other vessel, which caused the collision by lack of watchfulness, from liability. The Lynn (D. C. 1884), 21 Fed. 815.

The fact that a steamship, which, having met and passed a tug with a barge in tow, on a line, at a distance of 300 feet, immediately stopped and reversed, throwing her stem around across the course of the barge, resulting in a collision, failed to sound alarm signals, is contrary to her contention that the movement was justified by a sheering of the barge toward her, rendering it necessary. The Georgetown (D. C. 1905), 135 Fed. 854.

IV. Signals on Approaching Bend (Rule V).

Necessity for sounding signal for bend.—This rule, as literally construed, is imperative on every steamer "nearing" such short curve or bend, whatever may be her intention as to future navigation after she shall have reached it, and the rule applies to a steamer passing up the west channel of the Harlem River on approaching Horn's Hook, though bound up the Sound. The Transfer No. 8 (1899) 96 Fed. 253, 37 C. C. A. 462, reversing decree (D. C. 1897), 82 Fed. 478.

Time for sounding signal for bend.—Where a vessel, after sounding a bend signal, is compelled to stop to allow another vessel to pass in front of her, it is a fault for her thereafter to proceed around the bend without sounding another signal. The Arrow (1914), 214 Fed. 743, 131 C. C. A. 49.

Effect of sounding bend signal.—A vessel held in fault for passing out from behind the hook of a bend after hearing the signal of another vessel, but without having any passing agreement. The Arrow (1914), 214 Fed. 743, 131 C. C. A. 49.

A long whistle on "approaching a bend in the river," is no intimation where there are three equally available channels around the bend, that the vessel giving it intends to take the channel to her own left. The City of Springfield (D. C. 1886), 26 Fed. 158.

Effect of failure to sound bend signal.—Failure to give the signals required by this rule where a steamer is approaching a bend places the burden on the delinquent steamer of showing that such failure did not contribute to the collision, and in the absence of such showing she will be held in fault, though it be not affirmatively shown that the omission did contribute to the collision. The Zouave (D. C. 1898), 90 Fed. 440; decree reversed, Tice v. The Zouave and The Sea King (1899), 98 Fed. 747, 39 C. C. A. 258.

V. Signals on Leaving Dock (Rule V).

Purpose of rule.—This rule has reference to the meeting and movement of vessels, and not to a vessel lying close to a pier, and a little boy playing on some logs in the water between the vessel and the pier, and hidden from view. In re Saville (D. C. 1898), 86 Fed. 800.

Time for sounding signal.—The precise time when the slip whistle should be sounded apparently depends on the circumstances, as the length of the slip or presence of obstructing vessels. The Bangor (1914), 212 Fed. 706, 129 C. C. A. 316.

Effect of sounding signal on leaving berth.—A tug starting out into the Delaware River, from behind piers which obstruct her view, with a tow on a hawser, must exercise caution, but is not bound absolutely to ascertain beforehand whether any vessel is approaching; and where she gives the proper signal to enable a vessel actually approaching to avoid the tow by proper and reasonable navigation, she is not to be held liable for a collision between them. Balano v. The Illinois (1898), 87 Fed. 574, 31 C. C. A. 111.

A transfer tug, passing down stream at a high speed at night within 30 feet or so of the end of a coal pier at Jersey City having a shed its full length, held solely in fault for a collision with a steamer coming out from the slip on the south side of the pier, and which gave the usual slip whistle. The Transfer No. 12 (D. C. 1911), 189 Fed. 549.

A vessel leaving a slip must so conduct itself that it can avoid running down any boat which may be in a position to be missed or not able to protect itself at the

warning of the slip whistle. The James P. McGuirl (D. C. 1915), 225 Fed. 662.

Effect of failure to sound signal.—The failure to sound the slip whistle will not render her liable for a subsequent collision between the tow and another vessel, where the latter saw the tug at the slip, and knew she was taking out a tow. The Captain Sam (D. C. 1902), 115 Fed. 1,000.

VI. Signals of Overtaking Vessel (Rule VIII).

Necessity for sounding signals.—It is the duty of the vessel ahead to answer the signal at once, and the overtaking vessel is prohibited from attempting to pass, where it is not clearly safe and the cooperation of the vessel ahead is required, unless she receives an assenting answer to her signals. Where both vessels violate these requirements, the overtaking vessel mistaking the silence of the other for acquiescence in her signal, and in attempting to pass at a bend in a channel a collision occurs, both are in fault; and neither is relieved from liability by the fact that her violation of the rule was not the sole cause of collision, and that the passage would have been safely made but for the improper navigation of the other. The Mesaba (D. C. 1901), 111 Fed. 215.

Where a steamship and steam pilot boat start about the same time after the pilot is put aboard the former, and first one and then the other forges ahead, neither is an overtaking vessel within the rules but both are in fault in entering abreast, without exchanging signals, a narrow pass where a shifting current caused the ship to sheer into the pilot boat. The Joseph Vaccaro (D. C. 1910), 180 Fed. 272.

Repetition of signal.—The signal of an overtaking vessel intending to pass must be repeated if not responded to, and the possibility of collision avoided, if necessary, by slackening speed and changing course. Erwin *v.* Neversink Steamboat Co. (1882), 88 N. Y. 184, affirming (1881), 23 Hun 573.

Effect of signal by overtaking vessel.—The giving of the signal by the overtaking vessel does not relieve her from liability for running down the other vessel, where the latter kept her course. The Cephalonia (C. C. 1887), 32 Fed. 112, affirming (D. C. 1886), 29 Fed. 332.

Effect of assent by overtaken vessel.—An affirmative response to a signal by whistle from a vessel astern, requesting permission to pass on the side of the vessel ahead, does not imply any relinquishment of the right of way, excepting so much as may be necessary to enable the overtaking vessel to execute her maneuver. The Dents (C. C. 1886), 29 Fed. 525.

Effect of failure to answer.—The failure of the overtaken vessel to answer the passing signal is not to be taken as an assent. Erwin *v.* Neversink Steamboat Co. (1882), 88 N. Y. 184, affirming (1881), 23 Hun 573.

VII. Signals in Fog (Rule IX).

Application of Rule I.—Rule I of this article does not apply to vessels in a fog, unless they can see each other. The George F. Randolph (D. C. 1912), 200 Fed. 96.

1431. Steam-vessels crossing.—When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. *Art. 19, sec. 1, act of June 7, 1897 (30 Stat. 101).*

Notes of Decisions.

Applicability of rule.—This rule is binding on a steamer or tug, though encumbered with a tow on a hawser. The George S. Schultz (1898), 84 Fed. 508, 28 C. C. A. 476.

A fog not sufficiently dense to prevent vessels from seeing each other a third of a mile away, in which distance there was ample opportunity to avoid each other, does not render the starboard hand rule inapplicable. The New Hampshire (1905), 136 Fed. 769, 69 C. C. A. 415.

This rule applies whenever the courses being steered cross so as to involve risk of collision, even though the burdened vessel might cross the bows of the other before it reached the place of intersection, and though the proximity of the shore precludes turning to port. The Ashley (1915), 221 Fed. 423, 137 C. C. A. 221, modifying decree (D. C. 1913), 209 Fed. 965.

The rule applies when the master of the vessel having the other on her starboard hand knows or ought to know that the other vessel will be on a crossing course as soon as it gets straightened out after leaving the piers. The Senator Rice (1915), 223 Fed. 524, 139 C. C. A. 72, reversing decree (D. C. 1914), 215 Fed. 149.

Approaching or leaving piers.—The starboard hand rule becomes applicable as soon as a boat leaving her pier gets under way. The Breakwater *v.* New York, L. E. & W. R. Co. (1894), 155 U. S. 252, 15 Sup.

Ct. 99, 39 L. Ed. 139; Greenman v. The Narragansett (D. C. 1880), 4 Fed. 244; The James P. McGuire (D. C. 1915), 225 Fed. 662.

When a ferryboat is nearing her slip the starboard hand rule for crossing can not be invoked against her by another vessel. The City of Lowell (D. C. 1905), 139 Fed. 901; decree reversed (1907), 152 Fed. 593, 81 C. C. A. 583.

Vessels in narrow channels.—The rule has its usual application upon the open sea or upon a comparatively broad expanse of water, where each vessel is free to maneuver, and ordinarily can not be applied to vessels in a narrow and winding channel. The Captain Bennett (D. C. 1909), 171 Fed. 199; decree reversed, The Florence (1911), 186 Fed. 57, 108 C. C. A. 139.

Ferryboats.—The right of a ferryboat to an unobstructed ingress and egress to and from her slip does not absolve her from observing the rules of navigation when out in the river, and free to maneuver. The Columbia (1899), 92 Fed. 939, 35 C. C. A. 96, affirming decree (D. C. 1899), 92 Fed. 936.

When vessel is on crossing course.—Where a tug and barge crossed the usual track of a ferryboat fully one minute before the ferryboat left her pier, the courses of the colliding vessels were not crossing. The Manhasset (D. C. 1888), 34 Fed. 408.

Faster vessel.—Where the courses of two vessels are intersecting they are on crossing courses, even though one may be moving faster than the other. The Cayuga (1871), 14 Wall. 270, 20 L. Ed. 828; The Scandinavia (1908), 158 Fed. 96, 85 C. C. A. 564; The Aurania (D. C. 1886), 29 Fed. 68.

Courses permitting a safe passing.—Where the courses of two vessels do not cross so as to involve risk of collision, the one having the other on her port hand is not privileged, but is in fault if she changes her course across that of the other. The Ashley (D. C. 1913), 209 Fed. 965.

Conflicting pilot rules.—The rule of the supervising inspectors governing navigation in New York Harbor, that a steam vessel approaching another on a crossing course, so as to endanger collision, shall signify by a blast or blasts of the whistle what course she proposes to take, can not be held to deprive the vessel which is on the starboard side of the other of her right to keep on her course. Hamilton v. The John King (1891), 49 Fed. 469, 1 C. C. A. 319.

Inspectors' rule No. 3, prohibiting the giving of cross-signals when vessels are approaching each other from opposite directions, does not apply to vessels on crossing courses, nor have inspectors power to make rules which would deprive a vessel of a right given her by the statutory navigation rules. The Transfer No. 15 (1906), 145 Fed. 503, 76 C. C. A. 263.

A tug rounding Town Point, in Norfolk Harbor, was governed by this article notwithstanding that the inspectors, in their note to the rules, say that they are to be complied with except in crowded channels, or near wharves. The Georgia v. The Luckenbach (D. C. 1891), 7 Fed. 619; decree affirmed, The Luckenbach (1892), 50 Fed. 129, 1 C. C. A. 489.

Rule 9 of the board of the United States inspectors, approved by the Secretary of Commerce and Labor February 25, 1907, which permits the vessel having the other on her starboard hand to cross the bows of the other if it can be done without risk of collision, is invalid, as repugnant to the starboard hand rule. The Pawnee (D. C. 1909), 168 Fed. 371.

A pilot rule requiring vessels on crossing courses to stop and back whenever danger signals are given is invalid, as violating this article and art. 21, post, 1433, unless under special circumstances. The James A. Walsh (D. C. 1912), 194 Fed. 549.

Extent of burdened vessel's duty.—This rule does not require the vessel which has the other on her starboard side to avoid the other vessel at all hazards and in some way or other, but only that she should yield the path to the latter and pass behind her. The Britannia v. Clough (1894), 14 Sup. Ct. 795, 797, 153 U. S. 130, 38 L. Ed. 660.

Excessive speed preventing compliance with rule.—A vessel whose failure to obey the rule was caused by its excessive speed while rounding a point which shut out vessels navigating the harbor beyond was solely liable for the collision. The Britannia v. Clough (1894), 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660, affirming (D. C. 1888), 34 Fed. 546 and reversing (C. C. 1890), 42 Fed. 67; The Luckenbach (1892), 50 Fed. 129, 1 C. C. A. 489, affirming (D. C. 1891), 67 Fed. 619.

Excuses for failure of burdened vessel to keep out of the way.—The burdened vessel's claim that the presence of vessels at anchor prevented her porting does not excuse her, where her failure to see the other in time to avoid her was due to a negligent lookout. The Hansa (C. C. 1870), Fed. Cas. No. 6,038; Id. (D. C. 1868), Fed. Cas. No. 6,036.

Where a steamship and a tug, with a tow, exchange signals for crossing in accordance with the starboard rule, the steamship being the privileged vessel, at a sufficient distance apart to enable the maneuver to be executed with safety, but the master of the tug, which had reversed,

fearing collision, interrupted the maneuver, and again started ahead, and a collision resulted, in which the tow was injured, the tug was alone in fault for the collision, regardless of any fault in the navigation of either vessel prior to the exchange of signals. The Guyandotte and The Delaware (1899), 92 Fed. 931, 35 C. C. A. 91.

The fact that the burdened vessel's master was ignorant of the rule does not excuse her failure to keep out of the way. The Cygnus (1905), 142 Fed. 85, 73 C. C. A. 309.

A burdened vessel which stops for the purpose of anchoring, and thereby loses her steerage way and collides with a privileged vessel, is liable. Brady *v.* The Bendo and The Sampson (D. C. 1890), 44 Fed. 439.

A hail by the master of the privileged vessel, made in extremis and without knowledge that the burdened vessel was backing, to go ahead strong, does not excuse the failure of the latter to keep out of the way. Maine S. S. Co. *v.* The Cyclops (D. C. 1891), 45 Fed. 122.

Conflicting custom.—If there is a custom which permits Sound steamers to claim exemption from the operation of this article and article 16 of the international regulations when approaching the ferries in the East River on the ebb tide, such custom is opposed to law, and can not prevail. The Pequot (D. C. 1887), 30 Fed. 839; The Mohegan (D. C. 1899), 91 Fed. 810.

Erroneous assumption as to course of privileged vessel.—Where a steam tug having a steam canal boat on her starboard hand approached each other, and the canal boat did nothing to avoid collision, expecting that the canal boat would starboard and pass between the tug and another tug coming down the river, and a collision was caused apparently by the two tugs starboarding their helms, which was not justified by any signals, the tug was liable for the collision. The New York Central No. 2 (D. C. 1904), 132 Fed. 167.

A steamer which was the burdened vessel had no right to expect a tug bound for Brooklyn to turn into the East River, where a starboard hand situation existed, which was not changed by signals. The Pawnee (D. C. 1909), 168 Fed. 371.

Effect of violation of rule.—A lighter, pursuing a course intercepting that of an approaching steamer, and having the steamer on its starboard, so that the lighter was crossing the bows of the steamer, was at fault for a collision with the steamer, in the absence of evidence that some act of the steamer prevented the lighter from keeping out of the way. The Bermuda (C. C. 1881), 11 Fed. 913, affirming (D. C. 1879), Fed. Cas. No. 1,344; The Helena *v.* The Lord O'Neill (C. C. 1886), 26 Fed. 463.

When the burdened vessel, whose duty it was to keep out of the way of another, was grossly at fault in bringing about a collision, she has the burden of showing clearly that the other is chargeable with contributory fault. The Haida (D. C. 1911), 191 Fed. 623; decree affirmed (1912), 196 Fed. 1,005, 115 C. C. A. 376.

1432. Steam and sailing vessels meeting.—When a steam-vessel and a sailing-vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing-vessel. *Art. 20, sec. 1, act of June 7, 1897 (30 Stat. 101).*

Notes of Decisions.

Applicability of rule.—Whether this rule applies strictly in narrow channels or harbors depends upon the existing dangers of navigation and the special circumstances of the case. The I. C. Harris (C. C. 1886), 29 Fed. 926.

Vessels meeting end on.—While the statutory rules do not require a steamer meeting a sailing vessel nearly end on to pass her port to port, yet that is the natural and usual course, especially when the steamer has a strong wind on her port bow; and it is a fault in the sailing vessel, after the steamer's red light shows fully, to then change her own course to port. The Farnley (C. C. 1881, 8 Fed. 629, reversing Farr *v.* The Farnley (D. C. 1880), 1 Fed. 631.

This rule applies to a steam vessel meeting a sailing vessel end on. Philadelphia, W. & B. B. Co. *v.* Kerr (1870), 33 Md. 331.

Steam vessel with tow.—A steam vessel with any kind of craft in tow, either at the end of a hawser or lashed alongside, are to be treated as a single vessel under steam, and must keep out of the way of sail vessels, even though in fact less able to change course than the sailing vessel. The Civilta (1880), 103 U. S. 699, 701, 26 L. Ed. 599, affirming The Civilta (D. C. 1873), Fed. Cas. No. 2,775. [C. S. p. 8374.]

The fact that a steam vessel is encumbered with a tow requires additional care upon her part. The Isaac H. Tillyer (D. C. 1900), 101 Fed. 478; The Mary A. Bird (D. C. 1900), 102 Fed. 648.

Extent of duty.—When a steamer and a sailing vessel are approaching each other,

in such direction as to involve risk of collision, the steamer must carefully watch the movements of the sailing vessel, so as to keep out of her way. The Falcon (1873), 19 Wall. 75, 77, 22 L. Ed. 98; The Pilot Boy (1902), 115 Fed. 873, 53 C. C. A. 329; Schooner Margaret v. The C. Whiting (D. C. 1880), 3 Fed. 870; Mailler v. Express Propeller Line (1874), 61 N. Y. 312.

The duty of the steamer to avoid the sailing vessel and of the latter to keep her course are mutual and equally binding upon the one as the other. The Old Point Comfort (1911), 187 Fed. 765, 109 C. C. A. 513.

It is the duty of a steam vessel with a tow to keep out of the way of a sailing vessel and exercise extreme care to keep her tow out of the way. The Teaser (1915), 223 Fed. 13, 138 C. C. A. 427.

Space allowed for passing.—Reasonable prudence demands that steamers, bound to keep out of the way of sailing vessels, shall, when nothing prevents, keep out of the way by a reasonably safe margin. Any disregard of this obligation, without excuse, resulting in collision, is a fault, notwithstanding a change of course by the other vessel. The E. Luckenbach (1899), 93 Fed. 841, 35 C. C. A. 628; The Laura V. Rose (D. C. 1886), 28 Fed. 104.

A large and swift steamer attempting to pass dangerously near a sailing vessel takes the risk of the helmsman losing his presence of mind. The Columbia (D. C. 1877), Fed. Cas. No. 3,035.

The steamer may be managed on the assumption that the sailer will keep her course. The Santee (D. C. 1891), 48 Fed. 126, 127.

Character or course of sailing vessel.—It is immaterial whether the sail vessel was close hauled or running free. The Carroll (D. C. 1867), Fed. Cas. No. 2,451.

A steam vessel is under the same obligation to avoid a sailing yacht as any other vessel under sail. Flannery v. The Medusa (D. C. 1891), 46 Fed. 303.

Sailing vessel tacking.—A tug meeting a sloop tacking toward the shore must avoid passing so close as to involve danger of collision in case the sloop should not beat out her tack to the utmost limit. Graddick v. The Relief (D. C. 1894), 63 Fed. 169.

Excuses for failure of steamer to keep out of the way.—While the statutory rule requiring a steam vessel to keep off the course of a sailing vessel is modified where the steamer can not obey it without serious peril to herself or other vessels, she is not justified in disobeying it until she has resorted to all other practicable means, not only to escape the danger after it is known, but to anticipate and provide against it. The Devonian (D. C. 1901), 110 Fed. 588.

The presence of other vessels does not excuse a violation of the rules by a steamer, but renders their observance all the more necessary. Donald v. Guy (D. C. 1905), 135 Fed. 429.

Expecting change of course by sailing vessel.—A tug is solely in fault for a collision with a schooner on a crossing course for persisting in her course, on the theory that the schooner would not run out her tack. The Anson M. Bangs (1904), 129 Fed. 103, 63 C. C. A. 605.

A steamer has no right to keep her course and speed relying on the expectation that the sailing vessel will change her tack. Donald v. Guy (D. C. 1905), 135 Fed. 429.

Presumptions and burden of proof.—It being the duty of a steamer to keep out of the way of a sailing vessel, she can not exculpate herself, in case of a collision, by the plea that the fault alleged against her indicates negligence so gross as to be improbable, unless her own explanation of the cause of the accident is probable, and such probability is established by the preponderance of the evidence. The George L. Garlick (D. C. 1898), 88 Fed. 853.

In case of a collision between a sailing vessel and a barge in tow of a tug, on which rested the duty of keeping out of the way, all the presumptions are in favor of the sailing vessel. The Delmar (D. C. 1903), 125 Fed. 130.

In an action for injury by defendant's steamer to plaintiff's schooner, it may be reasonably inferred that the steamer was in fault, if the collision happened in the daytime, but if it happened on a dark night, such inference can not be made. Union S. S. Co. v. Nottingham (Va. 1866), 17 Grat. 115, 91 Am. Dec. 378.

1433. Which vessel shall keep her course and speed.—Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed. *Art. 21, sec. 1, act of June 7, 1897 (30 Stat. 101).*

Notes of Decisions.

Purpose of rule.—The privileged vessel is bound to keep her course, so that the other may not be misled in taking measures to avoid collision. The Isaac H. Tiliyer (D. C. 1900), 101 Fed. 475.

Conflicting pilot rules.—A pilot rule requiring vessels on crossing courses to stop and back whenever danger signals are given is invalid, as violating this rule, unless under special circumstances. The

Transfer No. 15 (1908), 145 Fed. 503, 76 C. C. A. 263; The Ashley (1915), 221 Fed. 423, 137 C. C. A. 221, modifying decree (D. C. 1913), 209 Fed. 965; The James A. Walsh (D. C. 1912), 194 Fed. 549.

This rule does not admit of the imposition upon the right to keep course and speed by the pilot rules of the condition that she must signal her intention to so keep her course and speed. The Haida (D. C. 1911), 191 Fed. 623; decree affirmed (1912), 196 Fed. 1005, 115 C. C. A. 376.

Vessels required to keep course and speed.—The rule does not require a steamship attempting to pass a bark and tug on anchorage grounds, where the tug was merely holding the latter up against the tide while she was getting in her anchor, to keep her course. The Aller (1896), 73 Fed. 875, 20 C. C. A. 79, affirming (D. C. 1893), 59 Fed. 491.

A tug and tow, which had overtaken and passed a schooner on her starboard tack, becomes the overtaken vessel and required to keep her course and speed after the schooner comes about on the port tack and approaches the tow from more than two points abaft the beam. The Mary E. Morse (D. C. 1908), 179 Fed. 945.

Vessel on turning course.—A vessel which is constantly increasing its speed and swinging around can not keep such course and claim that another vessel should keep out of its way. The Jacob Luckenbach (D. C. 1913), 206 Fed. 226.

What is change of course or speed.—A sailing vessel coming down the Hudson River does not hold her course within the meaning of the law when, without cause, she changes from the west to the east side of the river in rounding West Point. The J. L. Hasbrouck (D. C. 1870), Fed. Cas. No. 7,323; affirmed (1876), 93 U. S. 405, 23 L. Ed. 962.

Where at the time an overtaking vessel signaled her intention to pass the vessel ahead, the latter had stopped her engines to permit a schooner to cross her bows, which purpose was obvious to the overtaking vessel, the resumption of her former course and speed after the temporary purpose of her stopping has been accomplished can hardly be charged as a violation of the rule requiring her to keep her course and speed. The Mesaba (D. C. 1901), 111 Fed. 215.

Steamer on crossing course with another on her port hand.—The preferred steamer will not be held in fault for maintaining her course and speed so long as it is possible for the other to avoid her. The Northfield (1878), 154 U. S. 629, 14 Sup. Ct. 1,184, 24 L. Ed. 680, affirming (D. C. 1870), Fed. Cas. No. 10,326; [c. a. p. 8380].

A steamer, when the privileged vessel, in crossing, is not required to change her course or reverse to avoid a collision until it becomes evident that the other vessel will not or can not keep out of the way. The Mary Powell (1899), 92 Fed. 408, 34 C. C. A. 421; The Republic (D. C. 1900), 102 Fed. 997; The Haida (D. C. 1911), 191 Fed. 623; decree affirmed (1912), 196 Fed. 1,005, 115 C. C. A. 376.

When steamers are approaching on intersecting lines, the one having the other on her starboard hand must keep out of the way, and, if she attempts to cross her bow, the privileged vessel will not be held in fault for not stopping, unless danger is apparent, especially when to do so would permit the strong tide to set the vessel in the direction in which the crossing vessel was proceeding. The Zouave (D. C. 1898), 90 Fed. 440.

Mere apprehension of danger of collision will not justify change of course in a vessel whose duty under the rules is to keep her course. A change should only be made where there is actual danger. The General U. S. Grant (D. C. 1873), Fed. Cas. No. 5,320.

The general provision that the privileged vessel shall keep her speed, as well as her course, does not apply when she has distinct notice that the other vessel is not taking, and does not intend to take, the necessary measures to avoid collision. Thames & M. Marine Ins. Co. v. The Friesland and The Bellarden (D. C. 1896), 76 Fed. 591.

A privileged vessel loses such privilege as soon as it appears that the other vessel is failing in her duty to take such course as to keep out of the way, and is then required by Pilot Rules (Ed. 1905) p. 4, rule 3, to sound alarm signals, and, if the vessels are within half a mile of each other, to slow down, until an understanding is reached. The Captain Bennett (D. C. 1909), 171 Fed. 199; decree reversed, The Florence (1911), 186 Fed. 57, 108 C. C. A. 159.

It is the duty of the privileged vessel to keep her course and speed, if a change would involve danger of collision; but no privilege exempts her from using ordinary common sense, and stopping when it would avoid danger The Southern (D. C. 1915), 224 Fed. 210.

Sailing vessel approaching steam vessel.—Where a steam and sailing vessel are approaching each other on courses involving risk of collision, the duty of the steamer under the rules to keep out of the way and

of the sailing vessel to keep her course are mutual, and the rules are as obligatory upon one as the other. The Illinois (1880), 103 U. S. 298, 299, 26 L. Ed. 562; The Old Point Comfort (1911), 187 Fed. 705, 109 C. C. A. 513.

Though a sailing vessel, having the wind, is, prima facie, bound to adopt such course as will prevent a collision with another sailing vessel, not having it, it is the duty of the latter, in an emergency, so to make its course as not to render it difficult for the former to do her duty. The Mary Eveline (1872), 83 U. S. (16 Wall.) 348, 21 L. Ed. 501.

Where well-known usage has sanctioned one course for a steamer ascending, and another for a sailing vessel descending, a river, the vessel, if required by natural obstructions to navigation to change her course, is, after passing them, bound to resume it. The John L. Hasbrouck (1876), 93 U. S. 405, 23 L. Ed. 962.

A schooner on a crossing course is privileged to run out her tack. The Anson M. Bangs (1904), 129 Fed. 103, 63 C. C. A. 605.

A sailing vessel is not in fault for holding a course, though it takes her across a channel through which several steamers are moving. The Main (1910), 180 Fed. 87, 103 C. C. A. 441.

A sailing vessel which collides with a steamer is not in fault where she keeps her course until collision is inevitable. The Celia (D. C. 1869), Fed. Cas. No. 2,542.

A sail vessel is in fault where adherence to the rule that she shall keep her course necessarily results in a collision, which a change would probably have averted. The Cornelius C. Vanderbilt (D. C. 1848), Fed. Cas. No. 3,235; Brooks v. The D. W. Lenox (D. C. 1878), Fed. Cas. No. 1,932.

A sailing vessel approaching a tug with tows should hold her course, at all events until it becomes evident that the tug will persist in her breach of the rule by refusing to give way. The Marguerite (D. C. 1898) 87 Fed. 953.

A ferryboat had no right to call on a sloop to give way or change its course, there being nothing to indicate peril or difficulty to the former in conforming to the accustomed rules of navigation. The Elizabeth (D. C. 1902) 114 Fed. 757.

Overtaken vessel.—Where an overtaking vessel has signaled her intention to pass another on the starboard side, and for any reason the maneuver can not be made in safety, it is the duty of the vessel ahead to give way to port, if she has unobstructed sea room on that side. The Menominee (1912), 197 Fed. 736, 117 C. C. A. 130, reversing decree (D. C. 1911), 190 Fed. 282.

Vessels in fog.—The rule as to crossing courses, requiring the vessel to starboard to keep her course, is inapplicable to navigation in a dense fog. The D. S. Gregory (D. C. 1874), Fed. Cas. No. 4,101; Id. (C. C. 1879), 4,103.

Where two vessels cross in a fog bank, the circumstances may be such as to require both to come to a stop, regardless of which has the other on its starboard side. Vernon v. International S. S. Co. (Wash. 1914), 139 P. 645.

Excuses for failure of privileged vessel to keep her course.—The rule requiring a sail vessel to keep her course when approaching a steamer in such direction as to involve risk of collision does not forbid such necessary variations in her course as will enable her to avoid immediate danger arising from natural obstructions to navigation. The John L. Hasbrouck (1876), 93 U. S. 405, 23 L. Ed. 962.

A ferryboat, about to make her slip, is exempted from fault for slowing down. The Dakota (1895), 668 Fed. 507, 15 C. C. A. 538, affirming (D. C. 1894), 60 Fed. 1,020.

In the absence of signals from the overtaking vessel a sheer of the overtaken vessel was not a fault. The Osceola (C. C. 1888), 35 Fed. 559, affirming (D. C. 1887), 30 Fed. 383.

In the case of overtaking steamers, the vessel ahead will not be held in fault in changing her course so as to pass to the left of a steamer which she meets on a parallel course, under proper signals; and the overtaking vessel, being duly warned by such signals, is bound to conform her movements thereto, and will be held wholly in fault for a collision while attempting to pass the vessel ahead. O'Brien v. The Whitcash and The Winnie (D. C. 1894), 64 Fed. 893.

Imminent danger.—A change of course by a sailing vessel at the last moment to avoid instant collision is not a fault, even if a mistake, when caused by the wrongful and dangerously near approach of the steamer. The E. Luckenbach (1899), 93 Fed. 841, 35 C. C. A. 628; The Renovator (D. C. 1887) 30 Fed. 194; The Excelsior v. The Bruce and The Hamilton Fish (D. C. 1888), 38 Fed. 271; The Hamilton Fish v. The Excelsior (D. C. 1888), Id. 272; Sanders v. The Santee (D. C. 1891), 48 Fed. 126.

The disregard by a sailing vessel of the rule requiring her to hold her course when meeting a steamer is not to be sanctioned except in a clearly existing exigency. Winter v. The Hercules (C. C. 1875), Fed. Cas. No. 17,889; The Gate City (D. C. 1898), 90 Fed. 314.

A steamship can not be held in fault for reducing her speed and changing her course where another vessel, after overtaking and passing her, turns to cross her bows, and collision is certain if she maintains her speed and course, and where her action, although it does not prevent, in fact lessens, the force of the collision. The Willkommen (D. C. 1900), 103 Fed. 699.

A sailing vessel is not justified in changing her course, when nearly ahead of a closely approaching steamer, because of a mere apprehension of danger; and where, in fact, the change creates or increases the danger, she will be held in fault for a resulting collision. The Europa (D. C. 1902), 116 Fed. 696.

Sailing vessel tacking.—The assumption that a sail vessel will beat out her tack must yield to peculiar exigencies, such as arise in a crowded river. The Vicksburg (C. C. 1870), Fed. Cas. No. 16,932.

The sail vessel is justified in changing her tack when the circumstances render it expedient and proper and the steamer must anticipate her movement. Bartelson *v.* The Cynthia (C. C. 1870), Fed. Cas. No. 1,067.

Where a steamer has shaped her course to keep out of the way of a sailing vessel on the wind, the latter is bound to beat out her tack. The W. C. Redfield (D. C. 1870), Fed. Cas. No. 17,305; The Clara Davidson *v.* The Virginia (D. C. 1885), 24 Fed. 763; The A. W. Thompson (D. C. 1889), 39 Fed. 115; Graddick *v.* The Relief (D. C. 1894), 63 Fed. 169.

Effect of change of course by privileged vessel.—A steamer is not liable where the collision was caused by an improper change in the course of the sail vessel, where she used all means in her power to avoid the collision after such change of course. The Potomac (1869), 75 U. S. (8 Wall.) 590, 19 L. Ed. 511. [C. S. p. 8383.]

A steamer is not liable for collision with a privileged steamer where the latter changed her course or stopped when so close that the former was unable to check its speed in time to avoid the collision, and the accident could not have occurred had the tug kept on its course. The Northfield (1878), 14 Sup. Ct. 1184, 154 U. S. 629, 24 L. Ed. 680; The Norge (1893), 55 Fed. 347, 5 C. C. A. 127.

Where the forward of two vessels pursuing the same course is willfully thrown in the way of the other, she can not recover for a collision ensuing, although the rear vessel be not without fault. Gaffner *v.* Pigott (1902), 116 Fed. 486, 54 C. C. A. 641.

Change of course before risk of collision arose.—Change of course by a schooner on crossing courses with a steamer does not place her in fault for collision, where it is shown to have been made long before any risk of collision was involved, and could in no way have operated to confuse, mislead, or obstruct the navigation of the steamer. The Energia (1895), 66 Fed. 604, 13 C. C. A. 653, affirming (D. C. 1893) 56 Fed. 124.

Change in extremis.—Luffing a schooner into the wind, when collision was imminent, in an effort to stop her headway and lessen the damage likely to ensue, was no fault. McCormick *v.* The Gladys (D. C. 1888), 35 Fed. 160.

Presumptions and burden of proof.—If a collision occurs from the privileged vessel not having kept on her course the obligation rests on her to show sufficient causes existing in the particular case to render a departure from the rule necessary. The Corsica (1869), 76 U. S. (9 Wall.) 630, 19 L. Ed. 804, affirming (C. C. 1868) Fed. Cas. No. 3,256.

The burden is on a steamboat to clearly prove that the luffing of a sloop would have saved a collision made imminent by the negligence of such steamboat. Maguire *v.* The Sylvan Glen (D. C. 1880), 2 Fed. 905.

Weight of evidence.—The rule applied, in cases of collision between sailing vessels, that where the evidence is conflicting, it is more probable that one vessel fell off from her course than that the other changed her course many points, applies with less force to a collision between a sailing vessel and a steamer. The Edda (1909), 173 Fed. 436, 97 C. C. A. 638; writ of certiorari denied, Coastwise Transp. Co. *v.* The Edda (1910), 30 Sup. Ct. 576, U. S. 622, 54 L. Ed. 641.

Courts view with some suspicion the exculpatory allegation of a steamer that a sailing vessel changed her course, and a claim by a tug that a gust of wind came with such nice punctuality as to make an involuntary change of eight points in the course of a schooner, and carry her against her navigator's intention, into a passing barge, which should have kept out of her way, is an improbable coincidence, not to be adopted when not supported by a preponderance of the evidence. The George L. Garlick (D. C. 1898), 88 Fed. 553.

Testimony from a steamer, clearly in fault for a collision with a sailing vessel, that the latter was guilty of contributing fault by changing her course, will be viewed with suspicion; and when the evidence from the sailing vessel is to the contrary, and accords with the probabilities, it will be accepted in preference. The Isaac H. Tillver (D. C. 1900), 101 Fed. 478.

1434. Vessel to avoid crossing ahead.—Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. *Art. 22, sec. 1, June 7, 1897 (30 Stat. 101).*

Notes of Decisions

Extent of duty of burdened vessel.—A steamer meeting another in the fifth situation, and bound to keep out of her way—if able to do so through stopping and backing—has no right to go to the left, and attempt to cross the bows of the other, when there is not sufficient time or space to pass in that manner without a collision unless the other vessel either stops or changes its course; the latter has the right of way, and the right to proceed on her course without obstruction. The Garden City (D. C. 1884), 19 Fed. 529.

Effect of attempt by burdened vessel to cross ahead.—Where the primary fault is on the vessel bound to keep out of the way for improperly attempting to cross the other's bows, the latter will not be held in fault except on a preponderance of proof that she did not stop and back as soon as she had reason to apprehend danger because the other could not or would not clear without her cooperation. The Cement Rock (D. C. 1889), 38 Fed. 764; The Pocomoke (D. C. 1906), 150 Fed. 193.

Excuses for attempt to cross ahead.—A steamboat which attempts to cross the bow of a tug having a tow, approaching on her starboard hand, despite opposing signals, is liable for a collision with the tow, though otherwise she would have had to stop. Myers Excursion & Navigation Co. v. The Richard Peck (D. C. 1894), 61 Fed. 336, affirming decree The Dave & Mose (D. C. 1892), 49 Fed. 389.

1435. Steam-vessels to slacken speed, etc.—Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. *Art. 23, sec. 1, act of June 7, 1897 (30 Stat. 101).*

Notes of Decisions.

Necessity for slackening or stopping.—A steam vessel is not bound to slacken her rate of speed until there is apparent danger. Jacobsen v. Dalles, P. & A. Nav. Co. (1902), 114 Fed. 705, 52 C. C. A. 407, affirming decree (1901), 106 Fed. 428, and writ of certiorari denied (1903), 24 Sup. Ct. 847, 191 U. S. 575, 48 L. Ed. 308; Kennedy v. The Sarmatian (C. C. 1880), 2 Fed. 911.

If two vessels, under steam, are approaching each other by interfering courses, so as to involve risk of collision, the vessel which has the other on the starboard side must, if the proximity is such that stopping is necessary, stop at once. The Hesper v. The Lord O'Neil (C. C. 1886), 26 Fed. 463.

A steam vessel, which is bound to keep out of the way of another steamboat, will be held in fault if collision happen through her delay in backing, where the circumstances of wind and tide and signals exchanged were sufficient to have shown her that such backing could not be delayed without risk of collision. New York, L. E. & W. R. Co. v. The Breakwater (D. C. 1888), 39 Fed. 511.

Where a steamer and a schooner are half a mile apart, and the master of the steamer sees there is danger of collision, it is his duty to slacken her speed, or stop and reverse, if necessary. The Havana (D. C. 1893), 54 Fed. 411.

A steamship about to collide with a schooner easily seen is bound to use due precaution and care to come to a standstill by reversing her engines if necessary before she should collide. The Director (D. C. 1910), 180 Fed. 606.

A rowboat is not a "vessel," within the rule; an a steamer is not bound to slacken speed or reverse for a rowboat. Fischer v. Camden & P. Steamboat Ferry Co. (1889), 124 Pa. St. 154, 16 Atl. 634, 23 Wkly. Notes Cas. 224.

Uncertainty as to course of other vessel.—When the course of a sailing vessel is uncertain, a steamer must in due time slacken her speed, and, if necessary, stop and back, and neither proceed nor change her course until it has been ascertained. The Western Metropolis (C. C. 1870), Fed. Cas. No. 17,441; Hoben v. The Westover (D. C. 1880), 2 Fed. 91.

A steamer meeting a schooner in a channel at night must stop or reverse when the schooner's light suddenly disappeared, it being uncertain [illegible] the schooner had turned. [illegible] Wm. R. [illegible] Fed. 590.

Excuses for failure to comply with the rule.—A vessel can not be excused from stopping and reversing when required by the rules of navigation, merely because her own construction is so faulty that she can not stop in time to prevent collision. The Albert Dumois (1900), 20 Sup. Ct. 595, 177 U. S. 240, 44 L. Ed. 751, affirming decree Jakobsen *v.* Springer (1898), 87 Fed. 948, 31 C. C. A. 315.

A steamer is not in fault for failing to sooner reverse, where she had already stopped her engines, and a reversal did not appear necessary until too late to prevent the collision. The Maine (1909), 170 Fed. 915, 96 C. C. A. 131, reversing decree (D. C. 1907), 153 Fed. 635.

As a steamer swinging round to enter a dock had no reason to apprehend that vessels coming up from below against the tide, in plain sight of her, would run into her without cause, and until a few moments before collision had a right to assume that the approaching tug would stop her headway, or go to the eastward of her, it was not contributory negligence to fail to reverse, which would have involved running into the pier with greater damage, and brought the bow of the steamer against the tow with greater force. The William E. Ferguson (D. C. 1901), 107 Fed. 155.

A steamer approaching a sailing vessel on a crossing course has no right to keep her speed on the assumption, or in the expectation, that the sailing vessel will change her tack. Donald *v.* Guy (D. C. 1905), 135 Fed. 429.

Presence of other vessels.—The presence of a passing steamer, instead of furnishing an excuse for failing to stop or reverse, renders the observance of the rule and the exercise of precautionary care all the more necessary. Donald *v.* Guy (D. C. 1905), 135 Fed. 429.

Inability to reverse.—The inability of a steamer going at a speed of from 10 to 12 knots an hour at once to reverse her engines after stopping them is not a fault. The Northfield (1878), 154 U. S. 629, 14 Sup. Ct. 1184, 24 L. Ed. 680, affirming (1870), Fed. Cas. No. 10,326, 4 Ben. 112.

Effect of violation of rule.—A steamer which fails to stop and reverse when meeting another steamer end on, or nearly so, which commits the fault of starboarding, is guilty of a contributory fault. The Albert Dumois (1900), 20 Sup. Ct. 595, 177 U. S. 240, 44 L. Ed. 751, affirming decree Jakobsen *v.* Springer (1898), 87 Fed. 948, 31 C. C. A. 315.

A steamer, colliding with a schooner while violating this rule, is liable for the damage. The Energia (1895), 66 Fed. 604, 13 C. C. A. 653, affirming (D. C. 1893), 56 Fed. 124.

1436. Overtaking vessel.—Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way. *Art. 24, sec. 1, act of June 7, 1897 (30 Stat. 101).*

Notes of Decisions.

Applicability of rule.—This rule does not apply where the vessels were originally on meeting courses but one of them before the collision rounded to to make a landing and at the time of the collision had no definite course. The John Englis (1910), 176 Fed. 723, 100 C. C. A. 579; writ of certiorari denied. Lehigh Valley Transp. Co. *v.* Monk (1910), 30 Sup. Ct. 697, 217 U. S. 608, 54 L. Ed. 901.

A steam vessel coming up with another from a direction more than two points abaft her beam does not cease to be an overtaking vessel, because of the fact that the overtaken vessel is at the time going astern. The Sicilian Prince (D. C. 1904), 128 Fed. 133; decree affirmed (1905), 144 Fed. 951, 75 C. C. A. 677.

Where a steamship and steam pilot boat start about the same time after the pilot

is put aboard the former, and first one and then the other forges ahead, neither is an overtaking vessel within the rules, but both are in fault in entering abreast without exchanging signals in a narrow pass, where a shifting current caused the ship to sheer into the pilot boat. The Joseph Vaccaro (D. C. 1910), 180 Fed. 272.

A vessel approaching from astern another vessel engaged in making fast to tows was an overtaking vessel and required to keep out of the way. The George W. Elder (D. C. 1913), 203 Fed. 523.

Duration of duty.—This article applies until the overtaking vessel has completely passed the other. Kennedy v. American Steamboat Co. (1878), 12 R. I. 23.

Overtaking or crossing courses.—Where two steamers on the same route are rounding the same point, they can not be considered crossing courses where the faster boat attempts to cross the bows of the other. The Oceanus (C. C. 1875), Fed. Cases Nos. 10,415; Id. (D. C. 1872), Fed. Cas. No. 10,414.

An overtaking vessel is one coming up astern of the proper range of the leading vessel's colored side lights; i. e. more than two points aft of abeam. The Ardanna (D. C. 1886), 29 Fed. 98.

If, upon starting out of the slip, the ferryboat's bow is astern of a steamer abreast of her slip, and if she subsequently crosses the bows of the latter vessel she will be considered as a following, but as a crossing, vessel. The Venetian (D. C. 1886), 29 Fed. 460.

A ship is an overtaking, and not a crossing, vessel, within the meaning of these terms as used in the navigation rules, although there is a difference of three points in the courses of the two vessels. Aldridge v. Clausen (N. Y. 1886), 42 Hun, 473.

Sailing vessels beating.—A sailing vessel which goes about at the same time as another vessel on a parallel course, and endeavors to pass such other vessel, is an overtaking vessel. The Clytie (D. C. 1870), Fed. Cas. No. 2,913.

Doubt as to rule applicable.—Where it was doubtful whether the vessels were on crossing or overtaking courses, and each attempted on the right of way, and proceeded without reference to the other, until too late to prevent the collision, both are in fault. Steaming No. 15 (D. C. 1907), 157 Fed. 147.

Extent of overtaking vessel's duty.—An overtaking vessel takes whatever risks attend her attempt to pass, from whatever cause arising, except from the fault of the vessel ahead, which is bound only to keep her course and speed. The Mesaba (D. C. 1901), 111 Fed. 215.

It is the duty of an overtaking vessel to pass at a safe distance and a safe point. The Sif (D. C. 1910), 181 Fed. 412.

It is the duty of an overtaking vessel to see to it that she does not come so near the overtaken vessel as to cause danger of collision; and, if she does come within the line of danger, it is her duty to warn the other vessel by signals, whether she intends to pass or not. The Fleetwing (D. C. 1902), 114 Fed. 409.

A steamboat meeting a tow, if she can not pass at a safe distance, must reduce her speed to prevent injury to the tow by the swell. The C. H. Northam (C. C. 1873), Fed. Cas. No. 2,690.

This article requires the overtaking vessel in a stream to give the one ahead such wide berth as to avoid any contingency that might arise from the effect or condition of the currents. The Newport (D. C. 1871), Fed. Cas. No. 10,183; The Ruth (D. C. 1910), 178 Fed. 749; decree affirmed (1911), 186 Fed. 87, 108 C. C. A. 199.

It is a fault in a vessel following another vessel, and going with the flood tide in the East River, to approach so near the vessel ahead as to be unable to avoid her in case of a stop on the part of the leading vessel. The Hackensack (D. C. 1887), 32 Fed. 800.

If a steamboat can not safely pass on either side of a tow, traveling in the same direction, it is her duty to wait until they have reached a point where she can thus pass in safety. Andus v. The Saratoga (D. C. 1880), 1 Fed. 730, 732.

An overtaking vessel is not bound to anticipate improper navigation on the part of the other vessel. Long Island R. Co. v. Killien (1895), 67 Fed. 365, 14 C. C. A. 418, reversing Killien v. Hyde (D. C. 1894), 63 Fed. 172.

Where an overtaking steamship, in stopping for the purpose of coming to anchor, loses her steerage way, and disables herself from keeping out of the other's way, and a collision ensues, the steamship is liable for the ensuing damages. Brady v. The Kendo and The Sampson (D. C. 1890), 44 Fed. 439.

An overtaking vessel, being warned by signals of the leading vessel as to a change of course to pass a meeting vessel, must conform her movements thereto. O'Brien v. The Whitenash and The Winnie (D. C. 1894), 64 Fed. 893.

Avoiding suction.—The force called "suction," exerted by one vessel on another, due to the creation of currents by a moving vessel, and the effect of which is apparently greatest when a larger and faster vessel is passing another moving in the same direction in shallow water and a nar-

row channel, has been recognized in many cases by courts of admiralty; and a court is not justified in refusing to consider it as a cause in a case of collision between two steamships, one of which had overtaken and was passing the other in a river at a distance of not more than 75 to 150 feet, and where, under the evidence, it appears that the overtaken vessel suddenly sheered and struck the other after the latter had nearly passed. The Aureole (1902), 113 Fed. 224, 51 C. C. A. 181; The Mesaba (D. C. 1901), 111 Fed. 215.

Excuses for failure to keep out of the way.—This rule does not apply where the vessel in front changes its course, and the vessel behind is so circumstanced as to be unable to do the same. The Grace Girdler (1868), 74 U. S. (7 Wall.) 196, 19 L. Ed., 113.

An overtaking steamer running down a tug, which, in accordance with rule, does not alter her course, is not excused by the fact that she blew whistles in time to enable the tug to get out of her way. The Cephalonia (C. C. 1887), 32 Fed. 112, affirming (D. C. 1886), 29 Fed. 332.

The mere fact that the overtaken vessel is on the wrong side of the channel does not justify the other in violating her plain duty to keep out of the way, when she has the former in plain sight, and is able to do so. Andus *v.* The Saratoga (D. S. 1880), 1 Fed. 730.

It is no defense that the overtaken vessel had not acquired full speed. The Bay Queen (D. C. 1886), 27 Fed. 813.

Change of course by overtaken vessel.—See notes to 1433, ante.

Presumptions and burden of proof.—A vessel overtaking another is required to keep out of the way, and steps to avoid a collision must be taken in season, and the burden of proof, in case of an accident, is on the overtaking vessel to show diligence on her part and negligence on the part of the other vessel. The Newport (D. C. 1871), Fed. Cas. No. 10,185; Forsyth *v.* The George A. Brandreth (D. C. 1880), 3 Fed. 414; The Sif (D. C. 1910), 181 Fed. 412.

Weight of evidence.—The testimony of the officers of an overtaken vessel as to the speed of the overtaking vessel is entitled to consideration, although their estimate differs from that of those on board the other vessel. Nicholas Transit Co. *v.* Pittsburgh S. S. Co. (D. C. 1912), 196 Fed. 65.

1437. Steam-vessels in narrow channels.—In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel. *Art. 25, sec. 1, act of June 7, 1897 (30 Stat. 101).*

Notes of Decisions.

Passing signals in narrow channels.—See notes to 1430, ante.

Applicability of rule.—This article applies as well to navigation in darkness or fog as in clear daylight, although the darkness or fog may affect the question of safety and practicability; and a vessel proceeding on the port side of a narrow channel in a fog, without any attempt to comply with the rule, must be held presumptively in fault for a resulting collision. The Yarmouth (D. C. 1900), 100 Fed. 667.

A steamship, after passing out to sea from New York Bay through Gedney Channel, which stopped to discharge her pilot some 800 to 1,000 feet outside of the entrance to the channel, which is about 1,150 feet wide, and lay to the north of the center of the channel extended, so that both she and the pilot boat which lay near were in the usual pathway of vessels approaching to enter the starboard side of the channel, did not violate the rule, since she was in the open ocean. The Kentucky (D. C. 1906), 148 Fed. 500.

Harbors and bays.—In the case of a bay which is also a port or harbor, the entire body of navigable water is not to be considered a single narrow channel, where through such bay, as in upper New York Bay, there have been officially designated two or more channels running substantially parallel with each other and in the same general direction as the main flow of the tide or current. The Bee (1905), 138 Fed. 303, 70 C. C. A. 593, affirming decree The Alfred W. Booth (D. C. 1903), 127 Fed. 453.

"Narrow channels" are bodies of water navigated up and down in opposite directions, and do not include harbor waters, with piers on each side, where the necessities of commerce require navigation in every conceivable direction. The No. 4 (1908), 161 Fed. 847, 88 C. C. A. 665.

Bends in channel.—When vessels approach each other in channels, especially narrow ones, each pilot is bound, with peculiar exceptions, to keep well over to the side on his starboard hand; and this rule is not affected by the fact that the bends in the channel may at times bring one of them on the starboard hand of the other. The Plymothear (1895), 68 Fed. 395, 15 C. C. A. 490, modifying decree The Victory (D. C. 1894), 63 Fed. 631; reversed (1896), 168

U. S. 410, 18 Sup. Ct. 140, 42 L. Ed. 519; Towboat No. 1, Norfolk & Western (1896), 74 Fed. 906, 21 C. C. A. 169.

The narrow channel rule applies to vessels following ranges on the Delaware River which intersect, so as to require a change of course of three points at the place of intersection. The Florence (1911), 186 Fed. 57, 108 C. C. A. 159, reversing decree The Captain Bennett (D. C. 1909), 171 Fed. 199.

Effect of navigating on port side of channel.—The fact alone that one of two vessels at the time of a collision was on the wrong side of a channel in violation of the narrow channel rule, will not constitute a contributory fault where the collision occurred in the daytime on a clear day through the direct fault in navigation of the other vessel with nothing to obstruct her actions. The La Bretagne (1910), 179 Fed. 286, 102 C. C. A. 651; reversing decree (D. C. 1906), 148 Fed. 477, and writ of certiorari denied, La Compagnie Generale Transatlantique v. Baltimore & O. R. Co. (1911), 31 Sup. Ct. 470, 219 U. S. 585, 55 L. Ed. 347; Andus v. The Saratoga (D. C. 1880), 1 Fed. 730, 733; The Westhall (D. C. 1899), 151 Fed. 1010.

In the absence of evidence that it was not safe and practicable to keep on the starboard side of the channel, or of credible evidence of fault on the part of the vessel navigating on that side, the collision must be attributed solely to such fault of the steamer on the wrong side of the channel. The Dauntless (D. C. 1903), 121 Fed. 420; decree modified (1904), 129 Fed. 715, 64 C. C. A. 243.

A vessel on the wrong side of the channel assumes the risk incident thereto and is required to exercise extra precautions to avoid collision with vessels which are rightfully on that side. The Winfield S. Cahill (D. C. 1904), 130 Fed. 989; decree reversed, Gring v. Boyer (1907), 157 Fed. 220, 84 C. C. A. 668.

Presumptions and burden of proof.—The burden is on a steamer meeting, in a channel, several tows on hawsers, to prove that she kept on the starboard side of the channel. The Lucy (1896), 74 Fed. 572, 20 C. C. A. 660, affirming decree (1896), 72 Fed. 85, 18 C. C. A. 442.

A steamer which, going down a narrow and frequented channel, decided to cross from the western to the eastern side, for the purpose of anchoring, and in so doing ran down the hindmost of two barges in tow of an ascending tug, has the burden of showing that she exercised great care in executing the maneuver, which was an extraordinary one. The Henry Clay (D. C. 1896), 72 Fed. 1021.

Excuses for navigating on port side of channel.—This article is not an inflexible rule, but only to be followed "when safe and practicable"; and, where it is manifest that an adherence to it will produce disaster, it is not only the right, but the duty of the navigator to disregard it. The Three Brothers (1909), 170 Fed. 48, 95 C. C. A. 322, reversing decree (D. C. 1908), 162 Fed. 388.

The rule does not state an absolute requirement, so as to justify one of two meeting steamers in acting on the assumption that she has the whole starboard half of the channel. The Howard Reeder (1913), 207 Fed. 920, 125 C. C. A. 377, reversing judgment (D. C. 1912), The Columbia, 195 Fed. 1000.

Custom contrary to rule.—An alleged custom by which large vessels take the north side in entering is bad in principle, and contrary to law, and affords no ground for exempting a vessel from liabilities incurred by disregarding the rule. Occidental & O. S. S. Co. v. Smith (1896), 74 Fed. 261, 20 C. C. A. 419, affirming decree The Oceanic (D. C. 1894), 61 Fed. 338.

The custom, known to all parties, for vessels going down the Mississippi River below New Orleans to keep in the middle of the stream, and for vessels coming up to cross over to the west side at Dick Wright's Point to avoid the current, and to follow the curving west bank until passing Sixty-Mile Point, which was followed by the ascending vessel, excuses her for a collision on that course. The Esparta (1908), 160 Fed. 289, 87 C. C. A. 413.

A custom for vessels bound both up and down the river to use the west passage of the draw in the railroad bridge over Newark Bay should be followed. The Thomas P. Way (D. C. 1886), 30 Fed. 207.

Particular excuses.—A steamer going east in the east channel of East River is in fault for hugging Blackwell's Island, though she had a tow on a 50-fathom hawser that might have drifted onto the opposite shore. Kennedy v. The Empire and The Transfer No. 3 (1894), 63 Fed. 476, 11 C. C. A. 519.

A tug with two long car floats in tow alongside was not in fault for being on the east side of the channel in East River in passing up to make a landing on the Brooklyn side, where such position was necessary and customary to enable her to round to and land safely in the then state of the tide. The New Hampshire (1905), 136 Fed. 769, 69 C. C. A. 415.

When there is an ebb tide in the Harlem River setting strongly against the Bronx shore at the bend below Kingsbridge, which makes it dangerous for a hawser tow going up to pass the bridge on that side, it is justifiable for such a tow, as is customary, to keep to the lefthand side of the river,

The Three Brothers (1909), 170 Fed. 48, 95 C. C. A. 322, reversing decree (D. C. 1908), 162 Fed. 388.

The presence of another boat ahead, which a tug desired to pass to the left, does not excuse her sheering to the port side of the channel. Scott *v.* The Drew and The Camelia (D. C. 1889), 38 Fed. 858.

Where the channel had been mined by the Government the steamer was directed to go to the port side of the passage, she was not in fault for a collision on that side with a vessel directed to take the other side. The Chalmette (D. C. 1899), 93 Fed. 500.

The position of a steamer's tow, which she had cast off to allow to go to anchorage, on her port side did not justify her in violating the narrow channel rule. The New Orleans (D. C. 1909), 171 Fed. 764.

State statutes regulating navigation in narrow channels.—In the absence of any regulation on the subject by Congress, the New York law providing that the East River between the Battery and Blackwell's Island shall be navigated as nearly as possible in the middle of the stream is valid. Lonan *v.* The C. H. Northram (D. C. 1878), Fed. Cas. No. 8,473; The Aldrich *v.* The W. H. Beaman (D. C. 1891), 45 Fed. 125.

The State statute requiring vessels navigating the East River to keep near the middle of the river is not changed or superseded by the pilot rules established by act June 7, 1897 (30 Stat. 96). The Hartford (1905), 135 Fed. 1021, 68 C. C. A. 230, affirming decree (D. C. 1903), 125 Fed. 559; the Spartan Prince (D. C. 1903), 126 Fed. 885.

Vessels navigating the East River are governed by the State statute requiring them to keep as nearly as possible in the middle, not by the narrow channel rule, but on meeting vessels they must observe the general rule of passing port to port, and when on crossing courses must obey the starboard hand rule. The Ashley (D. C. 1913), 209 Fed. 965.

1438. Fishing vessels to be avoided.—Sailing-vessels under way shall keep out of the way of sailing-vessels or boats fishing with nets, or lines or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing-vessels or boats. *Art. 26, sec. 1, act of June 7, 1897 (30 Stat. 102).*

Notes of Decisions.

Applicability of rule.—This article applies to a fishing boat having motor power, and a schooner is liable for the death of a person caused by her negligently running down a motor boat while at anchor and fishing in a place which left ample fairway. The Marshall O. Wells (1910), 178 Fed. 918, 102 C. C. A. 296, affirming decree (D. C. 1909), 172 Fed. 984.

Presumptions and burden of proof.—A schooner which ran down a fishing boat, either anchored or fishing with trawls, to avoid liability, has the burden of showing that she was without fault. The Marshall O. Wells (D. C. 1909), 172 Fed. 984; decree affirmed (1910), 178 Fed. 918, 102 C. C. A. 296.

1439. Obedience to and construction of rules for steering.—In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. *Art. 27, sec. 1, act of June 7, 1897 (30 Stat. 102).*

Notes of Decisions.

Relation to other rules.—The rules of navigation must be observed, and the courts have no option but to enforce them, unless in cases coming clearly under this rule, where it is necessary to avoid immediate danger. The R. R. Kirkland (D. C. 1880), 48 Fed. 760, 762.

Circumstances requiring departure from rules.—When a collision is imminent, each vessel must do all in her power to avert it, no matter what may have been the previous faults, or which may have the right of way. The Mauch Chunk (1907), 154 Fed. 182, 83 C. C. A. 276 affirming decree (D. C. 1905), 139 Fed. 747, and writ of certiorari denied, Central R. Co. of New Jersey v. Wren (1907) 28 S. Ct. 255, 207 U. S. 586, 52 L. Ed. 352; The Drew (D. C. 1885), 25 Fed. 457, 461; The Non Pareille (D. C. 1887) 33 Fed. 524.

Carrying the statutory lights will not exonerate a vessel from responsibility

for a collision, where the special circumstances reasonably called for extraordinary measures to apprise other vessels of her proximity and character. The R. W. Burrowes (C. C. 1870), Fed. Cas. No. 12,180.

While, ordinarily, a vessel has a right to assume that another vessel is not derelict in the observance of the rules of navigation, this presumption is not to be carried so far as to exonerate her from ordinary precautions on her own part, or to excuse her from the consequences of a mistake, when, by slight exertion, and without any peril to herself or other vessels, she could certainly avoid hazard. The Titan (C. C. 1885), 23 Fed. 413.

Circumstances justifying disregard of rules.—This rule admits a departure from all rules in moments of immediate danger. The Manhasset (D. C. 1888), 34 Fed. 408, 424.

Mere inconvenience will not excuse departure from the rules. The E. A. Packer (1893), 58 Fed. 251, 256, 7 C. C. A. 216.

The fact that a ferryboat runs in connection with railroad trains, which makes it especially desirable to avoid delay, and that she is pursuing her ordinary course, does not justify her in departing from the rules of navigation without first securing the assent of the other vessel. The Garden City (D. C. 1884), 19 Fed. 529; MacMahon *v.* Brooklyn & N. Y. Ferry Co. (1896), 41 N. Y. S. 1026, 10 App. Div. 376, 75 N. Y. St. Rep. 1394.

A steamship backing out from her slip at Jersey City preparatory to straightening down the North River to go to sea can not be deemed, while so backing, as being on a definite course, so as to give her the right of way over a steamer coming down the river, which has her on her starboard end. The case is rather one for the application of the "special circumstances" rule. The Noordland (1893), 149 U. S. 144, 13 Sup. Ct. 817, 37 L. Ed. 681, affirming (D. C. 1887) 30 Fed. 502.

Where a steamer overlook and passed another steamer in tow, and while maneuvering to effect a landing at a pier swung around and collided with one of the towing tugs, the starboard hand rule did not apply to the tow, the case being one of special circumstances. The Horatio Hall (D. C. 1904), 127 Fed. 620.

Danger from other vessels.—The fact that a meeting vessel is in danger from a third, which was within full view of the pilot of the other meeting vessel is a "special circumstance," which required the latter to slacken speed or to stop and reverse. The C. R. Hoyt (D. C. 1905), 136 Fed. 671.

Custom contrary to rules.—Where ferryboats plying from New York to Jersey City, their respective docks on each side being adjacent, have a custom of their own as to right of way, in the event of a collision, the case falls under rule 24, and the regulations of the board of supervising inspectors do not apply. The Pavonia (C. C. 1885), 26 Fed. 106.

Violation of statutory rules of navigation can not be justified upon the ground that it is customary for vessels to violate them under certain tidal conditions. The Transfer No. 10 (D. C. 1904), 137 Fed. 606.

1440. Sound signals.—When vessels are in sight of one another a steam-vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle. *Art. 28, sec. 1, act of June 7, 1897 (30 Stat. 102).*

Notes of Decisions.

Applicability of rule.—The rule is applicable, and obligatory, although the other is a sailing vessel. The Triton (1902), 118 Fed. 329, 55 C. C. A. 345.

A boat which has missed its landing in a fog, and is turning around to return to it in the fairway of other boats navigating the river, should blow three whistles. Wallamet R. T. Co. *v.* Oregon S. N. Co. (D. C. 1876), Fed. Cas. No. 17,106.

The enforcement of this rule is imperative, where steam vessels reverse their engines and move backwards, even with a view of avoiding a collision. The Georgetown (D. C. 1905), 135 Fed. 854.

This rule applies in all cases when vessels are in sight of one another, and is not limited by rule 6 of the pilot rules, adopted by the supervising inspectors, that whistle signals shall be given and answered by vessels "passing or meeting at a distance within half a mile of each other." The Aurelia (D. C. 1910), 183 Fed. 341.

This rule applies to a steam vessel going astern on leaving anchorage preparatory to laying her course. The Atkins Hughes (D. C. 1912), 199 Fed. 938.

Repeating signal.—A vessel should repeat her three-whistle signal, when the action of the other vessel indicates that it has not been heard. The Sicilian Prince (D. C. 1904), 128 Fed. 133; decree affirmed (1905), 144 Fed. 951, 75 C. C. A. 677.

1441. Negligence in avoiding collisions.—Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. *Art. 29, sec. 1, act of June 7, 1897 (30 Stat. 102).*

Notes of Decisions.

For decisions prior to enactment of rules see 1505, post.

I. Lookout.
II. Precautions required by ordinary practice of seamen.
- (A) Degree of care required.
- (B) Customs and usages.
- (C) Insufficient crew on deck.
- (D) Steering.
- (E) Navigation in harbors and narrow channels.
- (F) Speed of vessels in harbors and narrow channels.
- (G) Swells.
- (H) Currents.
- (I) Navigating near piers.
- (J) Entering or leaving slips.
- (K) Moored vessels.
- (L) Vessels at anchor.
- (M) Vessel lying at rest.
- (N) Tows.
- (O) Small boats.

III. Special circumstances.
- (A) Extra precautions.
- (B) Justification or necessity for deviation from rules.
- (C) Presence of other vessels.
- (D) Disability of vessel, equipment, or crew.
- (E) Prior fault of other vessel.
- (F) Maneuvers in extremis.
- (G) Inevitable accident.

I. Lookout.

"Lookout" defined.—A "lookout" is a person who is specially charged with the duty of observing the lights, sounds, echoes, or any obstruction to navigation. The Tillicum (D. C. 1914), 217 Fed. 976; The Wilbert L. Smith (D. C. 1914) Id. 981.

Necessity for lookout.—A sailing vessel is entitled to assume that a steam vessel approaching her is being navigated with a proper lookout, and with reasonable attention to the obligations laid upon her. Irons v. The Coe F. Young (1891), 49 Fed. 167, 1 C. C. A. 219, affirming (D. C. 1891), 45 Fed. 505.

The necessity of a lookout properly stationed on a steamer navigating a harbor is imperative. The Drew (D. C. 1885), 25 Fed. 457; The Manhasset (D. C. 1888), 34 Fed. 408.

The rule requiring a lookout admits of no exceptions, on account of size, in favor of any craft capable of committing injuries. Hodson v. The Harry Lynn (D. C. 1893), 56 Fed. 271.

The duty of a steamship to maintain a constant lookout is especially imperative in favor of a vessel, which under the rules has the right of way. The Dorchester (D. C. 1908), 163 Fed. 779; decree affirmed (1908), 167 Fed. 124, 92 C. C. A. 576.

A local custom can not excuse a vessel from observing the general admiralty rule requiring a lookout to be maintained forward, especially in the darkness or in a fog. The Tillicum (D. C. 1914), 217 Fed. 976.

Sailing vessels.—The duty of steamers to keep out of the way of sail vessels does not absolve the latter from the exercise of the most vigilant caution. Lonan v. The C. H. Northram (D. C. 1878), Fed. Cas. No. 8,473; Grube v. Hamburg-American S. S. Co., (1903), 68 N. E. 666, 176 N. Y. 383, reversing judgment Same v. Hamburg-American Packet Co. (1903), 82 N. Y. Supp. 429, 83 App. Div. 636.

Vessels in tow.—A tow being navigated in greatly frequented waters on a line 1,000 feet long must keep a lookout. The American (1900), 102 Fed. 767, 42 C. C. A. 617.

Towing vessel.—A propeller which tows a barge past a vessel at anchor, passing so close as to cause a collision between the vessel and the barge, and without keeping a proper lookout astern, is in fault, and solely liable. The Cement Rock and The Venture (D. C. 1876), Fed. Cas. No. 2,544.

Vessel at anchor or lying to.—A steamship without steam up, which has been moved from her dock, and is lying in the channel of a narrow harbor, while her tug is preparing to tow her, is in fault if she fails to maintain a lookout for approaching vessels, so as to apprise them of her helpless condition. The Bowden v. The Decatur H. Miller (1897), 78 Fed. 649, 24 C. C. A. 267.

A tug, attempting to take one of its scows alongside and shorten the hawser on the other, was at fault in attempting to perform her maneuver, which occupied from 500 to 750 feet of the channel, at a point where it was less than half a mile in width, and at a time when seagoing vessels were known to be due, without having some one

in the pilot house of the tug on the lookout to answer and give signals. The Umbria (1907), 153 Fed. 851, 83 C. C. A. 33, affirming decree (D. C. 1906), 148 Fed. 283.

When a vessel is at anchor in a place where vessels are frequently passing, and where navigation is difficult and dangerous, special care and vigilance are required. She must have a good lookout, and an anchor light of the regulation pattern lit and burning. To have a watch on deck is not sufficient, if there be no one on lookout at the time of the collision. The Henry Warner (D. C. 1886), 29 Fed. 601.

Necessity for lookout at the stern.—An ocean steamer starting her propeller in order to leave her slip, which was also occupied by other vessels, should have a lookout at the stern to give warning of danger to such vessels from the propeller's action. The Nevada v. Quick (1882), 106 U. S. 154, 1 Sup. Ct. 234, 27 L. Ed. 149, affirming (C. C. 1879), Fed. Cas. No. 10,131; The Colon (D. C. 1876), Fed. Cas. No. 3,022.

Vessel backing.—A vessel backing out from her slip must keep a lookout astern. The Luzerne (1912), 197 Fed. 162, 116 C. C. A. 599; The Nevada (C. C. 1879), Fed. Cas. No. 10,131; Dunstan v. The R. R. Kirkland (D. C. 1879), Fed. Cas. No. 4,181. The Dreamland (D. C. 1906), 149 Fed. 910.

A large steamship which, after having been passed by the health officer at the quarantine station, undertook to swing around with her head to the eastward, and in doing so backed and collided with a small schooner, with no lookout astern, was solely in fault for the collision. The Iowa Land (1905), 137 Fed. 1018, 70 C. C. A. 670, affirming judgment (D. C. 1904), 129 Fed. 964.

It is not a fault on the part of a stern-wheeler moving slowly and carefully out from her slip, not to have a lookout at her stern. McFarland v. Selby Smelting & Lead Co. (D. C. 1883), 17 Fed. 253.

A tug which, without looking astern, backed toward its slip and collided with a boat was in fault. Greenwood v. The W. [illegible] and The Grapeshot (D. C. 1886), 30 Fed. 156.

Where a lighter was backing to get out of her berth, her engine failed to start when the pilot gave the order to the lever, and she struck another vessel lying at an adjacent pier. Repairs were being made on the pier. There was more or less drift-ice in the river, and it was claimed that the propeller was fouled by a log. The tug had a lookout on the stern, but was not keeping a lookout for obstructions. Held, that the tug was in fault for failing to exercise greater care in backing, in view of the known danger of fouling, under the circumstances. The Despatch (D. C. 1902), 120 Fed. 856.

Overtaken vessel.—An overtaken vessel is under no duty to keep a lookout aft to prevent being run down by the overtaking vessel, but has a right to act on the presumption that the latter will keep out of her way. The Greystoke Castle (D. C. 1912), 199 Fed. 521; Erwin v. Neversink Steamboat Co. (1882), 88 N. Y. 184, affirming (1881), 23 Hun 573.

R. S. 4234, requiring a sailing vessel to exhibit a flare-up light on the quarter toward which a steamer was approaching, contemplated the keeping of a sufficient watch over the stern to enable the vessel to perform her duty as to the lights, and, if the situation is such that one lookout is not enough, there must be more. Kennedy v. The Sarmatian (C. C. 1880), 2 Fed. 911.

Position of lookout.—While no specific location on a vessel is prescribed for the lookout, he is required by good navigation to be placed at the point best suited for the purpose alike of hearing and observing the approach of objects likely to be brought into collision with the vessel; having regard to the circumstances of the case and condition of the weather. The Vedamore (1905), 137 Fed. 844, 70 C. C. A. 342, affirming decree (D. C. 1904), 131 Fed. 154; Brigham v. Luckenbach (D. C. 1905), 140 Fed. 322.

The pilot house is not a proper place for a lookout. Eastern Dredging Co. v. Winnisimmet Co. (1908), 167 Fed. 860, 89 C. C. A. 550; The Excelsior (D. C. 1882), 12 Fed. 195.

Rule 38 of the board of supervising inspectors, requiring passenger steamers and ferryboats to keep one of the crew on watch in or near the pilot house, does not supersede the general rule requiring a lookout forward. The Tillicum (D. C. 1914), 217 Fed. 976.

Where a large ocean-going steamship, with decks considerably above the water, was navigating Chesapeake Bay in the night in foggy weather, a lookout stationed in the crow's nest, 60 feet above the deck, and 100 feet from the stem, was not properly located. The Vedamore (1905), 137 Fed. 844, 70 C. C. A. 342, affirming decree (D. C. 1904), 131 Fed. 154.

The position of the captain of a schooner abaft the wheel is not a proper position for a lookout, when sailing full and free with a strong wind; and, in case of a conflict of testimony, observation reported from such a position must be deemed partial, interrupted, and incomplete, and entitled to far less weight than that of a lookout properly stationed. The Excelsior (D. C. 1882), 12 Fed. 195.

A tug must keep a lookout at the bow of the tow alongside, where that projects beyond the tug. The Pennsylvania (D. C. 1878), Fed. Cas. No. 10,949; Cocks *v.* The Tonawanda (D. C. 1880), 3 Fed. 588; The Lyndhurst (D. C. 1899), 92 Fed. 681; The A. P. Skidmore (D. C. 1901), 108 Fed. 972.

Necessity of lookout specially stationed for that purpose.—A lookout forward is necessary for all vessels sailing in harbors in daytime. The A. G. Brooks (D. C. 1869), Fed. Cas. No. 98.

Where the attention of a lookout on a vessel is necessarily absorbed in a special direction, it is the duty of the vessel to detail another man for the general duty. New York & Oriental S. S. Co. *v.* New York, N. H. & H. R. Co. (D. C. 1906), 143 Fed. 991.

All that the law requires with respect to a lookout is that there shall be some one properly stationed to best observe, see, and hear the approach of other vessels; and a small launch, only 61 feet long, having her pilot house, in which her navigator stood, well forward, with open windows all around, and other members of the crew on the deck, can not be held in fault for a collision in the daytime, in fair weather, because she did not have a lookout specially stationed, where she was the privileged vessel, entitled to keep her course and speed, and the absence of such lookout did not contribute to the collision. The Pocomoke (D. C. 1906), 150 Fed. 193.

Competency of lookout.—It is doubtful whether a steward is a competent lookout, but he certainly is not when his attention is divided between such duty and the duties belonging to his employment as steward. The Bessie Morris (D. C. 1882), 13 Fed. 397.

Lookout having other duties to perform.—A steamer should have a trustworthy lookout, properly stationed, other than the officer of the deck or the helmsman. The Pilot Boy (1902), 115 Fed. 873, 53 C. C. A. 329.

Under the general admiralty rules it is the duty of every vessel, when navigating in a fog, to maintain a lookout in a proper position, who shall be charged with no other duty. The Wilbert L. Smith (D. C. 1914), 217 Fed. 981.

Where the captain of a steamer is acting at the same time as pilot and lookout, the vessel has not a proper lookout, and the owners may be liable for damage caused by such omission. Bill *v.* Smith (1872), 39 Conn. 206.

Number on lookout.—Where the circumstances require more than ordinary care, as in the case of a steamer running at a speed of 15 miles an hour, on a dark night, in a narrow channel, where there is great probability of meeting other vessels, a deck watch composed of the river pilot in command, stationed upon the bridge just above the pilot house, a man at the wheel, and a lookout upon the forecastle head, is insufficient, and prudent navigation requires a lookout to be stationed on either bow. The Oregon (1895), 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, reversing decree (D. C. 1891), 45 Fed. 62.

Duties of lookout.—Besides watching for lights ahead and on crossing courses, a lookout should also be watchful for things adrift, so near as to be likely to drift against his vessel, and, where she has a long tow, his watch for such unlighted drifting objects should be correspondingly extended. Cook *v.* Moran Towing & Transportation Co. (1911), 193 Fed. 48, 113 C. C. A. 120, affirming decree (D. C. 1911), 188 Fed. 846.

Reports by lookout.—A tug, whose master was deaf and therefore failed to hear the lookout report an approaching vessel, was at fault for an ensuing collision. The Luzerne (1912), 197 Fed. 162, 116 C. C. A. 599.

A steamer coming up the river, and rounding in to the pier at Pinner's Point, below Norfolk, held in fault for collision with a steam barge, which was just leaving the slip, because her lookout, who saw the barge at a considerable distance, either neglected to report the fact to the pilot, or the pilot neglected to recognize and respond to his report. Fiske *v.* The Emily A. Foote (D. C. 1896), 73 Fed. 508.

Failure to report.—The failure of a lookout to report a vessel which he sees is evidence of negligence in the performance of his other duties. Wright *v.* Norwich & N. Y. Transp. Co. (C. C. 1870), Fed. Cas. No. 18,087.

Excuses for failure to see danger.—The failure to keep a lookout, though contributing to a collision, is not a fault where it was due to the fact that practically all of the crew were disabled by yellow fever. The Southern Home (C. C. 1879), Fed. Cas. No. 13,187

A steamer running at moderate speed in a bay over 10 miles wide should not be condemned for failing to discover a sailing vessel without lights on a dark night, merely because she might have been discovered in time to avoid collision if an officer had been constantly sweeping the horizon with a good pair of glasses. The Leversons (D. C. 1882), 10 Fed. 753.

On libel for collision between a schooner and a yacht lying at anchor in a river, it appeared that it was a very dark night and the yacht was at anchor in the channel 25 miles from any frequented port. An expert testified that the lookout on the

schooner ought to have seen the yacht at a distance of 200 or 300 yards, and that, if he had seen her at 300 yards, the schooner ought to have cleared the yacht. The schooner was sailing at the rate of 6 knots, and would have covered 300 yards in some seconds more than a minute. Held, that the evidence of fault on the part of the schooner was not clear enough to justify a division of damages. Pierce v. The J. R. P. Moore (D. C. 1890), 45 Fed. 267.

A lookout is not excused for failing to see the tows of another by preoccupation with prior danger, or by the fact that the hawsers on the tows were 360 and 180 feet long, respectively. Barney Dumping Boat Co. v. The El Rio and The Mutual (D. C. 1895), 66 Fed. 360.

Effect of failure to keep proper lookout.—Deficiencies in the watch, consisting in failure to maintain the number of lookouts which prudence requires, and the failure of the master to supervise the men on duty while the vessel is in charge of a pilot, are to be regarded as evidences of negligence, and illustrative of lax management in the navigation of the vessel, rather than as distinct faults in themselves, and would not suffice to condemn her in the absence of proof that they contributed to the collision. The Oregon (1895), 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, reversing (D. C. 1891), 45 Fed. 62.

Contributing to collision.—The absence of a lookout is immaterial where it does not appear that the collision could in any wise be attributed to his absence. The Annie Lindsley v. Brown (1881), 104 U. S. 185, 191, 26 L. Ed. 716; The Elk (1900), 102 Fed. 697, 42 C. C. A. 598; Meyers Excursion & Navigation Co. v. The Emma Kate Ross (D. C. 1890), 41 Fed. 826; Percival v. The Tacoma (1888), 3 Wash. T. 581, 19 Pac. 151; Vernon v. International S. S. Co. (Wash. 1914), 139 P. 645.

Want of a lookout will not be excused unless it is clear that it did not contribute to the collision. The Atlas (C. C. 1873), Fed. Cas. No. 634; The Titan (C. C. 1885), 23 Fed. 413.

The absence of a lookout stationed where he should be will not render a vessel in fault for a collision, where she was navigated exactly as she should have been had there been a lookout reporting the situation. Elcoate v. The Plymothian (D. C. 1894), 63 Fed. 631; The Anna W. (D. C. 1919), 181 Fed. 604; decree reversed (1912), 201 Fed. 58, 119 C. C. A. 396.

The absence of a lookout is unimportant, where the approaching vessel was seen long before the collision occurred. The Dexter (1874), 90 U. S. (23 Wall.) 69, 23 L. Ed. 84; The General Frank Sigel (D. C. 1874), Fed. Cas. No. 5,311; Flannery v. Cornell Steamboat Co. (1895), 89 Hun 135, 34 N. Y. Supp. 1,069.

Whether or not an efficient lookout was maintained on a dredge at work in a channel during a dense fog is immaterial, where the fog bell on the dredge was being rung at intervals of less than a minute, and could be heard many times the distance at which an approaching vessel could be seen. The Bailey Gatzert (1910), 179 Fed. 44, 102 C. C. A. 612, affirming decree (D. C. 1909), 170 Fed. 101.

Where the burdened vessel stopped well off the course of the privileged vessel, but the latter changed her course and ran into the former, the want of a proper lookout on the burdened vessel is not a contributory fault. The N. & W. 2 (D. C. 1903), 122 Fed. 171.

The failure of a steam yacht navigating New York Harbor at a speed of 16 miles an hour to maintain a lookout was a fault and a contributing cause of a collision between the yacht and a submerged scow in tow, where a vigilant lookout might have seen the scow or noted her position from the hawser with which she was being towed. The H. S. Beard (D. C. 1904), 134 Fed. 648.

Privileged vessel.—If a vessel having the right of way held her course, it is all an approaching vessel had a right to require, and whether she had a proper lookout or not is immaterial. The Fannie (1870), 78 U. S. (11 Wall.) 238, 20 L. Ed. 114; The City of Paris (D. C. 1867), Fed. Cas. No. 2,765; The Empire State (D. C. 1870), Fed. Cas. No. 4,474; The City of New Bedford (D. C. 1878), Fed. Cas. No. 2,757; The Havana (D. C. 1893), 54 Fed. 411; The Virginia Jackson (D. C. 1904), 130 Fed. 221; The Fannie Hayden (D. C. 1905), 137 Fed. 280.

Presumptions and burden of proof.—The absence of a competent lookout casts the burden upon the vessel of showing that it did not contribute to the collision. The Pilot Boy (1902), 115 Fed. 873, 53 C. C. A. 329; The Anna W. (1912), 201 Fed. 58, 119 C. C. A. 396, modifying decree (D. C. 1910) 181 Fed. 604; The M. M. Hamilton (D. C. 1873), Fed. Cas. No. 9,685; The General Geary v. The George W. Childs and The W. C. Tanner (D. C. 1895) 67 Fed. 269; The Arthur M. Palmer (D. C. 1902), 115 Fed. 417.

Absence of proper lookout on a steam vessel is prima facie evidence that she was in fault for a collision with a sailing vessel which should have been seen in time to have been avoided. Brigham v. Luckenbach (D. [illegible] 146 Fed. 522.

Want [illegible]. The fact that a vessel [illegible] and running with-

out a proper lookout, though not decisive of a fault contributing to a collision, may be taken into consideration as bearing upon the probabilities of the case and raising a presumption against her. The Albert Dumois (1900), 20 Sup. Ct. 595, 177 U. S. 240, 44 L. Ed. 751, affirming decree Jakobsen *v.* Springer (1898), 87 Fed. 948, 31 C. C. A. 315.

In a collision case, where there is a dispute about lights and their bearings, the lack of a proper lookout, or the absence of his testimony, has a very great weight against the vessel deficient in this respect. The Rabboni (C. C. 1892), 53 Fed. 952; decree reversed (1897), 81 Fed. 239, 26 C. C. A. 379.

Presumptions and burden of proof.—Where the evidence leaves no doubt that two blasts of a whistle were given by one steamer, which were heard on the other as only a single blast, the distance being such that both ought to have been heard, the court must conclude, in the absence of other explanation, that the officers and lookouts were inattentive. The Ottoman (1896), 74 Fed. 316, 20 C. C. A. 214.

Where a tug, having a heavy schooner in tow, safely passed a schooner lying at anchor at a distance of at least 55 feet, and the officers of the tow admitted that none of them saw the anchored schooner until they were "right into her," it will be presumed that the collision was the result of the negligence of the tow, and the tug will not be liable therefor. The Albert N. Hughes (1899), 92 Fed. 525, 34 C. C. A. 516.

When there are no obstacles in the way, the fact that the approaching vessel is not seen is all that is necessary to impute negligence on the part of the lookout. The Pavonia (C. C. 1885), 26 Fed. 106.

II. Precautions Required by Ordinary Practice of Seamen.

(*A*) *Degree of care required.*

Racing.—Where a vessel, in racing to reach a harbor, attempted to cross in front of an incoming vessel, which laid its course straight for the harbor, it was liable for a resulting collison. The Ocean Spray *v.* Erlandson (1870), 12 Wall. 366, 368, 20 L. Ed. 286.

Stopping across another vessel's bows.—It is negligence for a vessel which had turned across the bows of another to stop when her signal, sounded after turning, was unanswered. The Maine (1909), 170 Fed. 915, 96 C. C. A. 131, reversing decree (D. C. 1907), 153 Fed. 635.

(*B*) *Customs and usages.*

Effect.—General usages having the effect of obligatory regulations to prevent collisions may be referred to by the courts as furnishing the rule of decision to determine whether any fault of navigation was committed in a particular case. The Agnella (D. C. 1912) 198 Fed. 147, decree affirmed Walaas *v.* Johnson (1913) 204 Fed. 440.

(*C*) *Insufficient crew on deck.*

Sufficiency of crew.—A small schooner, attempting to enter the canal leading from Lake Pontchartrain to New Orleans, manned only by one seaman and a boy, was insufficiently manned. The Sarah *v.* Bellals (1892), 52 Fed. 233, 3 C. C. A. 56.

A schooner having only two men on deck during a fog, one attending to going about, and acting as a lookout, and the other steering and blowing the fog horn, was sailing short-handed. The Eleanora (C. C. 1879), Fed. Cas. No. 4,335.

In thick or foul weather, a vessel on the port tack must have some one on deck to give orders instantly on an emergency. The Mary Doane (D. C. 1875), Fed. Cas. No. 9,205.

A brig which had gone ashore in the Narrows was suddenly floated by the action of the wind, her sails having been trimmed with that object, and, going astern with the rising tide without any means of control, collided with a scow which was passing in tow of a tug, about 50 feet distant. The captain of the brig was the only person on deck at the time, no precaution had been taken to control her when she should come off, and no signal of danger was given to the approaching tug, nor was any attempt made to control her until too late to avert the collison. Held, that she was in fault for the collision. The F. W. Vosburgh (D. C. 1901), 107 Fed. 539.

Effect of failure to have sufficient crew.—A steamer can not, because she had but one wheelsman, be held liable for a collision in a fog, there having been no fault on her part by reason of any inability of the wheelsman to turn the wheel with sufficient promptness. The Ludvig Holberg (1895), 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620, affirming decree (C. C. 1890), 43 Fed. 117, 120.

Deficiencies in the watch, consisting in failure to maintain the number of lookouts which prudence requires, and the failure of the master to supervise the men on duty while the vessel is in charge of a pilot, are to be regarded as evidences of negligence, and illustrative of lax management in the navigation of the vessel, rather than as dis-

tinct faults in themselves, and would not suffice to condemn her in the absence of proof that they contributed to the collision. The Oregon (1895), 15 Sup. Ct. 804, 808, 158 U. S. 186, 39 L. Ed. 943.

Absence of all hands from posts of duty save the pilot, though inexcusable, yet if it did not contribute to collision does not render vessel liable. The America (C. C. 1872), Fed. Cas. No. 284, decree reversed (1875) 92 U. S. 432, 23 L. Ed. 724.

It was immaterial whether a schooner's crew were competent, where there was no fault in the steering of the vessel. The Everett (D. C. 1910), 182 Fed. 702.

A barge in tow, insufficiently manned and having an inexperienced steersman, is at fault for a resulting collision with another vessel. The Teaser (D. C. 1916), 229 Fed. 476.

(D) Steering.

Excuses for sheering.—A deep-draft vessel had a right to act on the exigency of the tide and her own draft, which make it imperative on her to reach a certain point at high water, in order to pass to sea on that tide, and was not bound to remain at her berth or to anchor or remoor, though she was steering badly because of smelling bottom, until another should have passed. Bedouin Steam Nav. Co. *v.* The City of Macon (1892), 51 Fed. 940, 2 C. C. A. 564, reversing decree (D. C. 1891), 47 Fed. 919.

A barge in tow is not in fault for a sheer which brought her in collision with the tow of a meeting tug, where she kept her course until after collision between the two tugs, and after her own tug had stopped, leaving her exposed to the effect of the tide. The Transfer No. 14 (1903), 127 Fed. 305, 62 C. C. A. 223, reversing decree The Teaser (D. C. 1902), 118 Fed. 81.

Where a steamer collides with a vessel aground in or near the channel of a navigable river, it will not relieve the colliding vessel from liability that from some hidden and unforseen cause her bow suddenly sheered directly toward the injured vessel when so near that by the exercise of the utmost care the collision could not have been avoided, where it also appears that at the time of such sheer the steamer's pilot was negligently steering her away from the channel and out of the accustomed course. Austin *v.* New Jersey Steamboat Co. (1870), 43 N. Y. 75, 3 Am. Rep. 663.

Striking known obstruction.—A vessel which ran against a mudbank on the side of the channel which was well known, and took a sheer that she could not overcome until she struck another [illegible] on a course which would carry [illegible] by, was in fault. The Sarah [illegible], 180 Fed. 629.

(E) Navigation in harbors and narrow channels.

Degree of care required.—In navigating a narrow stream choked with vessels on either hand, active diligence to avoid collisions, and the use of all available means, including the giving of prompt signals in case of apprehended danger, are among the obvious and ordinary duties of navigation. The James M. Thompson (D. C. 1882), 12 Fed. 189.

Passing in channels.—A tug which attempts to take her tow between the Battery and a barge removing a rock from the river, when to do so renders it impossible for her to pass another tow port to port, is in fault for a collision caused by forcing a boat of the meeting tow against the barge. The Senator Rice (D. C. 1914), 212 Fed. 960.

Right of way in channels.—Where two tows are approaching each other in a narrow channel in such wise that, by continuing on, they will meet at a point where it is difficult and dangerous for them to pass, it is the duty of the tow going against the tide to stop before reaching such difficult point, and wait for the other tow to go by her. Emery *v.* The Osceola and The Nannie Lamberton (D. C. 1892), 50 Fed. 326.

Sailing in harbors.—The maneuver of forereaching in a harbor is not objectionable, unless there be some reason to apprehend a collision by reason of making it. Red Bank Co. *v.* The John W. Gandy (D. C. 1859), Fed. Cas. No. 11,626.

Faulty navigation.—It is a fault for a tug to move a schooner from her anchorage into a channel in front of a steamer approaching from such a direction that the tug was hidden, at so slow a speed that the steamer could not detect the motion. The Curtis Bay (D. C. 1913), 206 Fed. 919.

(F) Speed of vessels in harbors and narrow channels.

Speed permitted in harbors and narrow channels.—A steam vessel in a crowded harbor should not be operated at a higher speed than is under perfect control. The Corsica (1869), 9 Wall. 630, 634, 19 L. Ed. 804; Liverpool, N. Y. & P. S. S. Co. *v.* Simmons (1869), 9 Wall. 634, 638, 19 L. Ed. 751.

Effect of excessive speed.—The facts that a steamer was running down the Columbia River from Portland on a dark night, at a speed of 15 miles an hour, over a course where it was the custom for sailing vessels to anchor at night, with only one watch and no officer on deck, are evidence of negligence contributing to a collision with a

ship at anchor. The Oregon (D. C. 1898), 89 Fed. 520.

Statute limiting speed.—A statute imposing a penalty for running along the piers of the East River at a speed exceeding 10 miles an hour does not necessarily render a less rate of speed prudent. Greenman *v.* The Narragansett (D. C. 1880), 4 Fed. 244.

Evidence as to speed.—Where a steamship collided with a railroad float moving out from the docks in charge of two tugs, which moved out 921 feet after being first seen coming past the end of the lower pier, the inability of the steamer to come to a stop showed that she was moving at too high a rate of speed. Starin's City, River & Harbor Transp. Co. *v.* The Eldorado and Two Steam Tugs (D. C. 1891), 47 Fed. 71.

(*G*) *Swells.*

Liability for causing excessive swells.—The owner of a large steamer navigating New York Bay and harbor is liable for injury caused by her swell to scows or similar vessels being lawfully and properly navigated in tows, where it is shown that when proceeding at full speed she causes a swell dangerous to such tows within a distance of 1,000 to 1,500 feet, but that by reducing her speed to a reasonable degree such swells may be avoided. Ross *v.* Central R. Co. of New Jersey (1907), 146 Fed. 608; decree affirmed, P. Sanford Ross *v.* Same (1907), 157 Fed. 1,004, 85 C. C. A. 678.

Vessels using a dock can not be expected to so manage their work as to receive extraordinary swells without harm, and a vessel making such swells, although navigated in the usual manner, is responsible for their effects. The Hendrick Hudson (1909), 168 Fed. 1,021, 93 C. C. A. 670, affirming decree (D. C. 1908), 163 Fed. 862.

Where a steamship lost her headway, so it was necessary to put her engines at half speed to gain steerage way, and she created a swell, causing damage to a tug and tow entering the channel, the steamship was at fault. The Kronprinzessin Cecilie (D. C. 1909), 171 Fed. 574; decree affirmed (1911), 192 Fed. 27, 112 C. C. A. 415.

Waters in which swells must be guarded against.—The rule that large vessels navigating New York Bay must so regulate their speed as not to injure by their swells small craft which are seaworthy and properly loaded and navigated, is also applicable to the lower bay, though not with the same strictness. The Campania (1913), 203 Fed. 855, 123 C. C. A. 494.

There is no distinction between harbor and river navigation in respect to the liability of a large vessel for causing dangerous swells by which other lawful and properly handled vessels are injured. The Hendrick Hudson (D. C. 1908), 159 Fed. 581.

Defenses.—It is not a defense to a suit to recover for an injury to a vessel caused by the swell of a passing steamer that other vessels were not injured, or that the one injured might have prevented the injury by taking unusual precautions. The Asbury Park (D. C. 1905), 138 Fed. 925; The Hendrick Hudson (D. C. 1908), 159 Fed. 581.

Negligence of injured vessel.—A steamer, navigating in the Hudson River at ordinary speed, is not liable for injury caused by her swell to a derrick scow, which was moored in a dangerous place above a sunken spile. The Hendrick Hudson (1913), 203 Fed. 694, 121 C. C. A. 652.

Swell damage to scow in tow of tug on a hawser, caused by navigation of a steamer in the vicinity, does not render the steamer liable, where the injury sustained was the result of an improper make-up of the tow by her tug, in that the boats were fastened within four or five feet of the tug. The St. Paul (D. C. 1900), 171 Fed. 606.

Weight of evidence.—The fact that a steamer ascending a narrow and shallow channel against the ebbing tide causes so violent a commotion at the time of passing a tow as to produce a collision between a canal barge and lighter therein, is sufficient to show either that she did not slow up at all or as soon as she should have done, and, in the absence of any excuse, renders her responsible for the damage. The Columbia (1894), 61 Fed. 220, 9 C. C. A. 455, affirming (D. C. 1893), 55 Fed. 766; [C. S. p. 8422].

(*H*) *Currents.*

Tidal currents.—Where, in order to avoid a collision between two steamers, one going with and the other against the tide, it is conceded that one should stop, it is the duty of the vessel proceeding against the tide to do so, as her movements can be controlled with less difficulty than those of the other vessel. The Galatea (1875), 92 U. S. 439, 23 L. Ed. 727; [C. S. p. 8423].

Eddies.—A tug coming down the East River, on emerging from the eddy into the flood tide at Corlear's Hook, which was swept by the current against an overtaking ferryboat, was in fault for having an incompetent wheelsman, who neglected to port his wheel in due season, or to do so sufficiently to neutralize the effect of the cross current. Long Island R. Co. *v.* Killien (1895), 67 Fed. 365, 14 C. C. A. 418, affirming Killien *v.* Hyde (D. C. 1894), 63 Fed. 172; [C. S. p. 8423].

Undercurrent.—Delay of the pilot of a steamship in reversing to avoid evident

danger from her failure to maneuver in the usual manner, caused by an undercurrent, is negligence, though he may have supposed that the interruption of her movement was only temporary, as he is chargeable with knowledge of the currents. Homer Ramsdell Transp. Co. *v.* Compagnie Generale Transatlantique (C. C. 1894), 63 Fed. 845.

(I) Navigating near piers.

Justification for navigating near piers.—A tug is justified in approaching a drawbridge on the usual course and at the usual distance from the dock, though she might have gone farther out, where that course was safe, and the collision with a moored vessel was caused by the negligence of another vessel outside the tug. The Mascot (1894) 66 Fed. 74, 13 C. C. A. 334.

In a thick fog, the navigation of boats near the shore is not a fault. Jenks *v.* The Midland (D. C. 1891), 48 Fed. 331.

Effect of navigating near piers.—It is immaterial that a tug with tows is navigating nearer the piers than prudence would justify if such navigation in no way contributed to the collision. The Delaware (D. C. 1881), 6 Fed. 195.

Speed near piers.—Where a vessel is justified in navigating near the piers because of the short distance she is going, she is bound to go at moderate speed and with special caution. Low *v.* The Komuk and The Don Juan (D. C. 1892), 50 Fed. 618.

A vessel has no right unnecessarily to maneuver at the entrance of the slip of a ferryboat so as to obstruct the latter while making her slip, and a ferryboat which has given in season the proper signals to indicate her approach to a tug so situated, is justified in assuming that she will get out of the way, and is not liable if collision ensue. Brown *v.* The West Brooklyn (1891), 49 Fed. 688, 1 C. C. A. 415, affirming (D. C. 1891), 45 Fed. 60; [C. S. p. 8424].

Maneuvers held faulty.—It is a fault for the master of a tug to miscalculate his speed on approaching a dock, so that he was rendered unconscious by the force of her striking the dock and the tug with no one in control backed out into the river and collided with another tug. The Transfer No. 19 (1912), 194 Fed. 77, 114 C. C. A. 155.

Approaching so near the pier at which a vessel was moored that a collision could be avoided only by reversing, which could not be done because of a broken bolt in her reversing gear. The J. N. Gilbert (1915), 222 Fed. 37, 137 C. C. A. 575.

Vessel held at fault for navigating unnecessarily near [illegible] a tug held at fault for coll[illegible] other vessel on the latter was leaving her slip; the tug passing so close to the pier that the vessels could not see each other until immediately before collision, because of obstructions on the pier. The Chicago (D. C. 1900), 101 Fed. 143.

(J) Entering or leaving slips.

Rounding to, to enter or after leaving slip.—Each vessel, preparatory to getting on her course to sea, must conform to her own customary course and observe the movements of the other, and each may assume that the other will do so. The Servia (1893), 13 Sup. Ct. 817, 820, 149 U. S. 144, 37 L. Ed. 681, affirming (D. C. 1887), 30 Fed. 502; The State of Texas (D. C. 1884), 20 Fed. 254.

Where a vessel is rounding to, to make a landing or enter a slip, other vessels which recognize the purpose of her maneuver should not hinder it by attempting to pass inside. The C. H. Seuff (D. C. 1887), 32 Fed. 237; New York Harbor & Towboat Co. *v.* The C. R. Stone (D. C. 1892), 49 Fed. 475.

Turning propeller or wheel in slip.—A scow, which had been lying alongside a vessel in a slip, cast off and was being moved up the slip by her bow line past a steamer, whose wheel was turning, when she was drawn by the suction within reach of the wheel, and was struck and sunk. Held, that the steamer was in fault for having no lookout to give warning and stop the engine in case of danger to other vessels, and that the scow was also in fault for attempting to pass the side of the steamer when her wheel was turning and the danger was obvious. The Middlesex (D. C. 1911), 189 Fed. 554.

Negligence in leaving slip.—A ferryboat coming into collision, soon after starting on her regular trip from New York across the North River, with a steamship coming up the river, held not in fault for leaving her slip in a strong ebb tide and northwest wind when the steamship was approaching; it being clear that the collision might have been avoided by prompt action on the part of the steamship in keeping out of the way of the ferryboat, as required under the rules. The Breakwater *v.* New York, L. E. & W. R. Co. (1894), 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139, affirming (D. C. 1889), 39 Fed. 511.

(K) Moored vessels.

Presumptions.—A moving vessel is prima facie in fault for a collision with one which is moored. The Banner (D. C. 1915), 225 Fed. 433.

Sufficiency of evidence.—The fact that a vessel propelled by steam runs into a

schooner properly moored at a dock is sufficient proof of fault on her part. Guthrie *v.* City of Philadelphia (D. C. 1896), 73 Fed. 688.

Evidence which failed to show why a barge became loosed from her mooring during the night, but which tended to show that she was properly moored, held insufficient to warrant a recovery against her for a collision with another moored vessel. The Banner (D. C. 1915), 225 Fed. 433.

Duty of moored vessel.—A vessel properly moored and out of the usual track of moving vessels is not bound to maintain a watch, unless local harbor regulations or custom require it. The Adventuress (D. C. 1914), 214 Fed. 834; The Banner (D. C. 1915), 225 Fed. 433.

A vessel properly moored at a wharf is not ordinarily bound to keep watch on board. Amoskeag Mfg. Co. *v.* The John Adams (C. C. 1860), Fed. Cas. No. 338.

Boats moored in the usual way alongside a wharf, and not in the way of other boats, need not exhibit lights. Denty *v.* The Martin Dallman (1895), 70 Fed. 797, 17 C. C. A. 419; Hadden *v.* The J. H. Rutter (D. C. 1888), 35 Fed. 365; L'Hommedieu *v.* The Mischief (D. C. 1889), 39 Fed. 510; City of New York v. The Express (D. C. 1891), 48 Fed. 323; decree affirmed, The Express (1893), 61 Fed. 513, 9 C. C. A. 598.

A vessel lying moored at the end of a wharf, in a dark night, in the navigable part of a narrow stream, constantly traversed by different kinds of craft, is required by the special circumstances in the exercise of common prudence, to carry a light, whether or not it was expressly required by the rules. The Millville (D. C. 1905), 137 Fed. 974.

(*L*) *Vessels at anchor.*

Duty of vessel under way toward vessel at anchor.—It is the duty of the tug to use ordinary care and skill to avoid a derrick lawfully anchored in a stream, and under the evidence she failed to do so. The James McWilliams (1909), 172 Fed. 919, 97 C. C. A. 277.

Dredging machines have rights of vessels at anchor. American Dredging Co. *v.* The Bedowin (D. C. 1879), Fed. Cas. No. 299.

A steamer which steers badly is in fault for approaching so near to an anchored vessel that a collision occurs through her failure to answer her helm. Wilhelmsen *v.* Ludlow (D. C. 1897), 79 Fed. 979.

Vessel about to anchor.—A steamship which, while not anchored, was about to anchor, and had stopped her engines, and was moving very little with the tide, if at all, had the rights of a vessel at rest with respect to passing vessels; and a tug with a tow on a long line, which saw and knew the situation of the ship, was solely in fault for a collision between her and the tow, due to the failure to allow sufficient room in passing. Britain S. S. Co. *v.* J. B. King Transp. Co. (1904), 131 Fed. 62, 65 C. C. A. 300.

Vessel anchored in improper place.—Where a steamer collides with a vessel, unlawfully anchored in an improper and dangerous place, while negligently maintaining too high a rate of speed, the damages will be equally divided. Green *v.* The Helen (D. C. 1880), 1 Fed. 916.

Duty of anchored vessel toward vessel under way.—If a vessel at anchor in a gale can avoid a collision threatened by another vessel, and does not adopt the means of doing so, she is a participant in the wrong, and must divide the loss with the other vessel. The Sapphire (1870), 78 U. S. (11 Wall.) 164, 20 L. Ed. 127.

Signals to approaching vessels.—It is not a fault constituting a legal ground of liability for a collision for the watchman on a ship at anchor to fail to give warning by sounds or signals to an approaching vessel when the weather is clear, and therefore the absence of a watchman from the position from which he could best see an approaching vessel can not be charged as a contributing cause of a collision. The Europe (1911) 190 Fed. 475, 111 C. C. A. 307.

Necessity for anchor watch.—A dredge lawfully fixed in a channel for improving it is to be considered as a vessel at anchor, and is under obligation to use the same precautions to guard against collisions that a vessel at anchor is in respect to the exhibition of lights, maintaining a watch and other measures calculated to make its position known. The Bailey Gatzert (1910), 179 Fed. 44, 102 C. C. A. 612, affirming decree (D. C. 1909), 170 Fed. 101.

A vessel at anchor at a breakwater in a storm is in fault in not having a watch on deck, and can not recover against a vessel for a collision. The Clara (C. C. 1876) Fed. Cas. No. 2,787.

A small vessel at anchor in a safe harbor in ordinary weather is not required by any rule or custom of navigation to set an anchor watch. The Fremont (D. C. 1876), Fed Cas. No. 5,094.

Effect of failure to maintain anchor watch.—The failure to maintain a proper anchor watch is not a fault, where it did not contribute to the collision. Churchill *v.* The Altenowner (C. C. 1889), 39 Fed. 118; The Europe (D. C. 1909), 175 Fed. 596.

Weighing anchor.—A vessel must allow a sufficient margin for the contingencies of navigation, in undertaking to avoid a vessel

weighing anchor, and must take decisive measures in time. Wells v. Armstrong (D. C. 1886), 29 Fed. 216.

Presumptions and burden of proof.—There is almost a conclusive presumption of fault in a steamer which runs into a vessel at anchor in a harbor, in a proper place, and with proper lights. Mercer v. The Florida (D. C. 1878), Fed. Cas. No. 9,433.

When a vessel in motion comes into collision with one at anchor, the presumption is that it was the fault of the vessel in motion, unless the anchored vessel is in an improper place. Green v. The Helen (D. C. 1880), 1 Fed. 916, 920; The Banner (D. C. 1915), 225 Fed. 433.

Where it appears that a vessel anchored in a channel at night was in a proper place, had up a proper light, and maintained a watch, but was run into by a vessel under way the latter will be deemed in fault, without determining the particulars thereof, further than that she failed to keep away. The Armonia (D. C. 1895), 67 Fed. 362, affirmed (1897), 81 Fed. 227, 26 C. C. A. 338.

(M) Vessel lying at rest.

Lying alongside another vessel.—A lighter came alongside of a steamship at anchor in an open roadstead, and, on being cast off, was carried by the swell against the ship's side, causing the latter some damage. On conflicting evidence, the court found that the master of the ship had ordered the lighter away, and had given the order to cast off her lines, whereupon the collision had occurred before the tug in charge of the lighter could get her under control in the seaway. Held, that the ship could not recover. Rusted v. Nicaragua Mail Steam Navigation & Trading Co. (D. C. 1893), 56 Fed. 1,022.

(N) Tows.

Duty of tug with tow.—It is as much the duty of a tug with a tow to so shape her course as to prevent collision by a crossing vessel with her tow as with herself, and a failure to exercise due care in that regard will place her in fault for a resulting collision. The Plover and The R. S. Carter (D. C. 1900), 100 Fed. 883.

While the fact that a tug is burdened with a heavy and unwieldy tow, like a raft of logs, may relieve her from liability for a collision in some circumstances, it also imposes on her the duty of taking extraordinary care to keep her tow out of the way of other vessels. The Bayonne (D. C. 1904), 128 Fed. 288.

Duty of vessel approaching tow. While it is the duty of a steamer having full control of her own movements to keep out of the way of a tug encumbered with tows, she is not bound to anticipate negligent maneuvers on the part of the tug or a violation of the rules of navigation. The Alabama (1903), 126 Fed. 332, 61 C. C. A. 238, modifying decree (D. C. 1902), 114 Fed. 214, and writ of certiorari denied, Gring v. McIlvaine (1904), 24 Sup. Ct. 851, 193 U. S. 669, 48 L. Ed. 840.

Defective condition of tug, tow, or equipment.—It is negligence for a tug not to carry an anchor heavy enough to hold herself and tow during a sudden squall. Hadden v. The J. H. Rutter (D. C. 1888), 35 Fed. 365.

Tide and weather conditions. A tug attempting to tow a bark past three dredges in such condition of the tide that the bark had only six inches of water under her, and for that reason would not answer her helm, and sheered against the dredge, was solely in fault, since she was bound to know of the danger, and should have waited for the rising of the tide; the tow had the right to assume that the tug was able to perform safely the duty she had undertaken, and was not in fault for allowing her to proceed. The Fort George (1910), 183 Fed. 731, 106 C. C. A. 169, modifying decree (D. C. 1909), 172 Fed. 1008, and writ of certiorari denied, Neall v. Maryland Dredging & Contracting Co. (1911) 31 Sup. Ct. 472, 219 U. S. 589, 55 L. Ed. 348.

Arrangement of tow.—Towing a vessel stern first in New York Bay, while unusual, is not unlawful, and does not render the tug liable for a collision, unless the other vessel was in fact misled as to her course. The Texas (1912), 198 Fed. 482, 117 C. C. A. 568, modifying decree (D. C. 1911), 192 Fed. 233.

Towing astern. A vessel which incapacitates herself by her method of towing from performing an ordinary statutory duty to avoid collision must show that she has exercised an amount of care commensurate with the increased risk; and the fact that she has her tow on a hawser while going with the tide does not privilege her to continue with unabated speed in the face of an impending collision, but to be exonerated from fault she must at least have stopped her engines and reduced her headway to that given her by the tide. The Teaser (D. C. 1912), 118 Fed. 81; decree reversed, The Transfer No. 14 (1903), 127 Fed. 505, 62 C. C. A. 223.

In navigating the Port Arthur Canal a tug with a tow astern should use a bridle or two hawsers. Herbert v. The John I. Brady (1913), 201 Fed. 124, 122 C. C. A. 610.

Length of hawsers or tows. It is negligent navigation for a tug and tows, extending nearly two-thirds of a mile, to go to sea without providing some effective means

of communication from one to the other in emergencies. The Mount Hope (1898), 84 Fed. 910, 29 C. C. A. 365, affirming (D. C. 1897), 79 Fed. 119.

It is not negligent under all circumstances for a tug to tow a vessel with a great length of line; and, to render her liable for a collision on that ground, it must be shown that it resulted from such cause. McWilliams v. Delaware, L. & W. R. Co. (1913), 207 Fed. 64, 124 C. C. A. 624; The Captain Sam (D. C. 1902), 115 Fed. 1,000; The Celtic Monarch (D. C. 1910), 175 Fed. 1,006.

A tug with a very long tow is held to a high degree of care, to avoid danger of collision with other vessels. The Gertrude (1902), 118 Fed. 130, 55 C. C. A. 80; The Plymouth (1911), 186 Fed. 105, 108 C. C. A. 217, affirming decree The Williamsport (D. C. 1909), 167 Fed. 184, and writ of certiorari denied, Central R. Co. of New Jersey v. Philadelphia & Reading Co. (1911), 32 Sup. Ct. 525, 223 U. S. 725, 56 L. Ed. 631; The Mary E. Morse (D. C. 1908), 179 Fed. 945; The Helen (D. C. 1913), 204 Fed. 653; The Prudence (D. C. 1914), 212 Fed. 537.

Making up tow.—A steam tug has a right to remain stationary in the East River, or nearly so, while making up a tow in the usual place, leaving room for vessels to pass on either side. The William H. Payne (D. C. 1884), 20 Fed. 650.

Shifting tow.—A tug took out of a slip in East River two barges abreast, and when a little out in the flood tide ordered one of them to "single out" so as to be towed astern of the other. In doing so she got adrift and damaged three other vessels. Held, that the tug was alone to blame for not "singling out" in the slip, and, after going out, for giving her order while too near the shore in the strong crossing tide. The Blanche L. (D. C. 1895), 68 Fed. 939.

Casting tows adrift.—A tug, which casts her tows, having neither motive power nor means of signaling, adrift in a channel, is in fault for a collision between them and another vessel. The E. A. Packer & The John Neilson (D. C. 1879), Fed. Cas. No. 4241; The Lyndhurst (D. C. 1899), 92 Fed. 681; [C. S. p. 8437].

Liability of tow.—A barge without motive power, which was cast off by a tug and sheered toward a pier for anchorage, was not in fault for a collision with a passing steamer, it being the duty of the tug to determine the place and time for the maneuver, and whether the way was clear, and whether proper signals to approaching vessels had been given. The Alabama (1903), 126 Fed. 332, 61 C. C. A. 238, modifying decree (D. C. 1902), 114 Fed. 214, and writ of certiorari denied, Gring v. McIlvaine (1904), 24 Sup. Ct. 851, 193 U. S. 669, 48 L. Ed. 840.

Anchoring or mooring tow.—Tugs held not in fault for leaving a part of their tow of barges tied up at the end of a pier, as was customary, while they distributed others. The Jersey Central (1915), 221 Fed. 625, 137 C. C. A. 349, modifying decree (D. C. 1914), 215 Fed. 235.

The law imposes upon a tug the duty of exercising reasonable care and caution and maritime skill in everything relating to the safe anchorage of its tow, and it is liable to anyone injured by its negligence in that respect. The Alabama (D. C. 1902), 114 Fed. 214, decree modified (1903), 126 Fed. 332, 61 C. C. A. 238; writ of certiorari denied, Gring v. McIlvaine (1904), 24 Sup. Ct. 851, 193 U. S. 669, 48 L. Ed. 840.

Tug and vessel to be towed approaching.—Evidence held to show that the sinking of a tug in collision with a large steamship, from which she had just taken a line to assist her in docking, was not due to fault of the steamship in making fast the line prematurely and without orders from the tug while it was being paid out, but to the negligent navigation of the tug in getting under the bow of the steamship, and in failing to keep out of the way, although the ship was moving with only sufficient speed to give her steerageway. The Minnehaha (1903), 124 Fed. 210, 59 C. C. A. 674, affirming decree Thomas v. Atlantic Transport Co. (D. C. 1902), 115 Fed. 852.

Liability of tow.—A steamship is not in fault for an injury by her propeller to a tug assisting in docking her, where the tug selected her own position and thereby assumed the risk. The Olympic (D. C. 1914), 221 Fed. 296; decree affirmed (1915), 224 Fed. 436, 140 C. C. A. 130.

Deviation of tow from course of tug.—Where it is shown clearly that the navigation of one of the vessels in a collision was proper, and that the collision was due to the deviation of the other, which was in tow, from the course of the towing steamer, the burden rests upon such tow to state such explanation as will free her from liability. Davidson v. American Steel Barge Co. (1903), 120 Fed. 250, 56 C. C. A. 86.

Presumptions and proof.—A steamer meeting, in a channel, a tug with several tows on hawsers, must keep out of the way, and, if a collision ensue, the burden is on her to show that she took every precaution, and chose the right side of the channel, to avoid risk. The Lucy (1896), 74 Fed. 572, 20 C. C. A. 660, affirming decree (1896), 72 Fed. 85, 18 C. C. A. 442.

(O) Small boats.

Sailboats.—A small sailboat, which, while becalmed, was run into by a steamer with

a large barge alongside, which approached her head-on, held in fault for the lack of proper oars and rowlocks in place, to aid in getting out of danger. The Bay Queen (D. C. 1890), 42 Fed. 271.

Rowboats.—While a steamer would not be justified in recklessly colliding with a rowboat, yet, when a boat is discovered at such a distance that a few strokes of the oars would back it safely out of the way, the steamer has a right to assume that those in charge of the boat will exercise the proper skill to avoid her; and, where a collision is the result of their ignorance of the proper management of the boat, the steamer is not liable. Fischer v. Camden & P. Steam-Boat Ferry Co. (1889), 124 Pa. St. 154, 16 Atl. 634, 23 Wkly. Notes Cas. 224.

III. Special Circumstances.

(A) *Extra precautions.*

Extra watchfulness.—Where one of two meeting vessels is rounding to under a port helm to make a landing the special circumstances required each vessel to watch and be guided by the movements of the other, and that both were in fault for not observing such rule and keeping a vigilant lookout. The John Engtis (1910), 176 Fed. 723, 100 C. C. A. 579; writ of certiorari denied, Lehigh Valley Transp. Co. v. Monk (1910), 30 Sup. Ct. 697, 217 U. S. 608, 54 L. Ed. 901.

In Norfolk Harbor on a dark and stormy evening, when the harbor was crowded with anchored shipping, an outgoing steamer, equipped with a searchlight should use it to aid in picking her path. The Virginia (D. C. 1913), 203 Fed. 851.

Crossing mouth of channel with large tow.—A tug with a tow of 34 vessels held in fault for proceeding with so long a tow so near the mouth of a channel without taking precautions to observe and warn any vessels coming out. The No. 32 (1909), 170 Fed. 932, 96 C. C. A. 148.

Launching.—The launch of a ship is an extraordinary and unusual proceeding, and the builder is therefore required to take extraordinary care, and exercise the highest caution to prevent damage to those who are navigating the harbor. Malster v. Humphreys (C. C. 1880), 3 Fed. 533.

Vessel on fire.—A steam tug went to the assistance of a ferryboat on fire at her dock, and, being unable to subdue the fire, at the request of her owners, and to prevent the fire spreading to other [illegible], towed the boat out in an attempt [illegible] her; but the towing [illegible] and burning [illegible] brought up against [illegible] without a watch, and set her on fire. The tug succeeded in separating the vessels and put out the fire so started. Held, that the tug was negligent in towing the boat by a hempen hawser, and was not excused by the circumstances. The Clara (1874), 90 U. S. (23 Wall.) 1, 23 L. Ed. 146, affirming (D. C. 1871), Fed. Cas. No. 2,788 (C. C. 1873), Fed. Cas. No. 2,789.

Weather conditions.—A vessel which anchored in the fairway of moving vessels in a fog is in fault for a collision with a passing vessel on the ground that she should not have left port under the existing weather conditions. The Georgia (D. C. 1913), 208 Fed. 635.

Presumptions and burden of proof.—Where a tug tows a ferry boat on fire from her slip, the burden of proof is on the tug to show that she was not in fault in towing the ferry boat against a schooner at anchor. The Clara (C. C. 1873), Fed. Cas. No. 2,789; Id. (D. C. 1871), Fed. Cas. No. 2,788.

(B) *Justification or necessity for deviation from rules.*

Circumstances requiring privileged vessel to yield right of way.—Where two steamers were on crossing courses, such as to involve danger of collision, it is the privileged vessel's duty to stop and reverse at once, on receiving the first cross signal. The Ocean (D. C. 1902), 115 Fed. 229.

Fire boat.—A fire boat, in hastening to reach a fire, collided with a barkentine properly moored to the dock. At the time of the collision another fire boat was already at work on the fire. Held, that the urgency created by the duty to extinguish the fire was not so extreme as to excuse the fire boat's failure to exercise reasonable care. Workman v. City of New York (D. C. 1894), 63 Fed. 298, decree affirmed City of New York v. Workman (1895), 67 Fed. 347, 14 C. C. A. 530.

Obedience to rules as a fault.—Obedience to the rules of navigation is not a fault, even if a different course would have prevented a collision, and the necessity must be clear and the emergency sudden and alarming before an act of disobedience can be excused. The Lauretta Speddin (1910), 184 Fed. 283, 106 C. C. A. 425.

Presumptions and burden of proof.—Where a tugboat, running a course parallel with a steamboat, signals her intention to cross the course of the latter, and, while attempting to do so, stops and backs immediately before a collision takes place, she must take the hazard of such departure from the ordinary rule of navigation, and, to escape liability, must show clearly an allegation the [illegible] steamboat disregarded her signals

and imperiled her own safety by continuing her former course at a negligent rate of speed. The Gratitude *v.* The Eutaw (D. C. 1882), 14 Fed. 479.

(C) Presence of other vessels.

Navigation near vessels which obstruct view.—A steamship is not negligent where, while navigating waters in which it is bound to use more than ordinary care at a very slow rate of speed, and with all needful lookouts, it suddenly collided with a schooner that had been wholly concealed by a schoolship. The Java (1871), 81 U. S. (14 Wall.) 189, 20 L. Ed. 834, affirming (D. C. 1867) Fed. Cas. No. 7,234, reversing Judd Linseed & Sperm Oil Co. *v.* The Java (C. C. 1870), Fed. Cas. No. 7,559.

Sheer to avoid privileged vessel.—A sheer made suddenly by an overtaking vessel to avoid the one ahead, which carried her against one coming from the opposite direction before she could recover her course, was a fault. The Alaska (D. C. 1887), 33 Fed. 527; Wright *v.* The Intrepid (D. C. 1891), 45 Fed. 775.

Stopping to avoid privileged vessel.—A steamer moving in a harbor was obliged to reverse and stop to avoid colliding with a schooner, and, while lying motionless, was run into by a tug running up on her starboard side. The master of the tug claimed that the sun was in his eyes, and a mud scow intercepted his view, so that he did not see the steamer. Held, it was his duty to slow or stop if he had not a clear view, as in a crowded harbor vessels were likely to be met at any moment. But the steamer was also in fault in not sounding her whistle while she lay motionless, and damages should be halved. The Wesley A. Gove (D. C. 1886), 27 Fed. 311.

Other vessel preventing burdened vessel from keeping out of the way.—When a tug, prevented by another vessel from turning under a schooner's stern, discovers the intention of the schooner not to tack, she should slacken her hawser and permit the schooner to cross it. Moran *v.* The Minnie C. Taylor (D. C. 1892), 52 Fed. 323.

(D) Disability of vessel, equipment, or crew.

Disability of master.—Where a tug had struck a pier, while her engines were working full speed astern, so hard as to render her master unconscious, and then backed out in a semicircle with no one in control of her, her actions created a special circumstance which required an approaching tug to reverse immediately. The Transfer No. 19 (1912), 194 Fed. 77, 114 C. C. A. 155.

Disability of crew.—A vessel whose crew was disabled by yellow fever is not in fault in failing to put back to port, or anchoring, where she took reasonable precautions to avoid collision. The Southern Home (C. C. 1879), Fed. Cas. No. 13,187.

Confusion from prior collision.—A vessel which had just been in a collision, was in fault for a second collision with a vessel whose fog signals were not heard, for proceeding before order was restored after the previous collision. The Stamford (D. C. 1886), 27 Fed. 227.

Location of pilot house.—It is negligence for a tug to have her pilot house so low that the pilot's view is cut off by the tow on her side, so that her navigation has to be controlled by an unlicensed lookout, stationed on the tow. The Drew (D. C. 1885), 25 Fed. 457, 461; The Gladiator (D. C. 1904), 132 Fed. 876; decree affirmed (1906), 144 Fed. 681, 75 C. C. A. 483.

Sailing vessel becalmed.—A yacht becalmed and drifting without power to control from the western side of the river toward the center of the channel was in fault for failure to anchor near the shore when the wind failed. The International (1906), 143 Fed. 468, 74 C. C. A. 602, affirming decree Welch *v.* Philadelphia & R. Ry. Co. (D. C. 1903), 125 Fed. 419, and writ of certiorari denied, Philadelphia & R. R. Co. *v.* Welch (1906), 26 Sup. Ct. 764, 202 U. S. 616, 50 L. Ed. 1172.

Liability of disabled or defective vessel.—A steamer descending the Mississippi River is in fault for faulty construction, rendering it difficult to check her speed. Jakobsen *v.* Springer (1898), 87 Fed. 948, 31 C. C. A. 315; decree affirmed, The Albert Dumois (1900), 20 Sup. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

The inability of a steamer to reverse her engine at once where she is running at full speed is not a fault. The Northfield (D. C. 1870), Fed. Cas. No. 10,326.

A tug is chargeable with fault in having a towing cleat so loose as to require her to stop and ease it on passing other steamers. Id.

(E) Prior fault of other vessel.

Prior fault as excuse for collision.—Each vessel is bound to use all reasonable vigilance and skill to avoid collision, no matter what the prior fault of the other vessel. The Pegasus (C. C. 1884), 19 Fed. 46; The Warren (D. C. 1883), 18 Fed. 559.

(F) Maneuvers in extremis.

Degree of care required in peril.—What was evidently done in extremis, if unwise,

was error, and not fault. The Cadiz (C. C. 1884), 20 Fed. 157; The Marguerite (D. C. 1898), 87 Fed. 953.

Where collision was imminent, a ferryboat was not negligent in making an incorrect maneuver, where it did what seemed to be best. The Oregon (D. C. 1915), 180 Fed. 299.

Peril to tow.—A steam tug, which put herself in the way between her tow and a schooner which was about to strike the tow, so as to fend off the schooner from the latter, damage thereby resulting to the schooner, was justified as an act in extremis, to prevent a more injurious collision, for which the tug was not responsible. The George L. Garlick (D. C. 1884), 20 Fed. 647.

Peril due to fault of other vessel.—Where a vessel, by her own negligence, or the breach of a statutory rule, places another in great peril, the latter will not be held guilty of negligence because at the last minute she did something that contributed to the collision, or omitted to do something that might have avoided it. The Pacific (1907), 154 Fed. 943, 83 C. C. A. 575; The Favorita (C. C. 1871), Fed. Cas. No. 4,695; Orhanovich v. The America (C. C. 1880), 4 Fed. 337; The Havana (D. C. 1893), 54 Fed. 411.

Peril of tow due to fault of tug.—A barge in tow which has followed her tug up to the time she is placed in extremis through the fault of such tug and a meeting vessel can not be charged with fault for a collision because of a slight variation of her course thereafter. The Teaser (D. C. 1902), 118 Fed. 81; decree reversed, The Transfer No. 14 (1903), 127 Fed 305, 62 C. C. A. 223.

Peril due to vessel's own fault.—An error in extremis can not be urged in exculpation of a vessel whose prior negligence has brought about the situation in which a mistake in judgment is excusable. The Protector (1902), 113 Fed. 868, 51 C. C. A. 492.

Where a tug mistook a two-blast signal of an approaching vessel, in answer to her own signal, for a one-blast signal, her turn to starboard and attempt to cross the other's bows, was not an error committed in extremis. Goodwyn v. The Newport News (D. C. 1897), 83 Fed. 522.

(G) Inevitable accident.

What is inevitable accident.—The conclusion that a collision was due to inevitable accident should only be adopted if either the cause of the collision is shown and that it was unavoidable or else that all possible causes were unavoidable [illegible] Paramus (1918), 248 Fed. 210, 160 [illegible].

Inevitable accident does not mean an accident which was unavoidable under any circumstances, but one which could not be prevented by the exercise of ordinary care, caution, and maritime skill. The Blackheath (D. C. 1907), 154 Fed. 758.

To exonerate a steamer from liability for an injury resulting from a collision with a vessel moored at a wharf on the ground of inevitable accident arising from a latent defect in her machinery, it must be shown that such defect could not have been discovered by a person of competent skill in the exercise of ordinary care, and, further, that such defect necessarily caused the accident. The Homer (D. C. 1900), 99 Fed. 795.

Injuries held not due to inevitable accident.—A collision due to a latent defect in the apparatus by which signals were communicated from the master to the engineer, where it was of such a character that the master, in the exercise of proper care, should have discovered it at once on attempting to ring the engineer's bell, and should have known that his attempted signal was not given, but, assuming it to have been received by the engineer, he gave further orders which directly brought about the collision. The Homer (1901), 109 Fed. 572, 48 C. C. A. 465, modifying decree (D. C. 1900), 99 Fed. 795.

Where a tug's wheel jammed and prevented the changing of her course in time to avoid collision with a crossing schooner was not an unavoidable accident which will exonerate the tug from fault, but the jamming was the result of the suddenness with which the wheel was turned, which would not have been necessary if the schooner had been seen when she should have been, if the tug had kept a proper lookout. Brigham v. Luckenbach (D. C. 1905), 140 Fed. 322.

A collision between a tug having no lookout, approaching a pier, whose master changed her course toward the pier, and immediately after suddenly fell in a faint, and a steamer which was lying at the pier, where a lookout would have noticed the trouble and prevented the collision. The Wilkesbarre (D. C. 1907), 151 Fed. 501; decree affirmed (1908), 157 Fed. 1,006, 85 C. C. A. 681.

Injuries held due to inevitable accident.—Where the sheering of a tug having a car float on her side, causing the float to come into collision with and sink a vessel in a meeting tow, was caused by a collision between the tug and an overtaking schooner on the other side, whose duty it was under the rules to keep out of the way. The Luserne (1907), 157 Fed. 391, 85 C. C. A. 328, affirming (D. C. 1906), 148 Fed. 133.

A collision between a steamer passing under the stern of a large vessel at anchor and schooner hidden from view. Judd Linseed & Sperm Oil Co. *v.* The Java, 14 Wall. (81 U. S.), 189, reversing (C. C. 1870), Fed. Cas. No. 7,559, which reversed (D. C. 1867), Fed. Cas. No. 7,234.

A collision between two sailing vessels, caused by the fact that practically the entire crew of the burdended vessel was disabled by yellow fever. The Southern Home (C. C. 1879), Fed. Cas. No. 13,187.

To a tow sunk when in ordinary and proper channel, by striking a single rock on the bottom, whose presence was not known to mariners and could not have been known by exercise of care. The Augelina Corning (D. C. 1867), Fed. Cas. No. 384; The America (D. C. 1872), Fed. Cas. No. 282.

A collision with a tug whose engine caught on the center. The M. B. Brazos (D. C. 1879), Fed. Cas. No. 9,898.

Where the hawser by a tug was pulling the stem of a steamship around to head her downstream broke, and a collision resulted between her and upward bound tows, and the latter were also driven against the piers. The Jumna (D. C. 1906), 140 Fed. 743; decree affirmed (1906), 149 Fed. 171, 79 C. C. A. 119.

A collision in East River in the early morning in a dense fog, by which a moored barge was struck and injured by a car float in tow which had been broken from its mooring with the tug by collision with a ferryboat. Wright & Cobb Lighterage Co. *v.* New England Nav. Co. (D. C. 1911), 189 Fed. 809; decree affirmed (C. C. A. 1913), 204 Fed. 762.

1442. Lights not shown by war vessels and revenue cutters.—The exhibition of any light on board of a vessel of war of the United States or a revenue cutter may be suspended whenever, in the opinion of the Secretary of the Navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it. *Art 30, sec. 1, act of June 7, 1897 (30 Stat. 102).*

1443. Special rules made by local authority.—That the supervising inspectors of steam vessels and the Supervising Inspector General shall establish such rules to be observed by steam vessels in passing each other and as to the lights to be carried by ferryboats and by barges and canal boats when in tow of steam vessels, and as to the lights and day signals to be carried by vessels, dredges of all types, and vessels working on wrecks by other obstruction to navigation or moored for submarine operations, or made fast to a sunken object which may drift with the tide or be towed, not inconsistent with the provisions of this Act, as they from time to time may deem necessary for safety, which rules when approved by the Secretary of Commerce are hereby declared special rules duly made by local authority, as provided for in article thirty of chapter eight hundred and two of the laws of eighteen hundred and ninety. Two printed copies of such rules shall be furnished to such ferryboats, barges, dredges, canal boats, vessels working on wrecks, and steam vessels, which rules shall be kept posted up in conspicuous places in such vessels, barges, dredges, and boats. *Sec. 2, act of June 7, 1897 (30 Stat. 102), as amended by act of May 25, 1914 (38 Stat. 381).*

Art. 30, act of Aug. 19, 1890, mentioned in this section, is set forth 1408, ante.

Notes of Decisions.

Rules applicable to other waters.—For decisions under the rules governing vessels navigating the Great Lakes and their tributaries, see 1447, post; governing vessels navigating the Red River of the North, and rivers emptying into the Gulf of Mexico, see 1479, post.

Conflict between rules and statute.—The binding force of the articles of the statutory navigation rules can not be affected by the pilot rules, but, where there is a conflict, the articles are of superior authority. The John H. Starin (1908), 162 Fed. 146, 89 C. C. A. 170, affirming decree (D. C. 1906), 145 Fed. 723; The American Eagle (D. C. 1870), Fed. Cas. No. 301; The Atlas (D. C. 1870), Fed. Cas. No. 633; The Greenpoint (D. C. 1887), 31 Fed. 231.

The rule of the supervising inspectors that a steam vessel approaching another on a crossing course shall signify by a blast or blasts of the whistle what course she proposes to take can not deprive the vessel which is on the starboard side of the other

…to keep on her course. Hamilton … The John King (1891), 49 Fed. 469, 1 C. C. A. 519; The Astley (1915), 221 Fed. 113, 137 C. C. A. 221, modifying decree … 1913), 209 Fed. 965.

The inspectors' regulations to guard … have the force of law; but they are only valid and obligatory in so … as they are not inconsistent with … The Grand Republic (D. C. 1881), 16 Fed. 424; The B. B. S… (D. C. 1881), 19 Fed. 118; The Ar… (D. C. 1910), 181 Fed. 341.

The power of the board of supervising inspectors which requires passenger steamers and … to keep watch in or near the pilot house does not supersede the general rule requiring a lookout forward. The T… (D. C. 1914), 217 Fed. 970.

Construction of rules. The construction … rules is for the court whose duty it is to apply them, as a matter of law … on the facts of a given case. Benham … (1841), 14 Sup. Ct. 264, 273, 150 U. S. 371, 37 L. Ed. 1213.

Vessels affected by rules. — The pilot rule … to the lights to be carried by … and canal boats when towed alongside … does not apply to sailing vessels, which are governed by article 5 of the statutory rules for rivers and harbors, 18… The Merrill C. Hart (1911), … 179 Fed. 49, 110 C. C. A. 187, affirming … Foss, 162 Fed. 371.

Lights required by rules. Pilot Rules for … Waters (34 Stat. 1096), rule 12, par. 3, … Delaware River, and in places … tow vessels of a tug on the … where the cars obscure … lights of the tug, to carry a green … light on her starboard bow. The … (D. C. 1909), 170 Fed. …

Exhibition of lights. The lights thereby required to be carried by a scow in tow are … to prevent collision with herself, … to assist in indicating to ap… … The rule as to length … … the outside boats … … Marine (1908), … … (C. C. A.) 164 Fed. … … 97 C. C. A. … … Wood), 166 … … Y… … Republic (D. C. 1909), 212 … … 1914) …

… vessels are in fault for a collision resulting from or contributed to by the failure to carry such lights. The New York Central No. 22 (1905), 135 Fed. 1021, 68 C. C. A. 631, affirming decree (D. C. 1903), 124 Fed. 750; North American Dredging Co. v. Cutler (1908), 162 Fed. 157, 89 C. C. A. 315; [U. S. p. 8449].

The requirement of inspectors' rule 11 (30 Stat. 1024), that "barges and canal boats when towed at a hawser, two or more abreast in one tier, shall carry a white light on the bow and a white light on the stern of each of the outside boats," imposes a duty on the tow, as well as on the tug, to see that such lights are maintained, and not only on the outside boats, but on each one in the tier, since the requirement is for the benefit of all; and for a collision resulting when such requirement is not being observed each boat injured should be held in fault. The Lyndhurst (D. C. 1899), 92 Fed. 681.

Where a canal boat being towed alongside a tug at night in a harbor failed to display a white light on her outboard bow, as required by inspectors' rule 11, both the tug and the canal boat are chargeable with the fault; and the tug is not exonerated from liability for a collision resulting by the fact that her master ordered the master of the canal boat to put out the light, but it was his further duty to see that his order was enforced. The Nellie I. Tice (D. C. 1901), 170 Fed. 461.

Effect of violation of rules. — A violation of an inspectors' rule does not subject the vessel to the penalty prescribed by sec. 1445, post, which applies only to the violation of statutory requirements, though on other of such vessel may be liable under sec. 1444, post. The Geneva (1913), 187 Fed. 115, 109 C. C. A. 35.

The failure of the owner of a steam ferry boat to post the inspectors' rules in a place where they can be conveniently read does not render such owner guilty to a collision, and deprive one of the fault to a Department of Justice on a pilot Vessel, where it results in fact that … the want of such rules, but from his failure to … such rules of which he had knowledge. In re Reid Transit Co. (D. C. 1909), 174 Fed. 780; … The Mount … (1910), 181 Fed. 83 C. C. A. … … Central R. Co. of New Jersey v. Wren (1907), 28 Sup. Ct. 255, 207 U. S. 580, 52 L. Ed. 352.

Failure to carry proper lights. — When a barge, injured in a collision in the night while in tow of a tug, was not carrying the lights required by the pilot rules, the burden rests upon her and the tug to

prove that such violation of the rule did not contribute to the collision. North American Dredging Co. *v.* Cutler (1908), 162 Fed. 457, 89 C. C. A. 343; The Komuk (D. C. 1903), 120 Fed. 841.

An overtaking vessel is not required to look to the lights on the tug which she may not be able to see clearly to ascertain the fact that there is a tow. North American Dredging Co. *v.* Cutler (1908), 162 Fed. 457, 89 C. C. A. 343.

Effect of failure to understand proper light.—A pilot's misreading the proper anchor lights of a dredge and lighter was negligence, rendering a moving raft, which collided with the dredge, in fault. Seabrook *v.* Raft of Railroad Cross-Ties (D. C. 1889), 40 Fed. 596.

1444. Liability of pilots, masters, etc.—That every pilot, engineer, mate, or master of any steam-vessel, and every master or mate of any barge or canal-boat, who neglects or refuses to observe the provisions of this Act, or the regulations established in pursuance of the preceding section, shall be liable to a penalty of fifty dollars, and for all damages sustained by any passenger in his person or baggage by such neglect or refusal: *Provided*, That nothing herein shall relieve any vessel, owner or corporation from any liability incurred by reason of such neglect or refusal. *Sec. 3, act of June 7, 1897 (30 Stat. 102-3).*

Notes of Decisions.

Liability of violation of inspector's rules.—An officer may be liable under this section for a violation of an inspector's rule, though the vessel would be liable under 1445, post, only for a violation of a statutory rule. The Geneva (1911), 187 Fed. 115, 109 C. C. A. 35.

Liability of vessel for master's fault.—The fact that the fault for which a vessel is seized under 1445, post, was that of her master, who is liable under this section, does not exonerate the vessel. The Confidence (1912), 201 Fed. 340, 119 C. C. A. 578.

1445. Liability of vessels.—That every vessel that shall be navigated without complying with the provisions of this Act shall be liable to a penalty of two hundred dollars, one-half to go to the informer, for which sum the vessel so navigated shall be liable and may be seized and proceeded against by action in any district court of the United States having jurisdiction of the offense. *Sec. 4, act of June 7, 1897 (30 Stat. 103.)*

Notes of Decisions.

Faults rendering vessel liable.—A vessel can not be subjected to the penalty for a failure to observe the inspector's regulations, but only for failure to observe the statutory rules. The Geneva (1911), 187 Fed. 115, 109 C. C. A. 35.

A vessel is subject to the penalty imposed by this section, although the fault was that of the master, who is also liable under 1444, ante. The Confidence (1912), 201 Fed. 340, 119 C. C. A. 578.

Place of commission of offense.—Penalties incurred by a vessel for violation of the inland navigation rules are recoverable by action brought by the United States under this section, although the offense may have been committed on waters within a district having jurisdiction to prescribe local rules. The Stella B. (D. C. 1910), 183 Fed. 507.

1446. Distress signals.—When a vessel is in distress and requires assistance from other vessels or from the shore the following shall be the signals to be used or displayed by her, either together or separately, namely:

IN THE DAYTIME

A continuous sounding with any fog-signal apparatus, or firing a gun.

AT NIGHT

First. Flames on the vessel as from a burning tar barrel, oil barrel, and so forth.

Second. A continuous sounding with any fog-signal apparatus, or firing a gun, *Art. 31, sec. 1, act of June 7, 1897 (30 Stat. 102).*

1447. Observance of rules for preventing collisions on the Great Lakes, etc.—That the following rules for preventing collisions shall be followed in the navigation of all public and private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal. *Sec. 1, act of Feb. 8, 1895 (28 Stat. 645).*

That all laws or parts of laws, so far as applicable to the navigation of the Great Lakes and their connecting and tributary waters as far east as Montreal, inconsistent with the foregoing rules are hereby repealed. *Sec. 4, act of Feb. 8, 1895 (28 Stat. 650).*

See "Historical Note" at the beginning of this chapter.

Notes of Decisions.

For decisions prior to enactment of rules see 1479, post.

Customs contrary to rules.—These statutory rules are mandatory, and evidence of prior usages and customs can not justify their violation, but a vessel which disregards them must show, in case of collision, that their violation not only did not, but could not, contribute to the disaster. The North Star (D. C. 1901), 108 Fed. 436.

Effect of observance of rules.—If the officers and crew of a vessel comply with all the rules which circumstances require them to observe, they can not be held in fault in the event of a collision. The Negaunee (D. C. 1884), 20 Fed. 918.

Effect of violation of rules.—Where the fault of one vessel for a collision is established beyond question, she is not entitled to a division of damages with the other, except upon clear proof of some fault on the part of the latter, not made in extremis, and reasonable doubts should be resolved in her favor. Lake Erie Transp. Co. v. Gilchrist Transp. Co. (1906), 142 Fed. 89, 73 C. C. A. 313; The William Chisholm (1907), 153 Fed. 704, 82 C. C. A. 562.

The fact that a ship was at the time of collision in actual violation of a statutory rule designed to prevent collisions throws the burden upon her to show that such violation could not have contributed to the collision. Hawgood Transit Co. v. Mesaba S. S. Co. (1909), 166 Fed. 697, 92 C. C. A. 369; Pittsburgh S. S. Co. v. Duluth S. S. Co. (1915), 222 Fed. 834, 138 C. C. A. 260.

1448. Sail vessel, steam vessel, and under way defined.—Every steam vessel which is under sail and not under steam, shall be considered a sail vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel. The word steam vessel shall include any vessel propelled by machinery. A vessel is under way within the meaning of these rules when she is not at anchor or made fast to the shore or aground. *Rule 1, sec. 1, act of Feb. 8, 1895 (28 Stat. 645).*

Notes of Decisions.

Vessel under way.—A steamer aground should not carry the lights of one under way. The Maurice B. Grover (1899), 92 Fed. 678, 34 C. C. A. 616.

A tug, lying in the open lake, waiting for a tow, and exhibiting colored lights, is under way. The Sunnyside (C. C. 1873), Fed. Cas. No. 13,620.

Where a steamer had left her berth, her propeller was moving and she exchanged passing signals with another vessel, she was under way. The Lake Shore (D. C. 1907), 149 Fed. 855.

1449. Visible defined. * * * The word visible in these rules when applied to lights shall mean visible on a dark night with a clear atmosphere. *Rule 2, sec. 1, act of Feb. 8, 1895 (28 Stat. 645).*

1450. Compliance.—The lights mentioned in the following rules and no oth shall be carried in all weathers from sunset to sunrise. * * * *Rule 2, s act of Feb. 8, 1895 (28 Stat. 645).*

Notes of Decisions.

Additional light held not misleading.—A light in the rigging on the hull or in the cabin windows of an anchored vessel, in addition to the required light. The Avon (D. C. 1885), 22 Fed. 905.

Vessel held in fault for showing misleading light.—A vessel aground carrying lights of vessel under way. The F. W. Wheeler *v.* Churchill (1897), 78 Fed. 824, 24 C. C. A. 353.

1451. Lights of steam vessels under way.—Except in the cases hereinafter expressly provided for, a steam vessel when under way shall carry:

(a) On or in front of the foremast, or if a vessel without a foremast, then in the forepart of the vessel, at a height above the hull of not less than twenty feet, and if the beam of the vessel exceeds twenty feet, then at a height above the hull not less than such beam, so, however, that such height need not exceed forty feet, a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such character as to be visible at a distance of at least five miles. *Rule 3, sec. 1, act of Feb. 8, 1895 (28 Stat. 645).*

(b) On the starboard side, a green light, so constructed as to throw an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side, a red light, so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A steamer of over one hundred and fifty feet register length shall also carry when under way an additional bright light similar in construction to that mentioned in subdivision (a), so fixed as to throw the light all around the horizon and of such character as to be visible at a distance of at least three miles. Such additional light shall be placed in line with the keel at least fifteen feet higher from the deck and more than seventy-five feet abaft the light mentioned in subdivision (a). *Rule 3, sec. 1, act of Feb. 8, 1895 (28 Stat. 646).*

Notes of Decisions.

Effect of failure to carry proper light.—A steamer, when aground, is in fault for a collision resulting from her misleading an approaching vessel by carrying the lights prescribed by this rule. The Maurice B. Grover (1899), 92 Fed. 678, 34 C. C. A. 616.

The failure to have proper port and stern lights burning is not a fault contributing to a collision with a meeting vessel which was on a course to pass safely to the right and heard the one whistle signal of the other but through a mistake of the mate or wheelsman hard astarboarded. The Livingstone (1902), 113 Fed. 879, 51 C. C. A. 560, reversing (D. C. 1898) 87 Fed. 769, and (D. C. 1900) 104 Fed. 918.

Vessels approaching each other, and seeing the lights of each other, not only have a right, but are bound, to assume that the lights seen are properly set and screened. The Wenona (C. C. 1871), Fed. Cas. No. 17,411.

1452. Lights of a steam vessel towing another vessel.—A steam vessel having a tow other than a raft shall in addition to the forward bright light mentioned in subdivision (a) of rule three carry in a vertical line not less than six feet above or below that light a second bright light of the same construction and character and fixed and carried in the same manner as the forward bright light mentioned in said subdivision (a) of rule three. Such steamer shall also carry a small bright light abaft the funnel or after mast for the tow to steer by, but such light shall not be visible forward of the beam. *Rule 4, sec. 1, act of Feb. 8, 1895* (*28 Stat. 646*).

1453. Lights of a steam vessel towing a raft.—A steam vessel having a raft in tow shall, instead of the forward lights mentioned in rule four, carry on or in front of the foremast, or if a vessel without a foremast then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the beam of the vessel exceeds twenty feet, then at a height above the hull not less than such beam, so however that such height need not exceed forty feet, two bright lights in a horizontal line athwartships and not less than eight feet apart, each so fixed as to throw the light all around the horizon and of such character as to be visible at a distance of at least five miles. Such steamer shall also carry the small bright steering light aft, of the character and fixed as required in rule four. *Rule 5, sec. 1, act of Feb. 8, 1895* (*28 Stat. 646*).

Notes of Decisions.

Lights required. A tug towing a large raft without, does not carry sufficient lights to indicate its presence, should exhibit such rear lights as will give warning of the tow to an overtaking steamer. The F. & P. M. No. 2 (C. C. 1888), 36 Fed. 264.

1454. Lights of sailing vessels under way and of vessels being towed.—A sailing vessel under way and any vessel being towed shall carry the side lights mentioned in rule three.

A vessel in tow shall also carry a small bright light aft, but such light shall not be visible forward of the beam. *Rule 6, sec. 1, act of Feb. 8, 1895* (*28 Stat. 646*).

Notes of Decisions.

Proper lights. A green and red light [illegible] the center of a schooner forward, [illegible] used only by a board, is not a compliance with the statute. The Empire State (D. C. 1870), Fed. Cas. No. 4,474.

Effect of failure to carry proper light.—The omission of a light by a sailing vessel [illegible] is prohibited by the act of Congress regulating such matters, as well as the omission to exhibit the proper lights, [illegible] not to relieve another vessel [illegible] duty of observing the laws of navigation and of using all practicable precautions to avoid a collision. The Gray Eagle (1869), 76 U. S. (9 Wall.) 565, 19 L. Ed. 741, affirming (1868), Fed. Cas. No. 5,735.

Even though improper lights carried by a sailing vessel misled a steamer, the latter is at fault if, after discovering the former, she could have avoided the collision. The Empire State (D. C. 1879), Fed. Cas. No. 4,474.

1455. Lights for tugs, ferryboats, etc.—The lights for tugs under thirty tons [illegible] whose principal business is harbor towing, and for boats navigating [illegible] River Saint Lawrence, also ferryboats, rafts, and canal boats, shall be regulated by rules which have been or may hereafter be prescribed by the Board of Supervising Inspectors of Steam Vessels. *Rule 7, sec. 1, act of Feb. 8, 1895* (*28 Stat. 646*).

1456. Small vessel may use portable lights.—Whenever, as in the case of small vessels under way during bad weather, the green and red side lights can not be fixed, these lights shall be kept at hand lighted and ready for use, and shall,

on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens. *Rule 8, sec. 1, act of Feb. 8, 1895* (*28 Stat. 646*).

1457. Lights for vessels at anchor.—A vessel under one hundred and fifty feet register length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern constructed so as to show a clear, uniform, and unbroken light, visible all around the horizon, at a distance of at least one mile.

A vessel of one hundred and fifty feet or upward in register length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light. *Rule 9, sec. 1, act of Feb. 8, 1895* (*28 Stat. 647*).

Notes of Decisions.

Purpose of rule.—The purpose of this rule was to have at least one bright white light set on a vessel at anchor so high as to be clearly visible from all directions, and which, from its comparative height and the fact that it was stationary, would indicate at once that it was upon a vessel at anchor; but having another light, even in the rigging or upon the hull or in the cabin windows, would not contradict such indication, or mislead an approaching vessel, and violate this rule. The Avon (D. C. 1885), 22 Fed. 905.

Proper lights.—This rule, though not obligatory on rafts in tow, points out what acts should be deemed acts of ordinary caution in cases of such rafts. The F. & P. M. No. 2 (C. C. 1888), 36 Fed. 264, 268.

A vessel at anchor, showing a proper anchor light, need not show a torch to an approaching steamer. The Avon (D. C. 1885), 22 Fed. 905.

Effect of failure to exhibit proper lights.—The absence of a light on a vessel moored at a pier is not a fault, where it could not have contributed to the collision. The Chicago (D. C. 1895), 71 Fed. 537; decree affirmed (1900), 100 Fed. 999, 40 C. C. A. 680.

Vessel held in fault for failure to exhibit proper light.—See Graves v. Lake Michigan Car Ferry Transp. Co. (1910), 183 Fed. 378, 105 C. C. A. 598; The Frank Moffat (D. C. 1878) Fed. Cas. No. 5,060; The Oscar Townsend (D. C. 1883), 17 Fed. 93, 94.

1458. Lights for small boats.—Produce boats, canal boats, fishing boats, rafts, or other water craft navigating any bay, harbor, or river by hand power, horse power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not otherwise provided for in these rules, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the Board of Supervising Inspectors of Steam Vessels. *Rule 10, sec. 1, act of Feb. 8, 1895* (*28 Stat. 647*).

Notes of Decisions.

Lights for raft in tow.—This rule gave the board no authority to prescribe the kind of lights to be exhibited by a raft in tow of a tug. The F. & P. M. No. 2 (C. C. 1888), 36 Fed. 264.

1459. Lights for open boats.—Open boats shall not be obliged to carry the side lights required for other vessels, but shall, if they do not carry such lights,

carry a lantern having a green slide on one side and a red slide on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white light. They shall not, however, be prevented from using a flare-up in addition if considered expedient. *Rule 11, sec. 1, act of Feb. 8, 1895 (28 Stat. 647).*

1460. **Torches.**—Sailing vessels shall, at all times, on the approach of any steamer during the nighttime, show a lighted torch upon that point or quarter to which such steamer shall be approaching. *Rule 12, sec. 1, act of Feb. 8, 1895 (28 Stat. 647).*

Notes of Decisions.

Vessels required to show torch.—This rule, though not obligatory on rafts in tow, points out what acts should be deemed acts of ordinary caution in cases of rafts. The F. & P. M. No. 2 (C. C. 1888), 36 Fed. 264, 268.

It is not necessary for a vessel at anchor to show a torch when its lights are properly set and burning, and an approaching vessel, by a vigilant and proper lookout, can see her without a torch. The Avon (D. C. 1885), 22 Fed. 305.

Effect of failure to show torch.—Failure of a sailing vessel to show a lighted torch to an approaching steamer does not make her liable when it is clear that the omission did not contribute to the collision. Bigelow v. Nickerson (1895), 70 Fed. 113, 17 C. C. A. 1, 30 L. R. A. 336, affirming The Robert Holland (D. C. 1893), 59 Fed. 200, The Buckeye (D. C. 1881), 9 Fed. 666; The Oregon (D. C. 1886), 27 Fed. 751, 757.

The failure of a schooner navigating on the Great Lakes to show a torch to a steamer approaching in the nighttime is not a fault contributing to a collision with the steamer, where she was seen by the steamer and signaled when a mile distant, and thereafter kept her course, and the omission did not in any way tend to mislead or confuse the steamer. The J. C. Ames (D. C. 1903), 121 Fed. 918.

Vessel held in fault for failure to show torch.—See Hood v. Lehigh (C. C. 1890), 43 Fed. 597.

1461. **Lights for vessels of war and revenue cutters.**—The exhibition of any light on board of a vessel of war or revenue cutter of the United States may be suspended whenever, in the opinion of the Secretary of the Navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it. *Rule 13, sec. 1, act of Feb. 8, 1895 (28 Stat. 647).*

1462. **Fog signals.**—A steam vessel shall be provided with an efficient whistle, sounded by steam or by some substitute for steam, placed before the funnel not less than eight feet from the deck, or in such other place as the local inspectors of steam vessels shall determine, and of such character as to be heard in ordinary weather at a distance of at least two miles, and with an efficient bell, and it is hereby made the duty of the United States local inspectors of steam vessels when inspecting the same to require each steamer to be furnished with such whistle and bell. A sailing vessel shall be provided with an efficient fog horn and with an efficient bell.

Whenever there is thick weather by reason of fog, mist, falling snow, heavy rain storms, or other causes, whether by day or by night, fog signals shall be used as follows:

(a) A steam vessel under way, excepting only a steam vessel with raft in tow, shall sound at intervals of not more than one minute three distinct blasts of her whistle. *Rule 14, sec. 1, act of Feb. 8, 1895 (28 Stat. 647).*

(b) Every vessel in tow of another vessel shall, at intervals of one minute, sound four bells on a good and efficient and properly placed bell as follows: By striking the bell twice in quick succession, followed by a little longer in-

terval, and then again striking twice in quick succession (in the manner in which four bells is struck in indicating time).

(c) A steamer with a raft in tow shall sound at intervals of not more than one minute a screeching or Modoc whistle for from three to five seconds.

(d) A sailing vessel under way and not in tow shall sound at intervals of not more than one minute—

If on the starboard tack with wind forward of abeam, one blast of her fog horn;

If on the port tack with wind forward of the beam, two blasts of her fog horn;

If she has the wind abaft the beam on either side, three blasts of her fog horn.

(e) Any vessel at anchor and any vessel aground in or near a channel or fairway shall at intervals of not more than two minutes ring the bell rapidly for three to five seconds.

(f) Vessels of less than ten tons registered tonnage, not being steam vessels, shall not be obliged to give the above-mentioned signals, but if they do not they shall make some other efficient sound signal at intervals of not more than one minute.

(g) Produce boats, fishing boats, rafts, or other water craft navigating by hand power or by the current of the river, or anchored or moored in or near the channel or fairway and not in any port, and not otherwise provided for in these rules, shall sound a fog horn, or equivalent signal, at intervals of not more than one minute. *Rule 14, sec. 1, act of Feb. 8, 1895* (*28 Stat. 648*).

Notes of Decisions.

Proper fog signals.—While the law does not specify the size of a fog whistle, it must be sufficiently large and so placed as to give effective warning to other craft in time to enable them by ordinary care and skillful seamanship to avoid the collision. The Leland (D. C. 1884), 19 Fed. 771.

When, in a fog, a barge is in tow of a tug or steamer by a long line, a fog horn or other signal should be sounded on the barge at regular intervals, in the same manner as if she were moving by the agency of her own sails; and, when this precaution is omitted, she will be chargeable with negligence, and responsible for its consequences. The Peshtigo (D. C. 1885), 25 Fed. 488.

Where the fog bell on two vessels, 300 feet long, which were lashed together and anchored during a fog, were at opposite ends, so that the ringing of both might confuse approaching vessels, it was not negligence for the master, in the exercise of his best judgment, to direct that but one should be rung. The Northern Queen (D. C. 1902), 117 Fed. 906.

Excuses for failure to sound fog signals.—A vessel is not relieved from the requirement of sounding fog signals by the fact that she is giving passing signals. Hawgood Transit Co. *v.* Mesaba S. S. Co. (1909), 166 Fed. 697, 92 C. C. A. 369.

Weight of evidence.—Scientific acoustic theories in explanation of the failure to hear fog signals can not be accepted to show that the infrequency of such signals or failure to keep a lookout did not contribute to the collision. The Leland (D. C. 1884), 19 Fed. 771.

The testimony being that the fog horn was regularly and properly blown by the vessel complained against, the proof that it was not heard by the vessel complaining does not, under the circumstances, overthrow that testimony. The Negaunee (D. C. 1884), 20 Fed. 918.

1463. Speed slackened in bad weather.—Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other. *Rule 15, sec. 1, act of Feb. 8, 1895* (*28 Stat. 648*).

Notes of Decisions.

What is moderate speed.—A steamer in a fog must keep her headway under a command sufficient to stop within such distance as other vessels can be seen or their position ascertained, on the assumption that the latter will do their duty in approximate view of their proximity. The Colorado (D. C. 1871), Fed. Cas. No. 3,028; affirmed (1875), 91 U. S. 692, 702, 23 L. Ed. 379; The Leland (D. C. 1884), 19 Fed. 771.

What constitutes a moderate speed on the part of a vessel in a fog can not be determined by any hard and fast rule, but depends on the dangers which are known or should be anticipated in the particular case. City of Chicago v. Goodrich Transit Co. (1912), 199 Fed. 112, 117 C. C. A. 372.

When a steam vessel is proceeding during a dense fog, it is her duty to stop occasionally, in order to listen for sounds from vessels that may possibly be approaching, or at all events to run only at such speed as would enable her to stop as soon as the close proximity of a vessel is known. The Oregon (D. C. 1886), 27 Fed. 751.

Error in locating direction of signal.—During a fog, where the lights of an approaching steamer can not be seen, but her steam whistle is heard, an error in locating the steamer by the sound of the whistle (if such be the only means available) is not a fault. The Oregon (D. C. 1886), 27 Fed. 751.

Necessity for moderate speed or stopping. In determining what constitutes the "moderate" navigation, after vessels approach within a fog have reduced their speed [illegible] circumstances of any particular [illegible] must be had to the general [illegible] requirements established by [illegible] courts of admiralty; and [illegible] will be held in fault for a failure to stop and reverse in such case, where [illegible] navigation required it. The [illegible] (1901), 111 Fed. 601, 49 C. C. A. 481, modifying decree in re Lake [illegible] Co. (D. C. 1900), 103 Fed. [illegible].

When a steamer navigating in a fog [illegible] distant passing signals to an [illegible] which she could not see [illegible] a period of six minutes or more, [illegible] answer to any of them, it [illegible] stop. Hawgood Transit [illegible] S. S. Co. (1909), 166 Fed. [illegible].

[illegible] does not require a vessel to [illegible] to slow down to bare [illegible] way, when progress appears safe, [illegible] running at moderate speed, commensurate with dangers which are either known or must be anticipated; she having the right to proceed in expectation of compliance on the part of others with the law in respect of fog signals. Erie & Western Transp. Co. v. City of Chicago (1910), 178 Fed. 42, 101 C. C. A. 170; writ of certiorari denied, City of Chicago v. Erie & Western Transp. Co. (1910), 30 Sup. Ct. 574, 216 U. S. 620, 54 L. Ed. 641.

The necessity for moderate speed exists in all atmospheric conditions increasing the perils of navigation, such as mist or falling snow. Flint & P. M. R. Co. v. Marine Ins. Co. (C. C. 1895), 71 Fed. 210.

A tug towing in narrow channel encountering blinding snow storm should anchor. The Armstrong (D. C. 1886), Fed. Cas. No. 540.

Moderate speed must always be used by steamers in a fog, even though no vessels are approaching. The Leland (D. C. 1884), 19 Fed. 771.

Changing course after hearing signals.—A vessel in a fog is never justified in changing her course to avoid the apparent course of the other from the sound of the whistles. The Alberta (D. C. 1885), 23 Fed. 807.

A steamer running in a dense fog which, on hearing a fog signal barely on one of her bows, made a radical change of course, was in fault. Leathem & Smith Towing & Wrecking Co. v. The Arthur Orr (D. C. 1895), 69 Fed. 350.

Excuses for failure to reduce speed or stop after hearing signals.—A vessel which hears a fog signal at three miles distance with such distinctness as to enable her to correctly locate an approaching vessel as being about a point on her starboard bow is chargeable with notice of subsequent signals which indicate a change of course so as to cross her bows; and if, through inattention, she fails to hear them, but continues at full speed until a near signal indicates a situation so critical that it is too late to reverse with safety, she is chargeable with fault contributing to the collision. The Kate Butterow (1894), 59 Fed. 491, 8 C. C. A. 196.

A steam vessel in a fog, approaching another, whose whistle bears a few points off either bow, should stop, and, if necessary, reverse, until the exact position and course of the other vessel can be ascertained, unless such circumstances present themselves at the time as would lead a reasonably prudent and skillful navigator to the conclusion that no risk of collision exists. The North Star (1894), 62 Fed.

71, 10 C. C. A. 262, modifying (D. C. 1890) 43 Fed. 807.

A vessel in a fog was not justified upon the apparent hearing of a single passing signal in neglecting to reduce speed to bare steerageway. The George W. Roby (1901), 111 Fed. 601, 49 C. C. A. 481, modifying decree In re Lakeland Transp. Co. (D. C. 1900), 103 Fed. 328.

The fact that the other vessel's fog signal is apparently broadening off does not justify a vessel in keeping her speed, especially if it apparently is on her starboard bow, so she will be obliged to keep out of the way when the vessel comes in sight. The Alberta (D. C. 1885), 23 Fed. 807.

Speed held moderate.—Five miles an hour in a fog, with some sea and wind. Bradley *v.* The John Pridgeon, Jr. (D. C. 1889), 38 Fed. 261.

Speed held excessive.—Ten miles and six miles per hour, respectively, after each heard several signals from the other, indicating that they were approaching each other upon opposite or crossing courses. The Alberta (D. C. 1885), 23 Fed. 807.

Seven miles an hour. The Manistee (C. C. 1874), Fed. Cas. No. 9,028.

Eight to ten miles an hour after hearing signals ahead. The North Star (1894), 62 Fed. 71, 10 C. C. A. 262, modifying (D. C. 1890) 43 Fed. 807.

Nine miles an hour, nearly full speed. Hood *v.* The Lehigh (C. C. 1890), 43 Fed. 597.

Nine miles an hour, in a dense fog, in the vicinity of the entrance to Chicago Harbor. The Peshtigo (D. C. 1885), 25 Fed. 488.

Ten and twelve miles an hour, respectively. Leathem & Smith Towing & Wrecking Co. *v.* The Arthur Orr (D. C. 1895), 69 Fed. 350.

Full speed, a short distance above the entrance to St. Mary's River. The Northern Queen (D. C. 1902), 117 Fed. 90 J.

Vessel held in fault for failure to reduce speed after hearing signals.—See The North Star (1894), 62 Fed. 71, 10 C. C. A. 262, modifying (D. C. 1890) 43 Fed. 807; [C. S. p. 8461].

1464. Sailing vessels approaching one another.—When two sailing vessels are approaching one another so as to involve risk of collision one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is closehauled.

(b) A vessel which is closehauled on the port tack shall keep out of the way of a vessel which is closehauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When they are running free, with the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward. *Rule 16, sec. 1, act of Feb. 8, 1895 (28 Stat. 648).*

Notes of Decisions.

Excuses for failure of burdened vessel to keep out of the way—Failure of privileged vessel to keep her course.—See notes to 1468, post.

Presumptions and burden of proof.—A vessel closehauled on the port tack, which collided with a vessel closehauled on the starboard tack, has the burden of showing some fault on the part of the other which caused or contributed to the collision. The H. P. Baldwin (D. C. 1871), Fed. Cas. No. 6,812.

1465. Steam vessels meeting end on.—When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision each shall alter her course to starboard, so that each shall pass on the port side of the other. *Rule 17, sec. 1, act of Feb. 8, 1895 (28 Stat. 648).*

Notes of Decisions.

When vessels are meeting end on.—Where two steamers were approaching on nearly opposite, but slightly converging, courses, each, however, showing the other only her green and white lights, they were not meeting nearly end on, so as to be required to pass port to port. The Manitoba (1887), 122 U. S. 97, 7 Sup. Ct. 1,158,

40 L. Ed. 1095, affirming The Manitoba (D. C. 1878), Fed. Cas. No. 9,029.

This rule has reference to the position of the two vessels when they will be meeting and about to pass each other, and not to their position when signals are given, if at that time they are on a temporary course from which they will depart before they will nearly approach each other. The William Chisholm (1907), 153 Fed. 704, 82 C. C. A. 502.

Duty of meeting vessels.—The term "risk of collision," in this rule, does not have the same meaning as the same term in 1469, post, and a steam vessel is not required in every instance to slacken speed at the same time she ports her helm. The Free State (C. C. 1873), Fed. Cas. No. 5,090, affirmed (1875), 91 U. S. 200, 23 L. Ed. 299.

A vessel approaching another is bound to pursue a consistent and steady course, and not to embarrass or confuse the other by unnecessary changes of her wheel. The Jay Gould (D. C. 1884), 19 Fed. 765.

Effect of signals for passing contrary to rule. Supervising inspectors' rule 1 does not authorize one steamer to dictate to another a departure from this rule, but it authorizes and makes binding a signaled agreement to depart from the rule. The Milwaukee (D. C. 1871), Fed. Cas. No. 9,626.

Effect of violation of rule by one vessel.—The failure of one vessel to port will not excuse the other for a failure to make a sufficient change in her own course to avoid danger of collision when it can safely be done, and she will be held equally in fault for a collision which she might thus have prevented, although she did in fact make such a change in her course as would have avoided the collision if the other vessel had done likewise. The Mary C. Elphicke (D. C. 1902), 115 Fed. 375; decree affirmed, The Mary C. Elphicke v. Pittsburgh S. S. Co. (1903), 123 Fed. 405, 59 C. C. A. 286.

Vessel held in fault for failure to turn soon enough.—See The L. C. Waldo (1900), 100 Fed. 502, 40 C. C. A. 517; [C. S. p. 8,462].

Vessel held in fault for failing to turn sufficiently.—See The Maria Martin (1870), 79 U. S. (12 Wall.) 31, 20 L. Ed. 251, affirming (C. C. 1868), Fed. Cas. No. 9,079; [C. S. p. 8,462].

Vessel held in fault for turning to port.—See The Comet (C. C. 1872), Fed. Cas. No. 3,051; The Jay Gould (D. C. 1884), 19 Fed. 765; Bradley v. The John Pridgeon, jr. (D. C. 1889) 38 Fed. 261; The Merida (D. C. 1909), 173 Fed. 703.

Vessel held in fault for turning to port across the course of another.—See The Livingstone (1902), 113 Fed. 879, 51 C. C. A. 560, modifying decree (D. C. 1900), 104 Fed. 918; In re Rend (D. C. 1903), 126 Fed. 564.

Vessel in tow.—See Martin v. Northern Transp. Co. (1870), 12 Wall. 31, 45, 20 L. Ed. 251.

1466. Steam vessels crossing.—When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other. *Rule 18, sec. 1, act of Feb. 8, 1895 (28 Stat. 678).*

Notes of Decisions.

When vessels are on crossing courses.—The rule applicable when two vessels are crossing so as to involve risk of collision, that the vessel which has the other on her own starboard side shall keep out of the way, has no application to vessels coming around bends in channels which may at times bring one vessel on the starboard of the other. The L. C. Waldo (1900), 100 Fed. 502, 40 C. C. A. 517.

In a locality known as one which, in following the usual custom, required each vessel to turn before their courses would cross, the rules respecting crossing courses have no application. Lake Erie Transp. Co. v. Great Lakes Transp. Co. (1908), 162 Fed. 89, 7 C. C. A. 313.

The fact that each of two vessels approaching on converging courses knows the destination of the other, and that their courses do not cross, does not affect the application of the starboard hand rule. The Kingston (D. C. 1909), 173 Fed. 992.

Extent of burdened vessel's duty. Under this rule, and irrespective of the supervising inspectors' rules, prudent seamanship ordinarily requires that the obligated vessel shall take a course which, if the preferred vessel perform her own duty, will certainly avoid a collision, viz, port and go astern; but if she elects to starboard, and cross the bows of the other vessel, she incurs the danger of not passing the point of intersection before the preferred vessel strikes her, and assumes responsibility for the success of the maneuver. The New York (1899), 20 Sup. Ct. 67, 73, 175 U. S. 187, 44 L. Ed. 126,

reversing (1897), 82 Fed. 819, 27 C. C. A. 154, and (1898), 86 Fed. 814, 30 C. C. A. 628; Id. (D. C. 1891), 53 Fed. 553.

A steamer which is bound to keep out of the way of an approaching steamer does not fulfill that duty when she presses so close upon the course of the preferred steamer that the latter, after making the necessary deviation to pass an obstruction known to both, has not room to come back to her course by an easy sweep, but is required to make a sudden turn around the obstruction. The New York (1897), 82 Fed. 819, 27 C. C. A. 154.

Excuse for failure to keep out of the way.—A vessel is not in fault for starboarding, instead of porting, to pass a vessel on her starboard hand, where the latter's sight light is not opened, and the former, therefore, mistook her for a stationary vessel. The Lansdowne (D. C. 1900), 105 Fed. 436.

1467. Steam and sailing vessels meeting.—When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision the steam vessel shall keep out of the way of the sailing vessel. *Rule 19, sec. 1, act of Feb. 8, 1895 (28 Stat. 648).*

Notes of Decisions.

Extent of steamer's duty.—The steamer must determine for herself, independently of the sailing vessel, whether it is safer to go to the right or to the left, or to stop. The Wenona (1873), 19 Wall. 41, 52, 22 L. Ed. 52.

The steamer may be managed on the assumption that the sailing vessel will keep her course. The Free State (1875), 91 U. S. 200, 23 L. Ed. 299.

A steamer bound under the rules to keep out of the way of a meeting schooner is not justified in taking a course which will barely clear but should allow a sufficient margin for safety, taking into consideration the contingencies of navigation. Bonnah v. Lakeside S. S. Co. (1915), 221 Fed. 40, 136 C. C. A. 566.

Steam vessels with tow.—A steamer with a long and unwieldy tow is bound to take special care to avoid dangerous proximity to an approaching sail, and in case of collision the burden is on her to prove that the same was due to the fault of the other vessel. Bigelow v. Nickerson (1895), 70 Fed. 113, 17 C. C. A. 1, 30 L. R. A. 336, affirming The Robert Holland and Parana (D. C. 1893), 59 Fed. 200.

Excuses for failure of steamer to keep out of the way.—The fact that a steamer has vessels to her right and to her left will not excuse a collision with an approaching sail vessel, which kept her course, where she could have passed without danger by making a sufficient change of course. The Dean Richmond (D. C. 1869), Fed. Cas. No. 3,713.

Where the green light of the schooner was not burning, which misled those on the steamer and accounted for the collision, and in the situation as it appeared the steamer was properly navigated, she was not in fault. The City of Erie (D. C. 1914), 211 Fed. 1009.

Presumptions and burden of proof.—A presumption arises that the fault for a collision between a steamer and a sailing vessel which kept her course was that of the steam vessel, and such presumption must be acted upon unless the accident is shown to have been inevitable, or that it was the result of neglect or omission on the part of those navigating the other vessel. Squires v. Parker (1900), 101 Fed. 843, 42 C. C. A. 51; writ of certiorari denied, Parker v. Squires (1901), 21 Sup. Ct. 922, 181 U. S. 617, 45 L. Ed. 1030; The Richmond (D. C. 1902), 114 Fed. 208.

An instruction that, if the jury find from all the evidence that the steam vessel collided with the sailing vessel, then the burden is on the steam vessel to show a sufficient reason for such collision, is erroneous. The presumption of negligence on the part of the steamer arises not from the mere collision. It must also appear that it did not keep out of the way of the sailing vessel. Chicago Transit Co. v. Campbell (1903), 110 Ill. App. 366.

Steam vessel held in fault for not keeping out of the sailing vessel's way.—When a steamer sees the green light of another vessel directly ahead, it is nearly certain that, if both keep on their courses, there can be no collision, and, in such case, starboarding by the steamer, out of abundant caution, though unnecessary, is not reprehensible. The Wenona (1873), 19 Wall. (86 U. S.) 41, reversing (C. C. 1871) Fed. Cas. No. 17,411, and affirming (D. C. 1870) Fed. Cas. No. 17,410.

1468. Which vessel to keep her course and speed.—Where, by any of the rules herein prescribed, one of two vessels shall keep out of the way, the

other shall keep her course and speed. *Rule 20, sec. 1, act of Feb. 8, 1895 (28 Stat. 649).*

Notes of Decisions.

Extent of privilege and obligation to keep course and speed.—Under this rule the sailing vessel must hold its course and rely on the steamship to avoid a collision. This is not only the right of the sailer, but it is its duty, and the steamer is bound to assume that the sailer will so act and manage its own vessel on that supposition. The Free State (1875), 91 U. S. 200, 204, 23 L. Ed. 299.

The rule requires a schooner known to be on a turning course to enter a channel to continue her turn until the proper time to straighten out in the channel. Wineman v. The Iron Chief (1894), 63 Fed. 289, 11 C. C. A. 196, reversing (D. C. 1892) 53 Fed. 507; certiorari denied (1895), 15 Sup. Ct. 1040, 159 U. S. 270, 40 L. Ed. 143.

The fact that a steamer is entitled to hold her course does not excuse her from attending to signals, from answering where answer is required, or from adopting such precautions as may be necessary to prevent a collision in case there is a distinct indication that the obligated steamer is about to fail in her duty. The New York (1899), 20 Sup. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing decree (1897) 82 Fed. 819, 27 C. C. A. 154; Id. (D. C. 1891), 53 Fed. 553.

Where a schooner, sailing with a free wind, meets a propeller incumbered with a long tow, the duty of avoiding a collision does not devolve wholly upon the propeller. The schooner is also bound to look out for herself, and take such precautions as the circumstances seem to require. The Marion W. Page and the Missouri (D. C. 1888), 36 Fed. 329.

Vessels required to keep course and speed.—An overtaken vessel is required to keep her course and speed. Nicholas Transit Co. v. Pittsburgh S. S. Co. (D. C. 1912), 196 Fed. 65; The Henry W. Oliver (D. C. 1912), 202 Fed. 306.

What is change of course.—The rule of all navigation statutes and regulations which requires an overtaken vessel to keep her course and speed, as applied to a river, relates, not to the course on which the overtaken boat is directed when the passing agreement is made, but to her normal course in the channel, and every turn and change of direction in that course must be anticipated and guarded against by the overtaking vessel. The Queen City (D. C. 1910), 180 Fed. 653.

Circumstances justifying or requiring a change of course or speed by the privileged vessel.—In cases where there is danger of a collision, the rules of admiralty should be strictly adhered to in order to avoid it; but these rules do not apply to the case of a sailing vessel changing her course at sight of a steamer some 7 or 8 miles off, not in a narrow channel, but a wide lake. The Propeller Monticello v. Mollison (1854), 58 U. S. (17 How.) 152, 15 L. Ed. 68.

A steamer has no right to call upon a sail vessel to change her course, where she can, by herself taking the proper course, avoid collision, and the failure of the sail vessel to obey such signal can not be imputed to her as a fault, especially where it does not appear that it would have lessened the danger of collision. Squires v. Parker (1900), 101 Fed. 843, 42 C. C. A. 51; writ of certiorari denied, Parker v. Squires (1901), 21 Sup. Ct. 922, 181 U. S. 617, 45 L. Ed. 1030. Though a change of course made by a sail vessel in response to a hail from an approaching steamer will not be considered a fault. The Forest Queen (D. C. 1869), Fed. Cas. No. 4,938.

An overtaken vessel need not change her course to give more room, even if it could safely be done. The Atlantis (1903), 119 Fed. 568, 56 C. C. A. 134.

The fact that the vessel whose duty it was, under the rules, to give way, was disabled and partly unmanageable, does not impose upon the other vessel the duty to avoid her, unless the disability was manifest. The H. P. Baldwin (D. C. 1871), Fed. Cas. No. 6,812.

The fact that each of two vessels approaching on converging courses knows the destination of the other, and that their courses do not cross, does not affect the application of the starboard hand rule, which requires the privileged vessel, to keep her course and speed. The Kingston (D. C. 1909), 173 Fed. 992.

Change in extremis.—A change of course by a sailing vessel in the presence of imminent danger created by the wrong maneuver of a steamer with a tow is not such a fault as will preclude recovery for an injury to the vessel resulting from a collision with the steamer. Bigelow v. Nickerson (1895), 70 Fed. 113, 17 C. C. A. 1, 39 L. R. A. 336, affirming The Robert Holland and Parana (D. C. 1893), 59 Fed. 200; The George Murray (D. C. 1884), 22 Fed. 117.

Effect of change of course or speed by privileged vessel.—Where the vessel ahead is willfully thrown across the path of the overtaking vessel, she can not recover for

an ensuing collision, though the rear vessel be not without fault. The St. Paul (D. C. 1878), Fed. Cas. No. 12,243.

A change of course which necessitates a collision is a fault for which the vessel will be liable. Wolf v. The Bertie Calkins (D. C. 1880), 2 Fed. 793.

Weight of evidence.—Where there was direct and positive testimony that a sailing vessel kept properly on her course, at least until a collision became inevitable, the fact that the shape of the wound tends to show that she could not have been at the instant of such collision on such course will not overcome such testimony. Wolf v. The Bertie Calkins (D. C. 1880), 2 Fed. 793.

Change in extremis.—The schooner, swinging into the channel with her helm hard a-port, changed it to starboard, almost at the instant of collision, for the purpose of easing the blow. Held, that this was not a fault. Wineman v. The Iron Chief (1894), 63 Fed. 289, 11 C. C. A. 196, reversing (D C. 1892), 53 Fed. 507; certiorari denied (1895), 15 Sup. Ct. 1040, 159 U. S. 270, 40 L. Ed. 143.

1469. Which vessel to slacken speed.—Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. *Rule 21, sec. 1, act of Feb. 8, 1895 (28 Stat. 649).*

Notes of Decisions.

Necessity for slackening speed.—See also notes to 1474, post.

This rule clearly applies to a vessel going with the stream, which has signified an intention to pass to the left, which involves danger of collision. The New York (1899), 20 Sup. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing decree (1897), 82 Fed. 819, 27 C. C. A. 154, and reversing decree (1898), 86 F. 814, 30 C. C. A. 628.

The obligation to slacken speed under this rule of the collision act was not intended to be contemporaneous with the duty of porting under section 1465, ante, though the same term, "risk of collision," is used in both rules, The Free State (C. C. 1873), Fed. Cas. No. 5,090.

Where there is plenty of sea room, the steamer need not slacken her speed so long as the sail vessel is apparently keeping her course, and there is no danger if she continues to do so. The Free State (C. C. 1873), Fed. Cas. No. 5,090; affirmed, The Free State (1875), 91 U. S. 200, 203, 204, 23 L. Ed. 299.

The obligation to slacken speed arises in case of continuous approach, or when the approaching light is found to be closing in, instead of opening out. The Manitoba (D. C. 1878), Fed. Cas. No. 9,029.

Necessity for slackening speed or reversing.—Risk of collision, requiring reduction of speed, exists whenever vessels are so near that a collision might result from any departure from the rules. The Milwaukee (D. C. 1871), Fed. Cas. No. 9,626.

Vessels with tow.—Where there is ample sea room to make every maneuver necessary to insure safety, a steamer with a tow is bound, when approaching a sailing vessel so as to involve risk of collision, to slacken her speed, or, if necessary, stop and reverse. The Favorite (D. C. 1881), 9 Fed. 709.

1470. Overtaking vessel.—Notwithstanding anything contained in these rules every vessel overtaking any other shall keep out of the way of the overtaken vessel. *Rule 22, sec. 1, act of Feb. 8, 1895 (28 Stat. 649).*

Notes of Decisions.

Extent of overtaking vessel's duty.—The duty rests upon an overtaking vessel to keep out of the way of the vessel ahead, and she is only entitled to pass at a time and place where it is suitable and safe, taking all factors into account, including the danger of suction. The Ohio (1898), 91 Fed. 547, 33 C. C. A. 667; The Atlantis (1903), 119 Fed. 568, 56 C. C. A. 134; The J. G. Gilchrist (D. C. 1909), 173 Fed. 606; decree affirmed (1910), 183 Fed. 105, 105 C. C. A. 397; Nicholas Transit Co. v. Pittsburgh S. S. Co. (D. C. 1912), 196 Fed. 65.

An overtaking vessel must anticipate a change of course by the overtaken vessel, made in conformity to an agreement for passing a meeting vessel. The Queen City (D. C. 1910), 189 Fed. 653.

An overtaking vessel is bound to run at moderate speed. Nicholas Transit Co. v. Pittsburgh S. S. Co. (D. C. 1912), 196 Fed. 65.

Suction created by overtaking vessel.—The theory that the displacement waves of a large vessel when passing a smaller may cause the latter to sheer is recognized in the admiralty law of this country.

Nicholas Transit Co. v. Pittsburgh S. S. Co. (D. C. 1912), 196 Fed. 65; The Henry W. Oliver (D. C. 1912), 202 Fed. 306.

Where two steamers were proceeding down a river on a clear day in a broad channel from 200 to 400 feet apart, running abreast of each other, and the suction created thereby caused one of the steamers to sheer beyond control, and come into collision with a barge, and the evidence showed that the colliding steamer was the overtaking vessel, and as such was illegally running abreast of the other steamer, she was thereby wholly at fault, and liable for the images sustained. The Falcon (D. C. 1902), 116 Fed. 753.

Effect of failure of overtaking vessel to keep out of the way.—The fault of an overtaking vessel for a collision being established, in determining the question of the contributory fault of the vessel overtaking, every reasonable doubt should be resolved in her favor. The Atlantis (1903), 119 Fed. 568, 56 C. C. A. 134.

Burden of proof.—Where, as an overtaking vessel was passing a much smaller vessel in St. Clair river, the latter suddenly sheered from her course, resulting in her collision with the overtaking vessel, and also with a third vessel passing on an opposite course, the overtaking vessel has the burden of proving that she did not cause such sheer, taking into account the speed and distance at which she passed and the effect of her suction. The J. G. Gilchrist (D. C. 1909), 173 Fed. 666; decree affirmed (1910), 183 Fed. 105, 105 C. C. A. 397.

If a collision occurs between an overtaking and an overtaken vessel, the burden of proof rests on the overtaking vessel to show that she was not negligent and that the collision resulted from the fault of the other. The Henry W. Oliver (D. C. 1912), 202 Fed. 306.

1471. Whistle signals.—In all weathers every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied whenever required by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or, as provided in Rule Twenty-six:

One blast to mean, "I am directing my course to starboard."

Two blasts to mean, "I am directing my course to port." But the giving or answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels. *Rule 23, sec. 1, act of Feb. 8, 1895 (28 Stat. 649).*

Notes of Decisions.

Duty to sound signal.—The proper signal must be given an approaching vessel by one wishing to go to the opposite side of the channel. The Brothers (D. C. 1869), Fed. Cas. No. 1,969.

A steamer approaching another in the daytime, port to port, on nearly parallel but slightly diverging courses, sufficiently far apart to involve no danger of collision if maintained, need not sound any signal. In re Rend (D. C. 1903), 126 Fed. 504.

Duty to answer signals.—Where an obliqated steamer proposed by whistle to deviate from the customary course, the privileged vessel should make an immediate reply, since the fact that she is privileged does not excuse her from attending to signals. The New York (1899), 20 Sup. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing decree (1897), 82 Fed. 819, 27 C. C. A. 154, and (1898), 86 Fed. 814, 30 C. C. A. 328.

Meaning of signals.—When a vessel is pursuing a course which the law gives her a right to take without the assent of another vessel, the whistle consistent with that course is to be regarded as a positive indication of her intention to pursue it. But, where a vessel has no right to pursue a particular course without the assent of th vessel she is meeting, the whistles she uses to obtain that assent are merely invitations to an agreement contrary to the usual mode of passing, and are not to be taken as a distinct indication that on failure to obtain such assent she will violate the rules of navigation, at least until there is something additional in her conduct to justify such an inference. Id.

Effect of agreement by signals.—One of two vessels which have made a passing agreement is not bound to anticipate that the other will not act lawfully and comply with her agreement, and so long as there is apparently reasonable opportunity for her to do so it is not a fault to act on the assumption that she will. Lake Erie Transp. Co. v. Gilchrist Transp. Co. (1906), 142 Fed. 89, 73 C. C. A. 313.

Signals in narrow channels.—Where the one or two meeting steam vessels having

the right of way fails to signal as required by the following rule, 1472, post, she is not required to wait for an answering signal before changing her course. The Vulcan and The Genevieve (1901), 106 Fed. 989, 46 C. C. A. 87, affirming decree (D. C. 1899), 96 Fed. 859; and writ of certiorari denied, Hingston *v.* The Vulcan (1902), 22 Sup. Ct. 936, 183 U. S. 700, 46 L. Ed. 396.

An agreement in a channel to pass starboard to starboard does not require a steamer to navigate on the port side of the channel, but only to allow room enough for the other to pass on her starboard side. The Merida (C. C. A. 1913), 210 Fed. 440. But see The Alleghany (C. C. 1868), Fed. Cas. No. 205; Id. (D. C. 1865), Fed. Cas. No. 204.

A failure to answer a second signal where the approaching vessel indicated by her answer to the first signal that she would not give way, will not justify the signaling vessel in proceeding as if the other had yielded her course, though the latter is in the wrong place and on the wrong course, and she must proceed cautiously. The Louis Dole (D. C. 1870), Fed. Cas. No. 8,534.

It was the duty of a steam barge rounding an island in Niagara River to know before giving the signal to pass inside a meeting tug, that she could make the turn against the current. The Canisteo (D. C. 1891), 47 Fed. 908.

Excuses for failure to sound signal.—Where, because of the failure of a ferryboat to open her side light, a steamer was justified in supposing that she was stationary, the steamer was not in fault for failure to signal before attempting to pass. The Lansdowne (D. C. 1900), 105 Fed. 436.

Excuses for failure to turn according to signal.—A tug which had agreed to pass a meeting steamer starboard to starboard is at fault for turning to starboard across the steamer's bows to counteract a sheer by her tow to port toward a dangerous obstruction, where the current which caused the sheer was known to the master of the tug. The Merida (1913), 210 Fed. 440, 127 C. C. A. 172.

Signals by vessel aground.—It is a fault for a vessel aground to respond to signals in a way to indicate that she will keep out of the other vessel's way. The F. W. Wheeler *v.* Churchill (1897), 78 Fed. 824, 24 C. C. A. 353.

Presumptions and burden of proof.—A steamer claiming protection, under an alleged agreement to depart from the rule, must show a proposition to that effect by proper signals in time to be acted on with safety, and that it was understood and accepted. The Milwaukee (D. C. 1871), Fed. Cas. No. 9,626.

Vessel held in fault for not turning soon enough or sufficiently in accordance with signal.—See The Alleghany (1869), 76 U. S. (9 Wall.) 522, 19 L. Ed. 781; Great Lakes S. S. Co. *v.* Pittsburgh S. S. Co. (1915), 222 Fed. 862, 138 C. C. A. 288, affirming decree, The A. G. Brower (D. C. 1913), 201 Fed. 588; Argo S. S. Co. *v.* Buffalo S. S. Co. (1915), 223 Fed. 581, 139 C. C. A. 113.

Vessel held in fault for turning without signaling.—See The Manitoba (1887), 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095.

Vessel held in fault for turning in direction contrary to signals.—See The William Chisholm (1907), 153 Fed. 701, 82 C. C. A. 562; [C. S. p. 8470].

Vessel held in fault for failing to answer signals.—See The New York (1899), 20 Sup. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing (1897), 82 Fed. 819, 27 C. C. A. 154, and (1898), 86 Fed. 814, 30 C. C. A. 628; Id. (D. C. 1891), 53 Fed. 553.

Vessel held in fault for sounding cross signals.—See The North Star (1894), 62 Fed. 71, 10 C. C. A. 262, modifying (D. C. 1890), 43 Fed. 807.

1472. Right of way in narrow channels and rivers.—That in all narrow channels where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take. *Rule 24, sec. 1, act of Feb. 8, 1895 (28 Stat. 649).*

Notes of Decisions.

Decisions prior to enactment of rules.—See The Napoleon (D. C. 1857), Fed. Cas. No. 10,014; Drew *v.* The Chesapeake (Mich. 1845), 2 Doug. 33.

Waters to which rule is applicable.—This rule does not apply to Portage Entry and River, where there is only a slight normal current which may be turned the other way by the wind. Western Transit Co. *v.* Davidson S. S. Co. (1914), 212 Fed. 696, 129 C. C. A. 232.

Extent of ascending vessel's duty.—A steamer ascending a current of 2½ miles an hour was bound to keep out of the way of a descending tow and to stop if the situation became such as to require either to stop. The George Presley (1901), 111 Fed. 555, 49 C. C. A. 438.

Necessity for sounding signal.—A passing steamer, having the right of way, is not in fault for a collision because she failed to give the signal to indicate which side she expected to take, when the other vessel was aground, and her movements could not have been influenced by such signal. The Maurice B. Grover (1899), 92 Fed. 678, 34 C. C. A. 616.

Effect of failure of descending vessel to signal course.—Where the one of two meeting steam vessels having the right of way fails to signal as required by this rule, the other may properly signal by two blasts, in accordance with the preceding rule, 1471, ante, and she is not required to wait for an answering signal before changing her course. The Vulcan and The Genevieve (1901), 106 Fed. 989, 46 C. C. A. 87, affirming degree (D. C. 1899) 96 Fed. 859, and writ of certiorari denied, Hingston v. The Vulcan (1902), 22 Sup. Ct. 936, 183 U. S. 700, 46 L. Ed. 396.

Effect of assent by ascending vessel.—The ascending vessel can not contend that the course chosen by the descending vessel was improper where she assented to the signal, and there was ample room for her passage between the course of the descending steamer and the side of the channel. The Yuma (1904), 132 Fed. 964, 66 C. C. A. 74, affirming decree (D. C. 1902) 117 Fed. 894.

Descending vessel held in fault for failure to signal.—See The Fayette Brown (D. C. 1912), 198 Fed. 684.

Ascending vessel held in fault for disregarding signals of descending vessel.—See Griswold v. The T. W. Snook (D. C. 1891), 49 Fed. 686; The Lake Shore (D. C. 1912), 201 Fed. 449.

Descending vessel held in fault for not turning sufficiently in accordance with her signal.—See Wineman v. Drake (1907), 154 Fed. 933, 83 C. C. A. 505; writ of certiorari denied (1907), 28 Sup. Ct. 256, 207 U. S. 590, 52 L. Ed. 354.

1473. Steam vessels in narrow channels.—In all channels less than five hundred feet in width, no steam vessel shall pass another going in the same direction unless the steam vessel ahead be disabled or signify her willingness that the steam vessel astern shall pass, when the steam vessel astern may pass, subject, however, to the other rules applicable to such a situation. And when steam vessels proceeding in opposite directions are about to meet in such channels, both such vessels shall be slowed down to a moderate speed, according to the circumstances. *Rule 25, sec. 1, act of Feb. 8, 1895 (28 Stat. 649).*

Notes of Decisions.

Necessity for waiting to pass outside of channel.—A vessel should not attempt to pass a tow in the entrance to Milwaukee harbor where her draught is such that she can not take her proper side of the channel without so nearly grounding as to become unmanageable. The Alleghany (C. C. 1868), Fed. Cas. No. 205; Id. (D. C. 1865), 204.

A tug is liable for a collision between boats in her tow, caused by the grounding of one on attempting to overtake and pass a raft moving in the same direction in a narrow channel, where the raft occupied half of the channel and the tug could have slowed down until it reached open water. The David Morris (D. C. 1871), Fed. Cas. No. 3,596.

A steamer with a barge in tow is not chargeable with fault for entering the St. Clair Ship Canal while a meeting vessel was coming through, and a dredge was working near the entrance, where it was not apparently dangerous to attempt to pass therein. Nicholas Transit Co. v. Pittsburgh S. S. Co. (D. C. 1912), 196 Fed. 60.

Speed of vessels.—Where there is evidence to show that defendant's boats were running eight miles an hour when they met a tug, which was unable to manage her tow, the question as to whether there was negligence in the manner of navigating and managing defendant's boats was for the jury. Hackett v. Wilson Transit Co. (1902), 89 N. W. 360, 129 Mich. 576, 8 Detroit Leg. N. 1047.

Overtaking vessel held in fault for attempting to pass without agreement. See The Edward Smith No. 2 (D. C. 1901), 105 Fed. 987; judgment affirmed, The Edward Smith (1905), 135 Fed. 32, 67 C. C. A. 506; [C. S. p. 8472].

Overtaken vessel held in fault for failure to protest passing in improper place. See The Edward Smith (1905), 135 Fed. 32, 67 C. C. A. 506, affirming judgment (D. C. 1901), 105 Fed. 987.

1474. Steam vessel refusing to pass.—If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse. *Rule 26, sec. 1, act of Feb. 8, 1895 (28 Stat. 649).*

Notes of Decisions.

Necessity for sounding alarm signals.—Where a steam vessel navigating in a thick fog gave four distinct passing signals to a meeting vessel, which she could not see, covering a period of six minutes or more, and received no answer to any, it was her duty to sound alarm signals. Hawgood Transit Co. v. Mesaba S. S. Co. (1909), 166 Fed. 697, 92 C. C. A. 369.

A steam vessel in a thick fog, hearing a passing signal from a vessel nearly ahead and about a mile distant, had no right to conclusively assume that such signal was not intended for her, and in doing so acted at her peril; it being her duty, if she was in doubt as to the course or intention of the other vessel, to give the alarm signal. Id.

Necessity of slackening speed or reversing.—It is the duty of a vessel to slacken speed, or stop, or reverse if necessary when approaching another, so as not to involve risk of collision, but there is no risk of collision within the meaning of the rule so long as the two vessels, by complying with their passing agreement, can certainly pass in safety, and each vessel may be navigated upon this supposition until the intervention of something which should operate as notice to an officer of skill and prudence of the presence of danger. The Livingstone (1902), 113 Fed. 879, 51 C. C. A. 560, reversing (D. C. 1898) 87 Fed. 769, and (D. C. 1900) 104 Fed. 918; Lake Erie Transp. Co. v. Gilchrist Transp. Co. (1906), 142 Fed. 89, 73 C. C. A. 313.

The rule that a steamer approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, is bound to stop until her course be ascertained with certainty, is peculiarly applicable when a vessel going up a narrow river channel is about to meet a descending vessel upon cross courses, and signals of the latter are given three times without reply. The New York (1899), 20 Sup. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing decree (1897), 82 Fed. 819, 27 C. C. A. 154, and reversing decree (1898), 86 Fed. 814, 30 C. C. A. 628.

Where a steam vessel navigating in a thick fog gave four distinct passing signals to a meeting vessel, which she could not see, covering a period of six minutes or more, and received no answer to any, it was her duty to stop, and, if necessary, reverse until the course and position of the other vessel could be ascertained. Hawgood Transit Co. v. Mesaba S. S. Co. (1909), 166 Fed. 697, 92 C. C. A. 369.

See also notes to 1469, ante.

Excuses for failure to slacken speed or reverse.—Where a propeller and a steamer are approaching each other, and there is danger of a collision because of the reckless speed of the propeller, the risk of such a collision affects the steamer equally with the propeller, and imposes upon her the same duty of slackening her speed, or, if necessary, stopping and reversing, which under this section would be imposed on the propeller. The Manitoba (1887), 7 Sup. Ct. 1158, 1165, 122 U. S. 97, 30 L. Ed. 1095.

The fact that a vessel is on the wrong side of the channel does not relieve another from the duty to reduce her speed to avoid a collision. The Brothers (D. C. 1869), Fed. Cas. No. 1,969.

The duty of a steamer approaching another in a narrow channel, whose signals are not answered, to stop and reverse on losing the starboard lights of the other steamer, was not excused by the fact that neglect in answering signals is common. She had no right to assume that her presence was known until her signals had been answered. The New York (D. C. 1891), 53 Fed. 553.

Effect of failure to sound alarm signals.—Fault can not be predicated on the failure of a steamer to sound an alarm, when the developing danger was equally apparent to both. The Queen City (D. C. 1910), 179 Fed. 653.

Vessel held in fault for failure to slacken speed or reverse in time.—See The Alleghany (1869), 76 U. S. (9 Wall.) 522, 19

L. Ed. 781, affirming (C. C. 1868), Fed. Cas. No. 205, and (D. C. 1865), Fed. Cas. No. 204; [C. S. p. 8473].

After failure to receive answer to signal.—See The New York (1899), 20 Sup. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing (1897), 82 Fed. 819, 27 C. C. A. 154 (1898), 86 Fed. 814, 30 C. C. A. 628, and (D. C. 1891), 53 Fed. 553; [C. S. p. 8473].

After receiving cross signal.—The Fountain City (1894), 62 Fed. 67, 10 C. C. A. 278.

Vessel held in fault for failure to sound alarm signals in time.—A vessel which at the time of collision is in actual violation of a statutory rule designed to prevent collisions has the burden to show that such violation could not have contributed to the collision. Pittsburgh S. S. Co. v. Duluth S. S. Co. (1915), 222 Fed. 834, 138 C. C. A. 260.

See Duluth S. S. Co. v. Pittsburgh S. S. Co. (1910), 180 Fed. 656, 103 C. C. A. 622; The Merida (D. C. 1909), 173 Fed. 703.

Vessel aground.—The F. W. Wheeler v. Churchill (1897), 78 Fed. 824, 24 C. C. A. 353.

1475. Obedience and construction of rules.—In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. *Rule 27, sec. 1, act of Feb. 8, 1895 (28 Stat. 649).*

Notes of Decisions.

Circumstances justifying a disregard of statutory rules.—The failure of an approaching vessel to observe the admiralty rules will not warrant another vessel in disregarding them. Martin v. Northern Transp. Co. (1870), 12 Wall. 31, 47, 20 L. Ed. 251.

A change of course by the privileged vessel is not excused under this rule unless she affirmatively shows it was necessary to avoid immediate danger. The Elizabeth Jones (1884), 5 Sup. Ct. 468, 112 U. S. 514, 28 L. Ed. 812.

While a steamship may disregard the statutory rules for the prevention of collision, where she can not obey them without placing herself in serious peril she is bound to resort to all other practicable means before she is justified in doing so. Squires v. Parker (1900), 101 Fed. 843, 42 C. C. A. 51; writ of certiorari denied, Parker v. Squires (1901), 21 Sup. Ct. 922, 181 U. S. 617, 45 L. Ed. 1030; The Elizabeth (D. C. 1902), 114 Fed. 757.

Wherever by the fault of another vessel a steamer is placed in danger of collision, she is bound to stop or reverse, and will not be excused for a departure from the statutory rule, except upon clear proof that such departure was rendered necessary by the circumstances of the case, or that it could not have contributed to the collision. The Jay Gould (D. C. 1884), 19 Fed. 765.

A fire tug owned by a city, and forming a part of its fire department [illegible] v. empt, by reason of its [illegible] the duty of carrying

prevent collision with other vessels, though what constitutes ordinary care, as a question of fact, may vary with the exigencies of the service in which it is at the time engaged. Henderson v. City of Cleveland (D. C. 1899), 93 Fed. 844.

Circumstances requiring a disregard of statutory rules.—The fact that a steamer is entitled to hold her course does not excuse her from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty. The New York (1899), 20 Sup. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing decree (1897), 82 Fed. 819, 27 C. C. A. 154.

All navigation rules pertinent to a given situation are to be construed together, and while each of two approaching vessels has the right to expect the other to navigate in accordance with the rules, or a passing agreement, when it becomes evident that either is not doing so it is the duty of the other to navigate accordingly and take such measures as may seem necessary to avoid a collision. U. S. v. Erie R. Co. (1909), 172 Fed. 50, 96 C. C. A. 538.

This rule applies in cases where two vessels approach each other unexpectedly in very dangerous proximity. The Negaunee (D. C. 1884), 20 Fed. 918.

The rule which requires the privileged of two vessels to keep her course and speed is subject to exception, where special circumstances render a departure from it necessary, in the exercise of good seamanship, to avoid immediate danger, and in

such case the observance of it is a fault. The Kingston (D. C. 1909), 173 Fed. 992.

Circumstances requiring change of course or speed by privileged vessel.—See notes to 1468, ante.

Vessel held in fault for not taking precautions required by special circumstances.—See U. S. *v.* Erie R. Co. (1909), 172 Fed. 50, 96 C. C. A. 538; Scheele *v.* The W. E. Gratwick (D. C. 1897), 81 Fed. 590.

1476. Negligence.—Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. *Rule 28, sec. 1, act of Feb. 8, 1895 (28 Stat. 649).*

Notes of Decisions.

For decisions prior to enactment of rules see 1505, post.

I. Lookout.

II. Precautions required by ordinary practice of seamen.
- (A) Degree of care required.
- (B) Sufficiency of crew on deck.
- (C) Navigation in narrow channels.
- (D) Tows.
- (E) Moored vessels.
- (F) Anchored vessels.

III. Precautions required by special circumstances.
- (A) Circumstances requiring extra precautions.
- (B) Defective or disabled vessel.
- (C) Inevitable accident.
- (D) Maneuvers in extremis.

I. Lookout.

Decisions prior to enactment of rules.—A steamboat navigating, at night, waters much frequented by other vessels, is bound to have a lookout stationed near her bows. Genesee Chief *v.* Fitzhugh (1851), 53 U. S. (12 How), 443, 13 L. Ed. 1058; [C. S. p. 8475].

Necessity for lookout.—It is the imperative duty of a steamship, when making a landing at a dock in a river where other vessels are constantly passing, to maintain an efficient lookout. The Northland (D. C. 1903), 125 Fed. 58.

Lookout astern.—A vessel alongside a dock in a river should not start her propeller without a lookout astern to give warning of danger from the suction to nearby vessels. The Northland (D. C. 1903), 125 Fed. 58.

Competency of lookout.—A man who needs a night glass to enable him to discover lights in time to avoid a collision is unfit for a lookout. His own natural vision should be sufficient to perform all the duties of a lookout. The Avon (D. C. 1885), 22 Fed. 905.

Lookout having other duties to perform.—It is a fault for the entire crew of a sail vessel, including the lookout, to be engaged in handling the sails. The H. P. Baldwin (D. C. 1871), Fed. Cas. No. 6,812.

The lookout required by the rules must not only be competent, but charged with no other duty while so serving, and the officer navigating a steamer can not at the same time serve as lookout. The J. C. Ames (D. C. 1903), 121 Fed. 918; The Young America (D. C. 1875), Fed. Cas. No. 18,179; Larsen *v.* The Myrtle (D. C. 1890), 44 Fed. 779.

If the master of a tugboat could not steer and at the same time maintain a lookout for an imperiled scow ahead, he should have maintained a competent lookout by his side. Dangelo *v.* John W. Danforth Co. (D. C. 1911), 192 Fed. 678.

Position of lookout.—A mate near the wheelsman at the time of collision can not be considered a proper lookout. The Empire State (D. C. 1870), Fed. Cas. No. 4,474.

A vessel in charge of her master and second mate who were together on the bridge, and which has no lookout forward or aloft, although in a dense fog, has not a sufficient lookout. The Alberta (D. C. 1885), 23 Fed. 807.

If a vessel has two men of experience stationed as lookouts in the eyes of the ship during a fog, it is not negligent. Bradley *v.* The John Pridgeon, jr. (D. C. 1889), 38 Fed. 261.

Number of men on lookout.—A propeller of 1,400 tons burden on Lake Huron, in a dense fog, should have two experienced lookouts. The Colorado (D. C. 1871), Fed. Cas. No. 3,028.

Excuses for failure to maintain proper lookout.—The absence of a lookout on a vessel while making a landing at a dock in a river is not excused on the ground that all of the crew were otherwise engaged. The Northland (D. C. 1903), 125 Fed. 58.

Excuses for failure to see other vessel in time.—A vessel was not in fault for failure to sooner see that another was in motion, whose lights were among those of 25 or 30

other vessels around where she had been at anchor. The Sitka (D. C. 1904), 132 Fed. 861.

Failure to discern true course of other vessel.—An approaching vessel, considering a white light on a moving vessel to be that of a vessel at anchor, is not excused where, by the exercise of ordinary nautical skill and care, the error might have been discovered in time to avoid a collision. The Gray Eagle (C. C. 1868), Fed. Cas. No. 5,735, reversing (D. C. 1865) Fed. Cas. No. 5,734.

Effect of failure to keep proper lookout.—Every doubt relating to the consequences is to be resolved against the vessel which is without a lookout. The John Fretter (C. C.), Fed. Cas. No. 7,342.

The fact that the master of a vessel was acting as wheelsman and lookout will render the vessel liable where the proofs leave it doubtful whether such fact contributed to the collision. The Young America (D. C. 1875), Fed. Cas. No. 18,179.

The absence of a lookout is not a fault when, from the circumstances, a lookout could not be of service, or when the officer of the deck is in full possession of all the information a lookout could possibly give. The Badger State (C. C. 1883), 15 Fed. 346, affirming (D. C. 1881) 8 Fed. 528; The George Murray (D. C. 1884), 22 Fed. 117.

The alleged absence of lookouts need not be considered where their presence could not have prevented the collision. The Chicago (1895), 71 Fed. 537; decree affirmed (1900), 100 Fed. 999, 40 C. C. A. 680; The Victor (D. C. 1873), Fed. Cas. No. 16,933.

The want of a lookout will not be considered a fault where the other vessel was seen in good season by the master and mate in charge. The Maria Martin (C. C. 1868), Fed. Cas. No. 9,079.

The failure of one of two meeting vessels to keep a lookout forward was not a fault where the other vessel was seen in ample time, and proper measures taken to avoid her, but the collision occurred because of an unexpected change of course of the other vessel when close at hand. The Livingstone (1902), 113 Fed. 879, 51 C. C. A. 569, reversing (D. C. 1898), 87 Fed. 769, and (D. C. 1900), 104 Fed. 918.

The want of a lookout will not be considered a fault where the other vessel was seen in good season by the master and mate. The Maria Martin (1870), 79 U. S. (12 Wall.) 31, 20 L. Ed. 251, affirming (C. C. 1868), Fed. Cas. No. 9,079.

The fact that the lookout of a steamer [illegible] a river with a tow was at the time another [illegible] was given, while a violation of the rules, was not a fault contributing to the collision, in view of the fact that such other steamer persisted in attempting to pass after the subsequent dissenting signals of the first steamer. The North Star (D. C. 1901), 108 Fed. 436.

Presumptions and burden of proof.—To exonerate a vessel from fault for a collision here she failed to maintain a lookout, although she was navigating in a dense fog, and with knowledge that another vessel was approaching ahead, the burden rests heavily upon her to show that the presence of a lookout could not have guarded against the collision. The George W. Roby (1901), 111 Fed. 601, 49 C. C. A. 481, modifying decree In re Lakeland Transp. Co. (D. C. 1900), 103 Fed. 328.

Weight of evidence.—The unexplained failure of a vessel to see the lights of another vessel or hear signals blown by her on a clear night, when they are not more than a mile apart, is conclusive evidence of a defective lookout, and the failure to put the officers and crew of a vessel on the stand to explain why the lights were not seen or her signals heard greatly strengthens the presumption of a defective lookout. The New York (1899), 20 Sup. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing decree, 1897) 82 Fed. 819, 27 C. C. A. 154, and reversing decree (1898) 86 Fed. 814, 30 C. C. A. 628.

Vessel held in fault for failure to keep a proper lookout.—See The New York (1899), 20 Sup. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing (1897), 82 Fed. 819, 27 C. C. A. 154, and (1898) 86 Fed. 814, 30 C. C. A. 628; [C. S. p. 8477].

Vessel held in fault for failure to discover other vessel, or to discern her position and course.—See The Gray Eagle (1869), 76 U. S. (9 Wall.) 505, 19 L. Ed. 741, affirming (C. C. 1868), Fed. Cas. No. 5,735 and reversing (D. C. 1865), Fed. Cas. No. 5,734.

Vessel held in fault for failing to keep watch of another after discovering it.—See The Sunnyside (D. C. 1875), 91 U. S. 208, reversing (C. C. 1873), Fed. Cas. No. 13,620.

II. Precaution Required by Ordinary Practice of Seamen.

(A) Degree of care required.

Excuse for failure to take precautions.—A neglect of one vessel as approaching in the night to show proper lights or the showing of a wrong one does not absolve the other vessel from the obligation to observe the usual laws of navigation or such reasonable precautions as the cir-

cumstances allow. Pfister v. Greening (1869), 9 Wall. 505, 510, 19 L. Ed. 741.

Exceptions to statutory rules.—The statutory rules governing navigation in a fog do not supersede any usual requirement of prudent navigation not inconsistent with their positive provisions. The George W. Roby (1901), 111 Fed. 601, 49 C. C. A. 481, modifying decree in re Lakeland Transp. Co. (D. C. 1900), 103 Fed. 328.

The rule which requires the privileged of two vessels to keep her course and speed, is subject to exception, where special circumstances render a departure from it necessary, in the exercise of good seamanship, to avoid immediate danger, and in such case the observance of it is a fault. The Kingston (D. C. 1909), 173 Fed. 992.

(B) Sufficiency of crew on deck.

Absence of officers from post.—Absence of a pilot from a steamer navigating a narrow channel is prima facie a fault. The Milwaukee (D. C. 1871), Fed. Cas. No. 9,626.

The fact that the engineer and master left their post of duty after the lights of an approaching vessel were seen may be considered on the question of negligence in giving and executing orders. The Manitoba (D. C. 1878), Fed. Cas. No. 9,029.

Master acting as wheelsman.—A tug whose chief officer also acts as wheelsman is insufficiently manned, regardless of the custom of the waters, and every doubt as to her being in fault will be resolved against her. The Rochester (1898), 84 Fed. 365, 28 C. C. A. 428, affirming (D. C. 1897), 81 Fed. 237; The Coleman (D. C. 1873), Fed. Cas. No. 2,981; The Victor (D. C. 1873), Fed. Cas. No. 16,933; The J. G. Gilchrist (D. C. 1909), 173 Fed. 666; decree affirmed (1910), 183 Fed. 105, 105 C. C. A. 397.

Position of chief officer.—The chief officer, in a fog, should be so placed that he can have instant access to and command of the signals to the engineer. The Colorado (D. C. 1871), Fed. Cas. No. 3,028.

Number of men at wheel.—A propeller of 1,400 tons burden on Lake Huron in a dense fog should have two wheelmen. The Colorado (D. C. 1871), Fed. Cas. No. 3,028.

Vessel held in fault for not having sufficient crew on deck.—See Robinson v. Detroit & C. Steam Nav. Co. (1896), 73 Fed. 883, 20 C. C. A. 86; appeal dismissed by consent after rehearing granted, The City of Mackinac (1896), 82 Fed. 999, 27 C. C. A. 677; The J. G. Gilchrist (1910), 183 Fed. 105, 105 C. C. A. 397, affirming decree (D. C. 1909), 173 Fed. 666; Comerford v. The Melvina (D. C. 1890), 43 Fed. 77.

(C) Navigation in narrow channels.

Degree of care required.—In the narrow waters of a harbor which is apt to be crowded with vessels and where navigation is perplexed and complicated, a steamer must proceed with the greatest care and foresight. The Chicago (D. C. 1895), 71 Fed. 537; decree affirmed (1900), 100 Fed. 999, 40 C. C. A. 680.

Attempting to pass in dangerous channel.—A steamer will be held in fault for entering a harbor at such a speed (in this case, 6 miles an hour) that, owing to her great draft and shoals or shallow water, she sheers, and refuses to obey her helm. The Alleghany (1869), 76 U. S. (9 Wall.), 522, 19 L. Ed. 781, affirming (D. C. 1865), Fed. Cas. No. 204; (C. C. 1868), Fed. Cas. No. 205.

Where an upboard steamer met one bound down at a point in the river where the channel suddenly narrowed on the upbound vessel's starboard side, and the latter turned toward the other's course to enter the narrow part of the channel and was unable to check her sheer in time, she was in fault for not making the turn sooner so as to bring her course parallel with the other's or for not waiting till the other passed. Upton v. Whitaker (1912), 196 Fed. 651, 116 C. C. A. 343.

A free vessel, meeting another with a tow in a narrow channel should handle her own speed so as to select the meeting point at a place which will minimize the unavoidable danger of collision. Western Transit Co. v. Davidson S. S. Co. (1914), 212 Fed. 696, 129 C. C. A. 232.

It is not a fault for a tow to enter the channel of St. Clair flats while another tow is coming through in an opposite direction. The Sweepstakes (D. C. 1874), Fed. Cas. No. 13,687.

One attempting to take a raft of logs inclosed in a sack boom 1,200 feet long and 250 feet wide, through the Ste. Marie River, with a tug at either end, assumes the risks of so hazardous an undertaking; and if, on entering a narrow channel, he fails to notify an ascending steamer of the approach of the raft, so that, on finding she can not get safely by, she changes her course and cuts through the raft, whereby many logs are lost, he can not hold the steamer liable. Reid Towing & Wrecking Co. v. The Athabasca (D. C. 1890), 45 Fed. 651.

Where an ascending propeller, while approaching a narrow and dangerous bend in the Manistee river, receives notice that a steamer is entering the bend from above, it should wait until the other has descended; and if it attempts to pass in the bend, and a collision occurs, it will be held in fault.

Canfield v. The F. & P. M., No. 2 (D. C. 1891), 44 Fed. 698.

Position in channel. It is the established rule of the Chicago River that a steamer must take the starboard side of the channel. The Brothers (D. C. 1869), Fed. Cas. No. 1,970.

There is no general obligation requiring vessels navigating rivers to keep to the right of mid-channel. No such custom is proven in respect to the St. Clair Flats. The Milwaukee (D. C. 1871), Fed. Cas. No. 9,626.

A steamer is not in fault for passing up the Detroit River within 600 or 700 feet of the shore. The Lansdowne (D. C. 1900), 105 Fed. 436.

In the Detroit River, where ranges have been established to mark the regular path of vessels, such ranges, and not the winding and unknown midline between the irregular channel banks, fix the normal course which affects the rights and duties of meeting boats as to their position in the channel. The Queen City (D. C. 1910), 180 Fed. 65.

Entering channel or harbor.—A schooner is held at fault for taking a well-known natural channel, though she might have kept to the southward of the channel, through an open spread of shallower water, deep enough for her, through which vessels occasionally went, and thereby would have avoided risk of collision. Wineman v. The Iron Chief (1894), 63 Fed. 289, 11 C. C. A. 196, reversing (D. C. 1892), 54 Fed. 507, and certiorari denied (1895), 15 Sup. Ct. 1040, 159 U. S. 270, 40 L. Ed. 143.

A steering vessel voluntarily approaching a narrow entrance to a harbor in a high wind so closely that, on an accident to her tug which prevents taking her in charge, she is compelled to run in alone without adequate means of controlling her movements can not be held free from fault for coming with a vessel anchored within the entrance. The Jeremiah Godfrey (D. C. 1888), 37 Fed. 738.

Excuses for sheering. The fact that there was a cross-current at the point where the sheer took place did not exonerate the sheering vessel from liability, the existence of such current being well known, and its effect such that it could be overcome by proper care and skill in navigation. The Australia (1903), 120 Fed. 220, 56 C. C. A. 568.

Suction between passing vessels.—Suction or sheer from passing vessels is one of the natural incidents of navigation which a tug with a tow must guard against. The Monitor (D. C. 1868), Fed. Cas. No. 9,710.

The suction of two vessels passing each other in opposite directions in a channel is not very powerful, especially if there is no great difference in size, and is too brief in its operation to account for a sudden sheer by one which brings her into collision with the tow of the other. Nester v. The City of Cleveland and The John Martin (D. C. 1890), 56 Fed. 729.

Vessel aground or at anchor in channel.—A vessel aground in a narrow channel, in a situation to permit of other vessels passing her in safety, should, on the approach of another, cease her efforts to get off, until such other vessel has passed. The Thomas A. Scott (D. C. 1874), Fed. Cas. No. 13,921.

A large propeller, which grounded upon a mud bank at the mouth of the Blackwell Canal, in attempting to enter it from the Buffalo River just as a tug with a large barge in tow was coming out, is in fault for immediately backing off, and thereby narrowing the channel, before the barge had got past, thus contributing to a collision between them. The John Craig (D. C. 1895), 66 Fed. 596.

Presumptions and burden of proof.—A vessel which suddenly sheers from her proper course in a channel in ordinary weather, in a fairly ample space for navigation, and under no apparent stress of circumstances occurring without her fault, and in consequence of such sheering, comes into collision with another vessel, is presumptively in fault for the collision, and has the burden of exonerating herself. The Australia (1903), 120 Fed. 220, 56 C. C. A. 568; Minnesota S. S. Co. v. Lehigh Valley Transp. Co. (1904), 129 Fed. 22, 63 C. C. A. 672; writ of certiorari denied, Western Transit Co. v. Minnesota S. S. Co. (1904), 25 Sup. Ct. 793, 195 U. S. 636, 49 L. Ed. 355; Nicholas Transit Co. v. Pittsburgh S. S. Co. (D. C. 1912), 196 Fed. 60.

Evidence held not to show that the sheer of a passing vessel was caused by suction.—See The Alexander Folsom (1892), 52 Fed. 403, 3 C. C. A. 165, reversing (D. C. 1891), 44 Fed. 932; [C. S. p. 8479].

Speed held not excessive. Eight miles an hour, the speed necessary to keep her tow from being drifted by the wind across the channel. American S. S. Co. v. American Steel Barge Co. (1904), 129 Fed. 65, 63 C. C. A. 507; Nicholas Transit Co. v. Pittsburgh S. S. Co. (D. C. 1912), 196 Fed. 60.

Less than 5 miles an hour in the middle channel of Lake George. The Alexander Folsom (1892), 52 Fed. 403, 3 C. C. A. 165, reversing (D. C. 1891), 44 Fed. 932.

Not more than 6 miles an hour in St. Mary's River above the locks. The Sitka (D. C. 1904), 132 Fed. 861.

Speed held excessive.—Too great in overtaking a raft which occupied most of the channel to permit her being stopped before collision when she took a sudden sheer. Hall *v.* Chisholm (1902), 117 Fed. 807, 55 C. C. A. 31.

Twelve miles per hour when passing between two meeting tows in St. Clair River. American S. S. Co. *v.* American Steel Barge Co. (1904), 129 Fed. 65, 63 C. C. A. 507.

Over 5 miles an hour in the Chicago River. The Little Giant (C. C. 1868), Fed. Cas. No. 8,401.

Full speed entering a narrow and crowded harbor. Maxwell *v.* The Brothers and The Lady Franklin (C. C. 1869), Fed. Cas. No 9,322.

Nine miles an hour approaching the entrance to Chicago Harbor. The Badger State (C. C. 1883), 15 Fed. 346, affirming (D. C. 1881), 8 Fed. 526.

Eight miles an hour entering Milwaukee Harbor. The Alleghany (D. C. 1865), Fed. Cas. No. 204; Id. (C. C. 1868), Fed. Cas. No. 205.

Eight and one-half miles an hour ascending a channel and 14½ miles an hour descending the channel. The Milwaukee (D. C. 1871), Fed. Cas. No. 9,626.

Six miles an hour by a sailing vessel entering a crowded harbor at night. The Masten (D. C. 1872), Fed. Cas. No. 9,266.

From 9 to 10 miles an hour entering Chicago Harbor at night. The Badger State (D. C. 1881), 8 Fed. 526.

More than 3 miles an hour in the Chicago River between the Main Street bridge and Allen's Slip during the season of navigation and when the stream is crowded with other craft. The Buckeye (D. C. 1881), 9 Fed. 666.

Five or six miles an hour entering Buffalo Harbor, especially when a strong gale is blowing and a rapid current setting up the river. The Syracuse (D. C. 1898), 84 Fed. 1,005.

Eight miles an hour, and 10 miles an hour in the Genesee River, and in not giving alarm signals, or sooner stopping and reversing, when it became apparent that the Titania was being negligently navigated. The Kingston (D. C. 1909), 173 Fed. 992.

Full speed passing down St. Mary's River below the locks. The Fayette Brown (D. C. 1912), 198 Fed. 684.

Vessel held in fault for not navigating on proper course in channel.—See The Charles Hebard *v.* Lyons (1899), 56 Fed. 315, 5 C. C. A. 516, affirming (D. C. 1891) 46 Fed. 137; [C. S. p. 8480].

Vessel held in fault for attempting to pass at dangerous point in channel.—See Lake Shore Transit Co. *v.* Corrigan (1905), 137 Fed. 484, 70 C. C. A. 68; Western Transit Co. *v.* Davidson S. S. Co. (1914), 212 Fed. 696, 129 C. C. A. 232; The Swallow (D. C. 1875), Fed. Cas. No. 13,663; Illinois Stone Co. *v.* The Clyde, The Nashotah, and The W. J. Roebuck (D. C. 1891), 49 Fed. 762.

Starting while tow was passing so as to cause sheer by suction of propeller.—See The Chicago (D. C. 1895), 71 Fed. 537; decree affirmed (1900), 100 Fed. 999, 40 C. C. A. 680.

Vessels held in fault for entering narrow channel abreast.—See Minnesota S. S. Co. *v.* Lehigh Valley Transp. Co. (1904), 129 Fed. 22, 63 C. C. A. 672; writ of certiorari denied, Western Transit Co. *v.* Minnesota S. S. Co. (1904), 25 Sup. Ct. 793, 195 U. S. 636, 49 L. Ed. 355.

Vessel held in fault for passing so close as to cause danger of sheering.—See The Yuma (D. C. 1902), 117 Fed. 894; decree affirmed (1904), 132 Fed. 964, 66 C. C. A. 74; The Maria Martin (C. C. 1868), Fed. Cas. No. 9,079.

Meeting vessel held in fault for unnecessarily sheering against the other.—See Mitchell Transp. Co. *v.* Green (1903), 120 Fed. 49, 56. C. C. A. 455; [C. S. p. 8480].

(D) Tows.

Right of way.—See The George Presley (1901), 111 Fed. 555, 49 C. C. A. 438; Mitchell Transp. Co. *v.* Green (1903), 120 Fed. 49, 56 C. C. A. 455.

Degree of care required of towing vessel.—The degree of care required on the part of a tug must obviously be measured by the condition of the tow. To tow a large and deeply-laden schooner up a narrow and obstructed channel at the rate of 5 or 6 miles an hour, with a hurricane blowing, and the tow's sails unfurled, is not good seamanship, and, if this lack of care contributes to a collision, she is chargeable with negligence. The Nicholson (D. C. 1886), 28 Fed. 889.

A tug undertaking to assist vessels into a narrow and dangerous harbor, like that at Buffalo, is bound to know the channel, the current, and whether, in the existing state of wind and water, it is safe to attempt to enter without further assistance. The Syracuse (D. C. 1898), 84 Fed. 1,005.

While the obligation of an insurer, or even of a common carrier, is not imposed by law upon towing boats, they are required to have a general knowledge of the situation and its difficulties, and to exercise the care and skill of prudent navigators to avoid injury to their tow or to other vessels, while the duty rests on the tow to exercise all reasonable care to the end, and particularly to promptly obey to and obey the signals of the pilot

R. Brook v. Gilchrist Transp. Co. (D. C. 1904), 132 Fed. 174.

Duty of tow. The vessel towed is bound to prevent a collision if she can, or to make the damages as light as possible. The Sarah (C. C. 1876), Fed. Cas. No. 9,811.

A vessel in tow must keep in proper trim to follow the tug, and steer accordingly. The Pontiac (D. C. 1869), Fed. Cas. No. 11,269.

A vessel in tow, being bound to keep out of the way of a vessel at anchor, must, at her peril, shape her course for a safe berth against the contingencies of navigation and the effect of the current. The Ogemaw (D. C. 1887), 32 Fed. 919.

When it is customary for a tug to give orders by signals from the steam whistle to another tug assisting in towing a vessel, the assisting tug should pay no heed to such orders from the vessel in tow, unless they are authorized; and if, in obedience to such signal order, the tug abandons the vessel, the abandonment is negligence. The Harry E. Packer (D. C. 1896), 76 Fed. 601; The Puritan, Id.

A barge in tow should have an anchor in a position where it could be used in case of emergency. The Langham (D. C. 1904), 131 Fed. 763.

If one of the tugs engaged in towing a vessel is permitted to abandon the tow without protest from the officers of the vessel in tow they, by remaining mute, share the act of desertion, and involve themselves in the negligence. The Harry E. Packer (D. C. 1896), 76 Fed. 601.

A tow is in fault if, in threatening weather, she enters a narrow fairway, filled with vessels, with her headsails insufficient to control, and, if this fault contributes to produce a collision, she is chargeable with negligence. The Nicholson (D. C. 1886), 28 Fed. 889.

Where three sailing vessels are in tow, and, owing to a sudden squall, the third is driven against the first, the latter is in fault, where the collision is shown to have been prevented by taking down her topsails and leaving her aftersails up, when she was turned broadside against the third tow's course. Law v. Rose (D. C. 1886), 26 Fed. 164.

Towing vessel held in fault for improper navigation. Slowing, so as to lose control of her tows, at the critical moment. The C. A. Hand v. Lyons (1903), 56 Fed. 316, 5 C. C. A. 516, affirming (D. C. 1901), 50 Fed. 137.

Not releasing the line in time to prevent the tow colliding with a schooner, with which the towing steamer had just collided. Held that the steamer was liable for the damage therefrom. Wineman v. The Iron Chief (1904), 65 Fed. 299, 11 C. C. A. 196; certiorari denied (1895), 15 Sup. Ct. 1040, 159 U. S. 270, 40 L. Ed. 143, and reversing (D. C. 1892), 53 Fed. 507.

Two tugs approaching a prospective tow at full speed, and attempting to turn so as to catch the towline. Latham v. Hamilton & Merryman Co. (1894), 63 Fed. 856, 11 C. C. A. 454, reversing Hamilton & Merryman Co. v. Smith (D. C. 1892), 50 Fed. 583.

Willfully attempting to crowd a rival tug seeking a tow off her course. The John Gregory (1896), 81 Fed. 971, 27 C. C. A. 33.

Not casting off her tow line, upon her tow's taking a sharp sheer across the course of another steamer, coming down the channel, and on the point of passing. The F. W. Wheeler v. Churchill (1897), 78 Fed. 824, 24 C. C. A. 353.

Where a barge in tow of a tug on a hawser was coming up a narrow channel, on one side of which a vessel was moored, and the barge took a sheer toward such vessel, the tug was in fault for continuing too long to pull at the tow line in order to pull the bow of the barge around, her action in fact merely serving to continue the speed of the barge, and thereby precipitating collision. The Fannie Tuthill (D. C. 1882), 12 Fed. 446.

Attempting a maneuver while towing steamer into harbor, which necessitated so sudden and strong a pull as to part an ordinarily sufficient tow line. The Alpha (D. C. 1886), 27 Fed. 759; The Philip Minch (D. C. 1912), 198 Fed. 718.

Through a narrow waterway full of vessels, and where a right angle turn was necessary. The Olson (D. C. 1888), 35 Fed. 333.

Attempting to take her tow through a perilous passage between vessels at a bend in the Chicago River. Miller v. The Argonaut and The John C. Ingram (D. C. 1889), 37 Fed. 910.

Casting off a steamer in tow of herself and another tug without notice whereupon the latter, by a wrong maneuver, collided with a barge. The Harry E. Packer (D. C. 1896), 76 Fed. 601.

Permitting a steamer in tow to run past her, in the course of a sheer, so that the pull on the tow line tends to throw her over so as to make it necessary to cast it off. The Syracuse (D. C. 1898), 84 Fed. 1,005.

(E) *Moored vessels.*

Customs and usages. A vessel which moves into St. Mary's canal at the rate of 4 or 5 miles an hour, and does not send out the line until it is passed 750 or 800 feet beyond the lighthouse, contrary to

the custom to avoid a tendency to sheer toward the north pier, is negligent. Pringle *v.* The Michigan (C. C. 1891), 52 Fed. 501.

Putting propeller in motion.—A steamship making her berth in Buffalo river where it was about 250 feet wide, which started one of her propellers at high speed, creating a suction which drew a canal boat from her course and caused a collision was negligent. The Northland (D. C. 1903), 125 Fed. 58.

(F) Anchored vessels.

Decisions prior to enactment of rules.—See Buzzard *v.* The Petrel (C. C. 1855), Fed. Cas. No. 2,261.

Duty of anchored vessel.—In the absence of evidence that it was customary, an anchored steamship can not be charged with fault for a collision because she did not keep up enough steam to be prepared to move instantly. The Charles Hubbard (C. C. A. 1916), 229 Fed. 352.

Weighing anchor.—A schooner at anchor hoisted her sails in order to assist in loosening the anchor. When the anchor broke from the bottom, the schooner started with the master alone on deck, the entire crew being engaged at the windlass, and collided with another vessel lying at anchor a third of a mile to leeward. Held, that the schooner was responsible for the collision for not dropping anchor again or calling a man to handle the sails which would have avoided the collision. Comerford *v.* The Melvina (D. C. 1890), 43 Fed. 77.

Presumptions and burden of proof.—A moving vessel, which comes into collision with one at anchor without fault of the latter, is presumptively in fault, and has the burden of proof to exonerate herself from liability. The Charles Hubbard (1916), 229 Fed. 352, 143 C. C. A. 472.

Where a vessel under way collides with one at anchor in a proper place, the presumption is that the former was at fault. The Philip Minch (D. C. 1912), 198 Fed. 718.

Vessel under way held in fault for collision with anchored vessel.—See The Charles Hubbard (1916), 229 Fed. 352, 143 C. C. A. 472; The Scotia (D. C. 1881), 10 Fed. 684; The Ogemaw (D. C. 1887), 32 Fed. 919.

III. Precautions Required by Special Circumstances.

(A) Circumstances requiring extra precautions.

Warning of danger.—The fact that other vessels going down the river had warned a steamer that there was such a dangerous raft in the river before she met it was not sufficient notice to require her to disregard the invitation of the towing steamer to pass, where such vessels had not described the raft in question. Benham *v.* The Niagara (D. C. 1891), 44 Fed. 775.

As a steamer with two barges in tow, each on a line about 500 feet long, was passing up the Detroit River in the daytime, about 800 feet from the Canadian side, and when she was about opposite a dock on that side, the steamer Minch, which had been coaling there, swung out and started slowly across the river, her head diagonally upstream. She continued to move slowly until she struck the rear barge about amidships. When she was some 200 feet ahead of the barge, and 50 to 75 feet on her starboard side, the helm of the barge was starboarded 1 or 1½ points; and immediately before the collision, and when it was inevitable the helm was put hard aport to lessen the blow. Held, that there were no special circumstances requiring the barge to put her helm hard astarboard. The Philip Minch (1904), 128 Fed. 578, 63 C. C. A. 14.

(B) Defective or disabled vessel.

Vessel aground.—A propeller passing between two other propellers, which were aground, and near a schooner moored to a pier, was caused to sheer and collide with the latter by the current created by the propeller of one of the grounded vessels, which was suddenly started. Although neither the grounded propellers, nor the tugs which were assisting them, were at work as the moving vessel approached, still the appearance of the water indicated that they had just stopped working, and there was every reason to believe that the efforts would be presently renewed. Held, that the sudden movement of the grounded vessel should have been anticipated, and the propeller was in fault in passing so near as to be affected by it. Plathner *v.* The F. & P. M. No. 1 (D. C. 1891), 45 Fed. 703.

A steamer aground in the river St. Mary, about 300 feet south of the light crib at Sailors' Encampment Island, was solely in fault for a collision with her of a descending steamer, where she failed to answer the usual signal given by the latter on turning the bend above, and gave no signal indicating that she was aground, and later, when the danger of collision was apparent, gave a signal of four blasts to summon a tug, which was understood on the other vessel as a signal to come on, or hurry up. The Maurice B. Grover (D. C. 1897), 79 Fed. 378.

Towing defective raft.—A steamer proceeding down the St. Clair River, having in

tow a raft of telegraph poles, some 800 feet long and 400 feet wide, properly constructed for navigation in such river, but with which two schooners collided, and so broke it up that it spread out to the width of nearly 600 feet, and in some places occupied the whole of the channel, was in fault because her master did not acquaint himself with the dangerous character of the raft and give the danger signal to a meeting vessel, or hold the raft for repairs at some place where other vessels might pass safely. Benham v. The Niagara (D. C. 1891), 44 Fed. 775.

Presumptions and burden of proof.—When a collision results from the breaking of a steamer's tiller rope, the burden is upon her to rebut the presumption of negligence either by showing the cause which broke the rope, and that the result of that cause was inevitable, or by showing all the possible causes which might have produced the break, and then showing that the result of each one of them could not have been avoided. The Olympia (1894), 61 Fed. 120, 9 C. C. A. 393, affirming decree (D. C. 1891), 52 Fed. 985.

Disability resulting from negligence.—A tug which was unable to turn the tow properly because she had damaged her paddle wheel by negligently striking a rock is at fault for a collision resulting therefrom. Rebstock v. Gilchrist Transp. Co. (D. C. 1904), 102 Fed. 174.

(C) Inevitable accident.

When accident is inevitable.—A collision in open sea, in broad daylight, between vessels on crossing tacks, can not be attributed to unavoidable accident. The F. W. Gifford (D. C. 1876), Fed. Cas. No. 5166.

A collision of vessels in a severe and sudden gale, which, by proper and skillful seamanship in conformity with the rules of Maritime Law might have been avoided, is not fairly attributable to inevitable accident. The David Dows (D. C. 1883), 16 Fed. 154.

A collision resulting from the sudden sheering of a vessel which is being towed in a river can not be attributed to inevitable accident, when there was nothing in the state of the elements contributing to produce it. The Chicago (D. C. 1895), 71 Fed. 537; decree affirmed (1900), 100 Fed. 999, 40 C. C. A. 680.

Presumptions and burden of proof.—Where the cause of a collision was the sudden departure of a vessel from her course when about to meet and pass another, claimed to be due to inevitable accident, the burden rests upon her to show, not only that the initial sheer was due to such cause, but that she could not have overcome the effect of it by the exercise of reasonable care, caution, and maritime skill in her own management. The Ohio (1898), 91 Fed. 547, 33 C. C. A. 667; The Lackawanna (D. C. 1913), 201 Fed. 773; decree reversed (C. C. A. 1913), 210 Fed. 262.

Evidence held not to sustain defense of inevitable accident.—See The Lackawanna (C. C. A. 1913), 210 Fed. 262, reversing decree (D. C. 1913), 201 Fed. 773.

Accident held inevitable.—A collision resulting from the breaking of a steamer's tiller rope, shown to be of the usual kind, and externally sound, and that it had been bought of a reputable outfitter, and used less than two seasons, while the minimum life of such a rope is about three years, and that it had been inspected a few hours before the accident. The Olympia (1894), 61 Fed. 120, 9 C. C. A. 393, affirming (D. C. 1891), 52 Fed. 985; The E. M. Peck (C. C. A. 1915), 228 Fed. 481.

(D) Maneuvers in extremis.

Maneuvers excusable as in extremis.—The sudden starting of the propeller of a steamer in tow, at the moment of an impending collision, with the purpose of checking a sheer which is carrying her upon the other vessel, is to be regarded as an error in extremis, and the steamer is not liable. The Chicago (D. C. 1895), 71 Fed. 537; decree affirmed (1900), 100 Fed. 999, 40 C. C. A. 680.

In the face of a sudden sheer by one boat only one minute before the resulting collision, the other boat may invoke the rule of in extremis. The Queen City (D. C. 1910), 189 Fed. 653.

A false maneuver of a vessel, to be excusable as being done in extremis, must be produced by the fault of the other vessel. The Elizabeth Jones (1884), 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812.

Where two meeting vessels by signals agreed on the course on which they should pass, and one suddenly sheered from her course, and within from 40 to 60 seconds struck and sunk the other, the latter can not be held in fault for not maneuvering in such unexpected emergency with the utmost promptness, skill, and accuracy of judgment. The Ohio (1898), 91 Fed. 547, 33 C. C. A. 667.

It is at most an error in extremis, for which she is not responsible, for a steamer, instead of stopping or reversing, upon meeting another vessel, while coming down with a current with a tow behind her to put on steam, in an effort to avoid collision with such vessel's tow by crossing her bows. The F. W. Wheeler v. Churchill (1897), 78 Fed. 824, 24 C. C. A. 353.

One of two passing vessels can not be held in fault for a collision merely because of an error on the part of her master, where he acted in an emergency, and upon a reasonable judgment, in view of the circumstances as they were presented to him at the time. The Maurice B. Grover (1899), 92 Fed. 678, 34 C. C. A. 616.

Change of course by privileged vessel.—See notes to 1468, ante.

Effect of erroneous maneuver in extremis.—An erroneous maneuver committed in extremis is not a fault for which the vessel is liable. The Atlantis (1903), 119 Fed. 568, 56 C. C. A. 134; The Colorado (D. C. 1871), Fed. Cas. No. 3028; The F. W. Gifford (D. C. 1876), Fed. Cas. No. 5166; The North Star (D. C. 1901), 108 Fed. 436; In re Rend (D. C. 1903), 126 Fed. 564.

1477. Penalty for violation of rules.—That a fine, not exceeding two hundred dollars, may be imposed for the violation of any of the provisions of this Act. The vessel shall be liable for the said penalty, and may be seized and proceeded against, by way of libel, in the district court of the United States for any district within which such vessel may be found. *Sec. 2, act of Feb. 8, 1895 (28 Stat. 649).*

1478. Regulations by the Secretary of the Treasury and by the Board of Supervising Inspectors.—That the Secretary of the Treasury of the United States shall have authority to establish all necessary regulations, not inconsistent with the provisions of this Act, required to carry the same into effect.

The Board of Supervising Inspectors of the United States shall have authority to establish such regulations to be observed by all steam vessels in passing each other, not inconsistent with the provisions of this Act, as they shall from time to time deem necessary; and all regulations adopted by the said Board of Supervising Inspectors under the authority of this Act, when approved by the Secretary of the Treasury, shall have the force of law. Two printed copies of any such regulations for passing, signed by them, shall be furnished to each steam vessel, and shall at all times be kept posted up in conspicuous places on board. *Sec. 3, act of Feb. 8, 1895 (28 Stat. 649).*

See notes to first paragraph of sec. 1 of this act, 1447, ante.

Notes of Decisions.

Applicability of rules.—Rule 2 of the supervising inspectors, requiring steamers approaching in an oblique direction to pass to the right of each other, is not inapplicable, on the ground of the existence of a "crowded channel," to the case of a steamer descending the Detroit River, 2 miles below Detroit, in rear of a tug and tows, which are rounding to, across the river, to make a landing on the American side, where such steamer has the full width of the river to her right, in which to avoid an ascending steamer, by merely running down into the bight of the tow, and submitting to a very little delay. The New York (1897), 82 Fed. 819, 27 C. C. A. 154.

Rules applicable to other waters.—For decisions under the rules governing vessels navigating harbors, rivers and inland waters, see 1410, ante, governing vessels on the Red River of the North and rivers emptying into the Gulf of Mexico, see 1479, post.

Effect of signal.—The assenting of a propeller approaching a bend from below assenting to the two whistle signal of a descending steamer could not be regarded as an invitation to proceed, since it was required by the rules, and was merely an indication that the steamer's desire to pass on the south side of the river was known and acquiesced in. Starke *v.* The F. & P. M. No. 2 (D. C. 1891), 44 Fed. 701.

Vessel held in fault for failure to sound signals required by the rules.—See Robinson *v.* Detroit & C. Steam Nav. Co. (1896), 73 Fed. 883, 20 C. C. A. 86; appeal dismissed after rehearing was granted, The City of Mackinac (1896), 82 Fed. 999, 27 C. C. A. 677; The Michael Dewitt (D. C. 1886), 28 Fed. 886; Starke *v.* The F. & P. M. No. 2 (D. C. 1891), 44 Fed. 701; The Sitka (D. C. 1904), 132 Fed. 861.

1479. Observance of rules for preventing collisions on the Red River of the North and rivers emptying into the Gulf of Mexico.—The following rules for preventing collisions on the water, shall be followed in the navigation of vessels of the Navy and of the mercantile marine of the United States: * * * *R. S. 4233.*

See "Historical Note" at the beginning of this chapter.

This section remains in force only as to the navigation of the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries.

Notes of Decisions.

Construction of similar rules.—For decisions construing the rules governing navigation on the high seas, see notes to 1374, ante; in harbors, rivers, and inland waters, see notes to 1410, ante; and on the Great Lakes and their tributaries, see notes to 1417, ante.

Applicability of rules.—"Mercantile marine" is used to mean the merchant service or business of commerce at sea, and does not apply to steam vessels on inland rivers. Beck v. Johnson (C. C. 1909), 169 Fed. 154.

These rules are primarily for the government of sea-going vessels, and they are little applicable to steamers navigating rivers whose waters flow into the Gulf of Mexico. The Mary Ida (D. C. 1884), 20 Fed. 741, 742.

Vessels affected by rules.—These rules were intended to embrace all classes of vessels, including rafts. U. S. v. One Raft of Timber (D. C. 1882), 13 Fed. 796.

1480. Sail vessel and steam vessel defined.—Every steam vessel which is under sail and not under steam shall be considered a sail vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel. The words steam vessel shall include any vessel propelled by machinery. *Rule 1, R. S. 4233, as amended by sec. 10, act of March 3, 1905 (33 Stat. 1032).*

1481. Compliance with rules concerning lights.—The lights mentioned in the following rules, and no others, shall be carried in all weathers, between sunset and sunrise. *Rule 2, R. S. 4233.*

1482. Lights of ocean steamers, and steamers carrying sail, under way.—All ocean going steamers, and steamers carrying sail, shall, when under way, carry—

(a) At the foremast head, a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side.

(b) On the starboard side, a green light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

(c) On the port side, a red light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the port side.

The green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the lights, so as to prevent them from being seen across the bow. *Rule 3, R. S. 4233.*

1483. Lights for a steam vessel towing another vessel.—Steam-vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side-lights, so as to distinguish them from other steam-vessels. Each of these mast-head lights shall be of the same character and construction as the mast-head lights prescribed by Rule three. *Rule 4, R. S. 4233.*

Notes of Decisions.

Applicability of rule.—This rule does not apply to steam vessels engaged in towing on inland rivers. Beck *v.* Johnson (C. C. 1909), 169 Fed. 154.

This rule applies to a steam tug towing a raft of logs. U. S. *v.* The Annie S. Cooper (D. C. 1891), 48 Fed. 703.

Evidence held to show that towing vessel carried proper lights.—The Echo (D. C. 1904), 131 Fed. 622.

1484. Lights for steam vessels in general.—All steam-vessels, other than ocean-going steamers and steamers carrying sail, shall, when under way, carry on the starboard and port sides lights of the same character and construction and in the same position as are prescribed for side-lights by Rule three, except in the case provided in Rule six. *Rule 5, R. S. 4233.*

1485. Lights for river-steamers on waters flowing into the Gulf of Mexico.—River-steamers navigating waters flowing into the Gulf of Mexico, and their tributaries, shall carry the following lights, namely: One red light on the outboard side of the port smoke-pipe, and one green light on the outboard side of the starboard smoke-pipe. Such lights shall show both forward and abeam on their respective sides. *Rule 6, R. S. 4233.*

Notes of Decisions.

Decisions prior to enactment of rules.—See Waring *v.* Clarke (1847), 5 How. 441, 465, 12 L. Ed. 226.

Repeal.—This rule was repealed by the enactment of the international rules of 1890, ante, 1374–1409. (1894), 21 Op. Atty. Gen. 106.

Position of lights.—Signal lights hung on either side of the boat, on nails driven into the nosing of the hurricane roof, are not proper lights. Hazlett *v.* Conrad (C. C. 1870), Fed. Cas. No. 6,288.

1486. White lights on steam vessels.—All coasting steam-vessels, and steam-vessels other than ferry-boats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers, or other inland waters of the United States, except those mentioned in Rule six, shall carry the red and green lights, as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights; the after-light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The head-light shall be so constructed as to show a good light through twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the vessel; and the after-light so as to show all around the horizon. The lights for ferry-boats shall be regulated by such rules as the board of supervising inspectors of steam-vessels shall prescribe. *Rule 7, R. S. 4233.*

That rule seven, section forty-two hundred and thirty-three, Revised Statutes, be, and the same is hereby, amended by adding in the last paragraph of that rule, after the word "ferryboats," and preceding the word "shall," a comma and the words "barges and canal boats when in tow of steam vessels," so as to read:

"The lights for ferryboats, barges, and canal boats when in tow of steam vessels, shall be regulated by such rules as the Board of Supervising Inspectors

of Steam Vessels shall prescribe." *Act of March 3, 1893 (27 Stat. 557), amending Rule 7, R. S. 4233.*

Notes of Decisions.

Repeal.—This rule was repealed by the enactment of the International Rules of 1890, ante, 1374-1409. (1894), 21 Op. Atty. Gen. 106.

1487. Light for sailing vessels under way or being towed.—Sail-vessels, under way or being towed, shall carry the same lights as steam-vessels under way, with the exception of the white mast-head lights, which they shall never carry. *Rule 8, R. S. 4233.*

1488. Lights for small vessels in bad weather.—Whenever, as in case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens. *Rule 9, R. S. 4233.*

1489. Lights for vessels at anchor.—All vessels, whether steam-vessels or sail-vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile. *Rule 10, R. S. 4233.*

1490. Lights for pilot vessels.—Sailing pilot-vessels shall not carry the lights required for other sailing-vessels, but shall carry a white light at the mast-head, visible all around the horizon, and shall also exhibit a flare-up light every fifteen minutes. *Rule 11, R. S. 4233.*

That rule eleven * * * be amended by adding thereto a paragraph as follows:

"Steam pilot boats shall, in addition to the masthead light and green and red side lights required for ocean steam vessels, carry a red light hung vertically from three to five feet above the foremast headlight, for the purpose of distinguishing such steam pilot boats from other steam vessels." *Sec. 5, act of March 3, 1897 (29 Stat. 689), amending Rule 11, R. S. 4233.*

1491. Lights for small boats.—Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam-vessels. *Rule 12, R. S. 4233.*

Notes of Decisions.

Decisions prior to enactment of rules.—See Elliott v. The James Nelson (D. C. 1853), Fed. Cas. No. 4,393; The Blue Wing v. Buckner (1851), 51 Ky. (12 B.

Mon.), 246; Sparks *v.* The Saladin (1851), 6 La. Ann. 764; Lawrence *v.* Jones (1843), 1 Ohio Dec. 5.

Construction of similar rules.—For decisions construing the similar rule governing navigation on the Great Lakes and their tributaries, see notes to 1458, ante.

What is "water craft."—That a raft is a water craft distinctly appears in this rule. Seabook *v.* Raft of Railroad Cross-Ties (D. C. 1889), 40 Fed. 596, 597.

Necessity for exhibiting light.—The failure of the board of inspectors to prescribe the manner in which lights should be carried on a scow boat relieves a scow from obedience to the act. Harris *v.* Uebelhoer (1878), 75 N. Y. 169.

Localities in which lights are required.—A coal barge made fast about 10 or 15 feet from the bank of the Palo Alto plantation landing on Bayou Lafourche, La., where the bayou is about 200 feet wide, with sloping banks, deep water on the side where the barge lay, and shoal water on the other side, was bound to carry the prescribed light. The St. John (1893), 54 Fed. 1015, 5 C. C. A. 16.

A derrick boat moored to the pier of a bridge can not escape liability for failing to carry lights on the ground that such pier is located out of the mid-channel and of the usual course of vessels. The Alabama (D. C. 1886), 26 Fed. 866.

Effect of failure to carry light.—Where the barge showed a light when it would avail the approaching steamer to avoid a collision, the fact that this was n gleeted during the remainder of the night, when the steamer was not in sight, w- of no importance. Bigley *v.* Williams (1875), 80 Pa. St. (30 P. F. Smith) 107.

The failure of a barge moored to a bridge pier out of the usual channel to carry a light does not authorize recovery for the loss of a boat colliding with it, whose pilot, having mistaken his course, attempted the passage of the bridge at night at full speed without a lookout. Baltimore & O. R. Co. *v.* Wheeling, P. & C. Transp. Co. (1877), 32 Ohio St. 116.

Boat or barge held in fault for failure to exhibit lights.—See Williams *v.* The Whisper (C. C. 1889), 37 Fed. 495; The Alabama (D. C. 1886), 26 Fed. 866.

1492. Lights for open boats.—Open boats shall not be required to carry the side-lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on one side and a red slide on the other side; and, on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white light. They shall not, however, be prevented from using a flare-up, in addition, if considered expedient. *Rule 13, R. S. 4233.*

1493. Lights on ships of war and revenue cutters.—The exhibition of any light on board of a vessel of war of the United States may be suspended whenever, in the opinion of the Secretary of the Navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it. The exhibition of any light on board of a revenue cutter of the United States may be suspended whenever, in the opinion of the commander of the vessel, the special character of the service may require it. *Rule 14, R. S. 4233, as amended by sec. 12, act of March 3, 1897 (29 Stat. 690).*

Notes of Decisions.

Effect of amendment.—The amendment of this section by the act of 1897 was a special rule duly made by local authority within the meaning of 1408, ante. (1897) 21 Op. Atty. Gen. 513.

1494. Fog signals.—(a) Whenever there is a fog, or thick weather, whether by day or night, fog signals shall be used as follows: Steam vessels under way shall sound a steam whistle placed before the funnel, not less than eight feet from the deck, at intervals of not more than one minute. Steam vessels, when towing, shall sound three blasts of quick succession repeated at intervals of not more than one minute.

(b) Sail vessels under way shall sound a fog horn at intervals of not more than one minute.

(c) Steam vessels and sail vessels, when not under way, shall sound a bell at intervals of not more than two minutes. *Rule 15, R. S. 4233, as amended by sec. 12, act of March 3, 1897 (29 Stat. 690).*

(d) Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not in any port, shall sound a fog-horn, or equivalent signal, which shall make a sound equal to a steam-whistle, at intervals of not more than two minutes. *Rule 15, R. S. 4233.*

Notes of Decisions.

Decisions prior to enactment of rules.—See Lawrence v. Jones (1843), 1 Ohio Dec. 5.

Effect of amendment.—The amendment of this section by the act of 1897 was a special rule duly made by local authority within the meaning of 1408, ante. (1897) 21 Op. Atty. Gen. 513.

Sufficiency of signal.—The noise made by the use of patent rowlocks on a skiff is not equivalent to the foghorn required by the navigation rules. Quinette v. Bisso (1905), 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303; writ of certiorari denied, Bisso v. Quinette (1905), 26 Sup. Ct. 746, 199 U. S. 606, 50 L. Ed. 330.

Frequency of signals.—Steamboats on the Mississippi are in fault for running in a fog without sounding the whistle at intervals not exceeding two minutes. The Milwaukee (D. C. 1871), Fed. Cas. No. 9,625.

Effect of failure to sound fog signals.—Where the captain and pilot of a steam tow boat, acting on their best judgment, decided that the fog was not dense enough to require the sounding of signals, their failure to do so is not negligence. The Morning Star (D. C. 1866), Fed. Cas. No. 9,817.

Vessel held in fault for failing to sound proper signals.—See The Ella Andrews (1900), 105 Fed. 651, 44 C. C. A. 647; The Porter (C. C. 1873), Fed. Cas. No. 11,285.

1495. Ascertainment of risk of collision.—Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change such risk should be deemed to exist. *Rule 16, R. S. 4233, as amended by sec. 12, act of March 3, 1897 (29 Stat. 690).*

Notes of Decisions.

Effect of amendment.—The amendment of this section by the act of 1897 was a special rule duly made by local authority within the meaning of 1408, ante. (1897) 21 Op. Atty. Gen. 513.

1496. Sailing vessels approaching one another.—When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both vessels are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel. *Rule 17, R. S. 4233, as amended by sec. 12, act of March 3, 1897 (29 Stat. 690).*

One of two passing vessels can not be held in fault for a collision merely because of an error on the part of her master, where he acted in an emergency, and upon a reasonable judgment, in view of the circumstances as they were presented to him at the time. The Maurice B. Grover (1899), 92 Fed. 678, 34 C. C. A. 616.

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The Board of Supervising Inspectors of the United States shall have authority to establish such regulations to be observed by all steam vessels in passing each other, not inconsistent with the provisions of this Act, as they shall from time to time deem necessary; and all regulations adopted by the said Board of Supervising Inspectors under the authority of this Act, when approved by the Secretary of the Treasury, shall have the force of law. Two printed copies of any such regulations for passing, signed by them, shall be furnished to each steam vessel, and shall at all times be kept posted up in conspicuous places on board. *Sec. 3, act of Feb. 8, 1895 (28 Stat. 649).*

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Rules applicable to other waters.—For decisions under the rules governing vessels navigating harbors, rivers and inland waters, see 1410, ante, governing vessels on the Red River of the North and rivers emptying into the Gulf of Mexico, see 1479, post.

Effect of signal.—The assenting of a propeller approaching a bend from below assenting to the two whistle signal of a descending steamer could not be regarded as an invitation to proceed, since it was required by the rules, and was merely an indication that the steamer's desire to pass on the south side of the river was known and acquiesced in. Starke *v.* The F. & P. M. No. 2 (D. C. 1891), 44 Fed. 701.

Vessel held in fault for failure to sound signals required by the rules.—See Robinson *v.* Detroit & C. Steam Nav. Co. (1896), 73 Fed. 883, 20 C. C. A. 86; appeal dismissed after rehearing was granted, The City of Mackinac (1896), 82 Fed. 999, 27 C. C. A. 677; The Michael Devitt (D. C. 1886), 28 Fed. 886; Starke *v.* The F. & P. M. No. 2 (D. C. 1891), 44 Fed. 701; The Sitka (D. C. 1904), 132 Fed. 861.

Necessity of tying up during fog.—Navigating on the rivers in a fog is not negligence per se. The Joseph W. Gould (D. C. 1884), 19 Fed. 785; The Ella Andrews (1900), 105 Fed. 651, 44 C. C. A. 647.

Weight of evidence.—Where the evidence showed that the plaintiff's steamer was running at a low rate of speed, and was actually backing at the time she was struck by defendant's steamer, it was error to enter a nonsuit on the ground that plaintiff's steamer was guilty of contributory negligence in running at too high a rate of speed in a fog. Rees v. Joseph Walton & Co. (1903), 54 A. 271, 204 Pa. 412.

Speed held excessive in fog.—See Quinette v. Bisso (1905), 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303; writ of certiorari denied, Bisso v. Quinette (1905), 26 Sup. Ct. 746, 199 U. S. 606, 50 L. Ed. 330; Louisville & Cincinnati Packet Co. v. United Coal Co. (1915), 223 Fed. 300, 138 C. C. A. 542; The Milwaukee (D. C. 1871), Fed. Cas. No. 9,625.

1501. Overtaking vessel.—Every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel. *Rule 22, R. S. §4233.*

Notes of Decisions.

Extent of overtaking vessel's duty.—An overtaking boat takes upon herself the peril of determining what is a safe distance for passing, and must bear the consequences of a misjudgment in that respect. In determining the question of distance, however, she has a right to assume that the other boat is well equipped, and is being managed and run with ordinary care and skill. The Charles Morgan (D. C. 1881), 6 Fed. 913.

When a pursuing boat attempts to pass another upon an occasion not reasonable in regard to the safety of both, and a collision arises from what could not be avoided by ordinary care and skill of the other, the wrong is upon the pursuing boat alone, even though she was doing all that was proper at and immediately preceding the collision. This is so even if notice is given by the established signal and not answered as required. The Panther v. The Ajax (Pa. 1871), 3 Pittsb. R. 328.

1502. Which vessel shall keep her course and speed.—Where, by Rules seventeen, nineteen, twenty, and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of Rule twenty-four. *Rule 23, R. S. §4233.*

Notes of Decisions.

Extent of privileged vessel's duty.—After an overtaken boat has replied to the passing boat's signal in the affirmative, she is bound to continue in her then course, if it can be done without immediate danger to herself or other boats in the river. The Charles Morgan (D. C. 1881), 6 Fed. 913.

Excuses for change of course by privileged vessel.—The backing of an overtaken steamer in tow of a raft in order to make a customary and necessary change in approaching a draw-bridge is not a fault. The W. H. Clark (D. C. 1873), Fed. Cas. No. 17,482.

Privileged vessel held in fault for change of course.—St. Paul Fire & Marine Ins. Co. v. The Lake Superior (D. C. 1875), Fed. Cas. No. 12,244.

1503. Sailing vessel overtaken.—A sail vessel which is being overtaken by another vessel during the night shall show from her stern to such last-mentioned vessel a torch or a flare-up light. *Rule 25, added to R. S. §4233 by sec. 13, act of March 3, 1897 (29 Stat. 690).*

Notes of Decisions.

Effect of amendment.—The amendment of this section by the act of 1897 was a special rule duly made by local authority within the meaning of 1408, ante. (1897) 21 Op. Atty. Gen. 513.

1504. Obedience to and construction of rules.—In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any

special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger. *Rule 24, R. S. 4233.*

1505. Negligence.—Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. *Rule 26, added to R. S. 4233, by sec. 13, act of March 3, 1897 (29 Stat. 690).*

Notes of Decisions.

I. Construction and effect in general.
II. Lookout.
III. Precautions required by ordinary practice of seamen.
IV. Precautions required by special circumstances.

I. Construction and Effect in General.

Effect of enactment of this section.—The addition of this section to the rules by the act of 1897 was a special rule duly made by local authority within the meaning of 1408, ante. (1897) 21 Op. Atty. Gen. 513.

II. Lookout.

Necessity for lookout.—Knowledge of use of river by small boats imposed on those operating defendant's steamboat the duty of anticipating presence of small boats and maintaining a lookout for them. Monongahela River Consol. Coal & Coke Co. *v.* Lancaster's Adm'r (Ky. 1916), 183 S. W. 258.

Competency of lookout—Lookout having other duties to perform.—The master is not a proper lookout. Hazlett *v.* Conrad (C. C. 1870), Fed. Cas. No. 6,288; The Echo (D. C. 1904), 131 Fed. 622.

The man at the wheel is not a sufficient lookout. The Morning Star (D. C. 1866), Fed. Cas. No. 9,817.

Position of lookout.—The lookout should be stationed on the hurricane deck in front of the chimneys, not in the pilot house. Hazlett *v.* Conrad (C. C. 1870), Fed. Cas. No. 6,288; The Magenta (C. C. 1870), Fed. Cas. No. 8,946.

Effect of failure to keep proper lookout.—The absence of a lookout, where it did not contribute to the collision, is not a fault. Clark *v.* The Admiral Farragut (1870), 10 Wall. 334, 338, 19 L. Ed. 946; Shirley *v.* The Richmond (C. C. 1874), Fed. Cas. No. 12,795; The Milwaukee (D. C. 1871), Fed. Cas. No. 9,626.

III. Precautions Required by Ordinary Practice of Seamen.

Officers and crew—Presence of master on deck.—A master, who was the only lookout, and who went below after hearing the whistle of an approaching steamer, was grossly negligent. Hazlett *v.* Conrad (C. C. 1870), Fed. Cas. No. 6,288.

It is not fault that the master of a steamboat was not on the hurricane deck, his post of duty, at the time of a collision, when it appears that he was at dinner and the mate was on watch. The Mabel Comeaux (C. C. 1885), 24 Fed. 490.

Speed of vessels—Speed permissible.—Knowledge of the use of the river by small boats imposes on a steamboat the duty of anticipating their presence and of running at such a reasonable speed with proper signals as would give such small boats opportunity to avoid collision. Monongahela River Consol. Coal & Coke Co. *v.* Lancaster's Adm'r (1916), 183 S. W. 258, 169 Ky. 24.

Position in channel.—The rule on the Mississippi that ascending boats shall run the points, and descending boats the bends, will be enforced. Shirley *v.* The Richmond (C. C. 1874), Fed. Cas. No. 12,795.

Steamers and other water craft navigating the Mississippi River have the right to follow the usual channels. Fawcett *v.* The Natchez (C. C. 1876), Fed. Cas. No. 4,703.

Where a steamboat, in ascending a stream, has to pass a descending boat, it should keep within the larboard half of the navigable channel, and the descending boat should keep within the other half. The J. S. Neil (C. C. 1881), 8 Fed. 713.

Passing bridges.—A steamer which neglected to blow its whistle in time to have opened a bridge which it was approaching at great speed in the night, and about which barges were customarily moored, and in backing, while the bridge was being opened, collided with a barge moored in the channel, 75 to 100 feet below, was in fault. Williams *v.* The Whisper (C. C. 1889), 37 Fed. 495.

A pilot having mistaken his course, and not knowing where his boat is, who attempts the dangerous passage of a bridge at night, at the highest rate of speed, and

without any lookout, is guilty of negligence; and if, under such circumstances he collides with a barge moored to a bridge pier, which is out of the usual channel of navigation, and by the collision his own boat is lost, the owners of the boat can not recover, although the barge was without a light. Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co. (1877), 32 Ohio St. 116.

Duty of moored vessel.—It did not constitute negligence that the cables of a river steamboat moored to a wharf boat, which broke loose and collided with coal barges, were not bent to her anchors. Kineon v. The New Mary Houston (D. C. 1895), 69 Fed. 262.

Agreement as to landing.—A tow which tied up to a landing, lower down than she should have done by an agreement with a following tow, was not in fault for a collision where the latter saw her movements, and had ample room to avoid her, but, instead, followed her course so closely that, after the latter was tied up, the tows collided. The Beaver (1894), 64 Fed. 137, 12 C. C. A. 73.

Injuries to moored vessels caused by swells.—The owners of rafts, barges, or other craft moored to the banks must foresee and provide against accidents liable to be caused by the swell of passing steamers. Fawcett v. The Natchez (C. C. 1876), Fed. Cas. No. 4,703.

Excuses for injury to moored vessel by moving vessel.—Where there are two commonly practiced and approved modes of navigating towboats with coal tows past a certain point, parties who have there placed their barges so as to encroach upon the towboat channel, and be in the way of descending coal tows, have no right to complain that a descending towboat did not pursue that one of the two modes which was the safer for the barges in their exposed situation when those navigating the towboat did not know or have reason to suspect the barges were there until it was too late to change the mode of running the point. Fawcett v. The L. W. Morgan (D. C. 1881), 6 Fed. 200.

A steamboat whose pilot mistook his position, and which ran into a derrick boat moored to a pier or a bridge located out of the mid-channel and of the usual course of vessels without a light, was not in fault. The Alabama (D. C. 1886), 26 Fed. 866.

Right of way.—Where a barge, constituting part of a tow, is adrift in a narrow channel, a passing steamboat owes the duty of doing all that is possible to prevent collision with it; but if she reverses her engines as speedily as possible, and otherwise does all she can, there can be no blame because she is in a narrow channel, where the tug and tow would have had the right of way if it had not been partially aground. The Cherokee (D. C. 1883), 15 Fed. 119.

A tugboat, incumbered with a coal tow, descending the Ohio River, and passing through a narrow channel, has the right of way, and it is the duty of an ascending boat to remain below the channel until the descending tow has emerged therefrom. The Rescue (D. C. 1885), 24 Fed. 44.

Duty of towing boat.—The owner of a tug which parted from its tow of coal boats on the Ohio River at night in a fog is not chargeable with negligence which rendered it liable for injuries done by the boats merely because the tug was sent out with the tow at night, at a time when there was no fog. Bray v. Monongahela River Consol. Coal & Coke Co. (1908), 161 Fed. 277, 88 C. C. A. 323.

A towboat working at one of its barges aground in a channel should, if possible, make way, by temporarily suspending work, to permit another vessel to pass, where that is necessary to prevent delay. The Cherokee (D. C. 1883), 15 Fed. 119.

Towing boat held in fault for negligent navigation.—Attempting to run bridge piers in tempestuous weather with loaded barges in tow. The Mollie Mohler (D. C. 1871), Fed. Cas. No. 9701.

Right of way. The right of a steamer to maintain her course or speed, even against small craft like a skiff or yawl, is relative, and not absolute. She has no right to maintain a speed which is dangerous to a smaller craft which can be seen ahead, and, where she is navigating in a fog so dense that such a craft can not be seen at any considerable distance, and in a locality where numbers of them are liable to be encountered, she is required to exercise extraordinary care and watchfulness, and is not justified in relying solely on fog signals as a warning to other vessels. Quinette v. Bisso (1905), 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303; writ of certiorari denied, Bisso v. Quinette (1905), 26 Sup. Ct. 746, 199 U. S. 606, 50 L. Ed. 330.

Presumptions and burden of proof. A steamer on the Mississippi River which fails to keep out of the way of a flatboat is prima facie liable for the collision. Wiggins Ferry Co. v. Redding (1887), 24 Ill. App. 260.

IV. Precautions Required by Special Circumstances.

Special circumstances requiring extra precautions. It was not negligence or bad seamanship for the captain of a river steamboat, which went adrift on a dark

night at a place where there was great danger of striking bridge piers, to extinguish lights and fires before going on deck, so as to prevent the breaking out of fires in case of collision. Kineon *v.* The New Mary Houston (D. C. 1895), 69 Fed. 362.

A tug colliding with and sinking steamer in distress in attempting to succor passengers and crew is not liable where she acted with reasonable judgment and skill. Gilman *v.* The Tyler (C. C. 1877), Fed. Cas. No. 5,446.

Collision held to be due to inevitable accident.—Between a wharf boat and a loaded barge escaping from a tow and colliding with the wharfboat by reason of a heavy fog. Kenova Transp. Co. *v.* Monongahela River Consol. Coal & Coke Co. (1904), 48 S. E. 844, 56 W. Va. 70.

Collision held not due to inevitable accident.—Collision caused by "boils" and cross-currents in the river, which were known to be likely to occur at the point in question. Christie & Lowe *v.* Fane S. S. Co. (1908), 159 Fed. 648, 86 C. C. A. 516; writ of certiorari denied, Christie *v.* Same (1908), 28 Sup. Ct. 759, 209, U. S. 549, 52 L. Ed. 921.

Maneuvers in extremis—Effect of error in extremis.—An error committed under an impending danger or in extremis, to avoid a collision brought about by the fault of another vessel, will not be considered a fault. The Magnolia (C. C. 1854), Fed. Cas. No. 8,958.

1506. Regulations for towage of seagoing barges within inland waters.—That the chairman of the Light-House Board, the Supervising Inspector-General of the Steamboat-Inspection Service, and the Commissioner of Navigation shall convene as a board at such times as the Secretary of Commerce and Labor shall prescribe to prepare regulations limiting the length of hawsers between towing vessels and sea-going barges in tow and the length of such tows within any of the inland waters of the United States designated and defined from time to time pursuant to section two of the Act approved February nineteenth, eighteen hundred and ninety-five, and such regulations when approved by the Secretary of Commerce and Labor shall have the force of law. *Sec. 14, act of May 28, 1908 (35 Stat. 428).*

That the master of the towing vessel shall be liable to the suspension or revocation of his license for any willful violation of regulations issued pursuant to section fourteen in the manner now prescribed for incompetency, misconduct, or unskillfulness. *Sec. 15, act of May 28, 1908 (35 Stat. 429).*

For sec. 2, act of Feb. 19, 1895, above, see post, 1509.

Notes of Decisions.

Vessels bound by regulations.—The regulations established under this section while binding on tugs, are not binding on the vessels in a tow acting in obedience to the orders of the master of the tug, and they can not be held in fault for a collision between one of their number and another vessel, on the ground alone that, following such orders, they had lengthened their hawsers beyond the prescribed limit, at a place not within the rule, and could not shorten them after reaching waters within the rule. The Manhattan (1911), 186 Fed. 329, 108 C. C. A. 407, reversing decree (D. C. 1910), 181 Fed. 229.

Effect of violation of rule.—The use of too long a line does not render a tug liable for a collision, where the length of the line in no way contributed thereto. The Hamilton (D. C. 1914), 212 Fed. 1016.

1507. Lights on sailing vessels required by officers of the customs.—Collectors or other chief officers of the customs shall require all sail vessels to be furnished with proper signal lights. Every such vessel that shall be navigated without complying with the Statutes of the United States, or the regulations that may be lawfully made thereunder, shall be liable to a penalty of two hundred dollars, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense. *Sec. 3, act of Feb. 19, 1895 (28 Stat. 672).*

1508. Rules for preventing collisions extended to harbors, etc.—That on and after March first, eighteen hundred and ninety-five, the provisions of sections

forty-two hundred and thirty-three, forty-four hundred and twelve, and forty-four hundred and thirteen of the Revised Statutes and regulations pursuant thereto shall be followed on the harbors, rivers and inland waters of the United States.

The provisions of said sections of the Revised Statutes and regulations pursuant thereto are hereby declared special rules duly made by local authority relative to the navigation of harbors, rivers, and inland waters as provided for in Article thirty, of the Act of August nineteenth, eighteen hundred and ninety, entitled "An Act to adopt regulations for preventing collisions at sea." *Sec. 1, act of Feb. 19, 1895 (28 Stat. 672).*

Notes of Decisions.

Rules applicable to certain waters.—For decisions under the rules governing vessels navigating harbors, rivers, and inland waters, see 1410, ante; governing vessels navigating the Great Lakes and their tributaries, see 1447, ante.

Applicability of rules.—A rule of supervising inspectors adopted before but not promulgated at the time of a collision, is not applicable thereto. The Narragansett (D. C. 1871), Fed. Cas. No. 10,016.

Construction of particular rules.—The rule requiring the up-stream boat to give the first signal to indicate its choice of sides does not apply when there are 18 feet of water above the bars. Keys v. The Ambassador (D. C. 1869), Fed. Cas. No. 7,747.

Inspectors' rule 1 relating to passing signals by meeting vessels can not be construed as authorizing a vessel to dictate to another to pass contrary to the statutory requirement, but it does authorize a vessel to propose passing starboard to starboard which becomes binding when agreed to by the other. The Milwaukee (D. C. 1871), Fed. Cas. No. 9,626.

As the rules of the United States supervisors do not specify the short bends in the river at which certain precautionary signals are to be made by steamers, it is a matter within the discrimination of the navigators of the river to determine the places where, by the rules governing pilots, signals are to be given. Kennet v. Union Ins. Co. (1875), 27 La. Ann. 26.

Passing signals.—Under rule 1 of the pilot rules, relating to the passing of steamers on rivers, which requires the pilot of the ascending steamer to first indicate the side on which he desires to pass, his signal is controlling, unless the descending steamer shall deem such passing dangerous, and shall indicate such fact by danger signals and by a contrary signal, as required by the rule. Hudson v. Monongahela River Consol. Coal & Coke Co. (1905), 136 Fed. 173, 69 C. C. A. 85.

Where the ascending steamer on the Ohio River, after signaling her course, changes her signal, and the descending steamer answers that she will keep her course, the ascending steamer is bound to follow the course first signaled. The Quickstep (C. C. 1870), Fed. Cas. No. 11,509.

If an ascending steamer fails to return the signal of a steamer descending, and chooses rather to make a cross signal, the acceptance of this by the descending steamer does not excuse the pilot of the other for his first fault. U. S. v. Keller (C. C. 1884), 19 Fed. 633.

Where an overtaken vessel signals her consent that the other shall pass on her starboard side, knowing that there was shallow water and rocky bottom there, she must be careful not to crowd the other vessel while passing, even to make a landing. St. Paul Fire & Marine Ins. Co. v. The Lake Superior (D. C. 1875), Fed. Cas. No. 12,244.

Where two steamers are running in the same direction, and the one astern, under the eighth rule for the government of pilots on western rivers, signals her desire to pass the one ahead, the latter is bound to answer the signal, and the failure to respond is a fault in her; but such failure, so far from exonerating the pursuing steamer from taking the care demanded by the circumstances to avoid a collision, calls for special caution on her part. The D. Newcomb (D. C. 1883), 16 Fed. 274.

Entering channels. The Mississippi below the mouth of the Ohio is not, at any point or at any stage of water, a "narrow channel," within the meaning of supervising inspector's rule 3; the term only refers to the "chutes" running behind the island. Sinnott v. The Dresden (D. C. 1854), Fed. Cas. No. 12,908.

The pilot of a descending towboat is not culpable in not warning the ascending boat against entering the channel, where both boats are plainly in sight of each other. Each of two approaching vessels may assume that the other will reasonably perform its duty under the laws of navigation. The Rescue (D. C. 1885), 24 Fed 44.

Presumptions and burden of proof.—Where the findings show that the signals of approaching boats were understood, and there is no complaint in the pleadings touching the point, it will be presumed that they were made at the proper distance.

The Charles Morgan v. Kouns (1885), 115 U. S. 69, 5 Sup. Ct. 1172, 29 L. Ed. 316.

When a barge is run into which has not complied with the requirements of the rules as to lights, the burden of proof is upon the owners of the barge, in a libel for damages, to show that the damage did not result from the failure to comply with the law, and they can not recover unless they so show. The La Fayette Lamb (D. C. 1884), 20 Fed. 319.

In an action growing out of a collision of vessels consequent upon a failure of one to respond agreeably with the signal of the other, as directed in the navigation laws, the burden of proof is on the vessel that fails so to respond, to explain the failure satisfactorily to the court. The Mary Ida (D. C. 1884), 20 Fed. 741.

Weight of evidence.—When an ascending boat, having given two whistles, was hit on the port bow, and the other boat was injured on the starboard bow, there is convincing evidence that the ascending boat was at fault. The Des Moines (1872), 154 U. S. 584, 14 Sup. Ct. 1168, 20 L. Ed. 821.

1509. High seas defined.—The Secretary of the Treasury is hereby authorized, empowered and directed from time to time to designate and define by suitable bearings or ranges with light houses, light vessels, buoys or coast objects, the lines dividing the high seas from rivers, harbors and inland waters. *Sec. 2, act of Feb. 19, 1895 (28 Stat. 672).*

Notes of Decisions.

Designation of lines.—On the question whether a collision occurred within the jurisdiction of the United States, held, that a line drawn by the secretary by virtue of this section was not intended to pass beyond a marine league from shore. Carlson v. United New York Sandy Hook Pilots Ass'n (D. C. 1899), 93 Fed. 468.

Transfer to Secretary of Commerce.—The authority conferred upon the Secretary of the Treasury by this section was transferred to the Secretary of Commerce and Labor by sec. 10, act of Feb. 14, 1903 (32 Stat. 829). (1904) 25 Ap. Atty. Gen. 149.

Jurisdiction of courts.—This act is for the purpose of delimiting the inland waters of the United States, to inform navigators where the inland rules of navigation as distinguished from the international rules become applicable, but does not change the boundaries of any Federal judicial district, nor enlarge the jurisdiction of any particular Federal court. U. S. v. Newark Meadows Imp. Co. (C. C. 1909), 173 Fed. 426.

1510. Inland waters defined.—The words "inland waters" used in this Act shall not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal; and this Act shall not in any respect modify or affect the provisions of the Act entitled "An Act to regulate navigation on the Great Lakes and their connecting and tributary waters," approved February eighth, eighteen hundred and ninety-five. *Sec. 4, act of Feb. 19, 1895 (28 Stat. 672).*

1511. State regulation of pilots.—Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose. *R. S. 4235.*

Notes of Decisions.

Constitutionality.—This section is sustainable as a regulation of interstate and foreign commerce. Cooley v. Board of Wardens of Port of Philadelphia (1851), 12 How. 299, 317, 13 L. Ed. 996.

This section, with the next two sections and acts of Aug., 1852, June 8, 1864, July 25, 1866, and Feb. 25, 1867, regulating pilotage, exert and exercise the plenary power of Congress over the subject. In re McNiel (1871), 13 Wall. 236, 241, 20 L. Ed. 624.

Pilots and pilotage are rightful subjects of legislation. The Alcalde (D. C. 1887), 30 Fed. 133, 135.

The adoption of compulsory pilotage regulations by a State, under this section, does not violate Const. U. S. art 1, sec. 9, cl. 6, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. Thompson v. Darden (1905), 25 Sup. Ct. 660, 198 U. S. 310, 49 L. Ed. 1064, affirming judgment

Darden v. Thompson (1903), 44 S. E. 755, 101 Va. 635.

Recognition of State acts.—This provision indicates that Congress did not doubt the power of the States to legislate on the subject of pilots. Cooley v. Board of Wardens of Port of Philadelphia (1851), 12 How. 299, 317, 13 L. Ed. 996; In re McNiel (1871), 13 Wall. 236, 241, 20 L. Ed. 624; Wilson v. McNamee (1880), 102 U. S. 572, 573, 26 L. Ed. 234.

An admission can not be inferred from this section of the concurrent rights of the States with Congress to regulate commerce with foreign nations and among the States, since it merely adopted the existing and prospective laws of the States. Gibbons v. Ogden (1824), 9 Wheat. 1, 207, 6 L. Ed. 23; Wilson v. McNamee (1880), 102 U. S. 572, 573, 26 L. Ed. 234.

Effect of acts of Congress for licensing pilots of steam vessels.—The act of 1852 providing for the inspection of steam vessels and the licensing of their pilots applied only to pilots for their voyages, not in entering or leaving harbors, and did not supersede State laws recognized by this section. Pacific Mail S. S. Co. v. Joliffe (1864), 2 Wall. 450, 460, 17 L. Ed. 805.

Source of authority of State.—The State pilotage laws are enacted under an original power of the States, not under one conferred by the United States. The Chase (D. C. 1882), 14 Fed. 854.

Extent of authority of State.—Each State may license pilots, and provide regulations for their government and employment; but it can not exclude others duly licensed elsewhere from employment on the public waters of the Nation, either on the ground that those waters are within the territorial limits, or on the ground that the vessel to be piloted is bound to a port within its territory. The Clymene (D. C. 1881), 9 Fed. 164; The William Law (D. C. 1882), 14 Fed. 792.

Though Congress may legislate on the subject of pilotage throughout the United States, it has not manifested an intention to overrule the State laws except in one instance, and the law of a State imposing a forfeiture for the neglect of a vessel to take a pilot is not invalid. Cooley v. Board of Wardens of Port of Philadelphia (1851), 12 How. 299, 320, 13 L. Ed. 996.

Louisiana may make it a criminal offense for a pilot not duly qualified under its laws to pilot a foreign vessel from the Gulf of Mexico to New Orleans, though he holds a license under Mississippi. Leech v. Louisiana (1909), 29 Sup. Ct. 552, 553, 214 U. S. 175, 53 L. Ed. 956.

Where parties have a right, under the laws of the United States, to pilot vessels in and out of the Mississippi River to the sea through South Pass, although they are not duly licensed and commissioned branch pilots under the laws of Louisiana, to imprison them for exercising this right is to imprison them in violation of the laws of the United States. United States ex rel. Spink (C. C. 1884), 19 Fed. 631; contra, State v. Livaudais (1884), 36 La. Ann 122.

A State statute regulating pilotage and providing for a board of pilot commissioners with authority to license pilots and giving the commissioners 5 per cent of the fees collected by the pilots provides for a commission forming an essential part of pilotage establishment recognized by this section. The Queen (1913), 206 Fed. 148, 124 C. C. A. 214.

This act does not authorize a State to fix the compensation of pilots for services which are strictly those of salvors not pilots. Hobart v. Drogan (1836), 10 Pet. 108, 120, 9 L. Ed. 363.

Waters to which laws may extend.—A State may permit or require its pilots to tender their services to inward-bound vessels at a greater distance from the shore than 3 miles, or the outward limit of the pilot ground. Wilson v. McNamee (1880), 102 U. S. 572, 574, 26 L. Ed. 234; The Whistler (D. C. 1882), 13 Fed. 295.

State pilot laws have sufficient effect beyond the State boundaries to fix the compensation of pilots. The Nevada (D. C. 1874), Fed. Cas. No. 10,130.

The breakwater in Delaware Bay constitutes, within the act of Congress and the usage of navigation, a "port," in the proper and maritime sense of the term; and the offer of a Delaware pilot to take a vessel from sea into the breakwater is the exercise of a legitimate authority on his part, and the refusal of a vessel to accept his services entitled the pilot to half pilotage, according to the State law. The William Law (D. C. 1882), 14 Fed. 792.

Vessels subject to State laws. Where a steamship coming into the port of New York was spoken by a licensed pilot who offered his services, which were refused, such pilot had no lien for a sum claimed to be in lieu of services as provided by pilotage laws. Leitch v. The George Law (D. C. 1858), Fed. Cas. No. 8,223.

A State law making it unlawful for a vessel of her class to move at a greater speed than 4 miles per hour governs the movements of a Government transport leaving Norfolk Harbor, Southern Railway v. U. S. (1910), 45 Ct. Cl. 322.

Authority of Territories. A Territory has power to pass pilot laws. The Pan (D. C. 1861), Fed. Cas. No. 10,702.

Jurisdiction over suits for pilotage fees. Courts of admiralty have jurisdiction of

suits for pilotage. Wave *v.* Hyer (C. C.), Fed. Cas. No. 17,300; The Wave (D. C. 1831), Fed. Cas. No. 17,297.

The right to half pilotage held not cognizable on the admiralty side of the court. Arcularius *v.* Staples (D. C. 1859), Fed. Cas. No. 509b.

State statutes relating to pilotage do not affect jurisdiction of Federal court, but only give an additional remedy. The George S. Wright (D. C. 1869), Fed. Cas. No. 5,340.

This and the following section by implication make applicable, in favor of pilots, the laws of either New York or New Jersey; and hence a New Jersey pilot may sue in the Federal courts of New York for pilotage services rendered in New York waters. Reardon *v.* Arkell (D. C. 1894), 59 Fed. 624.

Liability of vessel for pilot's negligence.—The fact that the master of a vessel is by a State law compelled to take a pilot does not exonerate the vessel from liability for a collision caused wholly through the negligence of such pilot. The China (1868), 74 U. S. (7 Wall.) 53, 19 L. Ed. 67; Camp *v.* The Marcellus (C. C. 1860), Fed. Cas. No. 2,347; The Alabama (D. C. 1867), Fed. Cas. No. 122; Cook *v.* Curtis (1878), 58 N. H. 507.

1512. Pilots on boundaries between States.—The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port. *R. S. 4236.*

Notes of Decisions.

Constitutionality.—This section is sustainable as a regulation of interstate and foreign commerce. Cooley *v.* Board of Wardens of Port of Philadelphia (1851), 12 How. 299, 317, 13 L. Ed. 996.

Territories.—The term "State" includes an organized territory. The Ullock (1884), 19 Fed. 207; Neill *v.* Wilson (1887), 14 Or. 410, 12 Pac. 810.

State statutes affected by act.—A State statute which prohibits any one not licensed under the authority of the State from piloting a vessel to a port within the State is void, so far as it interferes with the employment on public waters of pilots licensed by other States bordering thereon. The Clymene (D. C. 1881), 9 Fed. 164. So is the requirement of a State statute that the master receive the first pilot who tenders his services, since this section gives him an election as to which he shall take. The South Cambria (D. C. 1886), 27 Fed. 525.

1513. No discrimination in rates of pilotage.—No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated. *R. S. 4237.*

Notes of Decisions.

Validity of State statutes.—Section 1512 of the Code of Georgia, relating to pilotage, and containing discriminations between vessels sailing between the ports of the same State and vessels sailing between the ports of different States, is in conflict with this section. Spraigue *v.* Thompson (1886), 6 Sup. Ct. 988-990, 118 U. S. 90, 30 L. Ed. 115.

Only the discriminatory features of State pilotage laws are abrogated by this section. Olsen *v.* Smith (1904), 25 Sup. Ct. 52, 54, 195 U. S. 332, 49 L. Ed. 224.

No discrimination in State pilotage laws is made by the Virginia compulsory pilotage charge on all vessels (except coasting vessels having a pilot's license) either inward bound from the sea through the Virginia Capes to Smith's Point, Yorktown, Newport News, or Norfolk, and intermediate points, or outward bound to the sea from those points through the Capes, although compulsory pilotage does not prevail in all the inland waters of the State. Thompson *v.* Darden (1905), 25 Sup. Ct. 660, 661, 198 U. S. 310, 49 L. Ed. 1064, affirming judgment Darden *v.* Thompson (1903), 44 S. E. 755, 101 Va. 635.

The invalidity under this section of Pol. Code Cal. sec. 2468, exempting certain coasting vessels from liability for half pilotage does not exempt a vessel in the foreign trade from such liability under sec. 2466. The Alameda *v.* Neal (C. C. 1887), 32 Fed. 331, affirming (D. C. 1887), 31 Fed. 366. But half pilotage can not be collected under it from a vessel bound from San Francisco to New York. Freeman *v.* The Undaunted (C. C. 1889), 37 Fed. 662.

CHAPTER 26.

RIVERS AND HARBORS.

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1514. Board of Engineers for rivers and harbors.—That there shall be organized in the Office of the Chief of Engineers, United States Army, by detail from time to time from the Corps of Engineers, a board of five engineer officers, whose duties shall be fixed by the Chief of Engineers, and to whom shall be referred for consideration and recommendation, in addition to any other duties assigned, so far as in the opinion of the Chief of Engineers may be necessary, all reports upon examinations and surveys provided for by Congress, and all projects or changes in projects for works of river and harbor improvement heretofore or hereafter provided for. And the board shall submit to the Chief of Engineers recommendations as to the desirability of commencing or continuing any and all improvements upon which reports are required. And in the consideration of such works and projects the board shall have in view the amount and character of commerce existing or reasonably prospective which will be benefited by the improvement, and the relation of the ultimate cost of such work, both as to cost of construction and maintenance, to the public commercial interests involved, and the public necessity for the work and propriety of its construction, continuance, or maintenance at the expense of the United States. And such consideration shall be given as time permits to such works as have heretofore been provided for by Congress, the same as in the case of new works proposed. The board shall, when it considers the same necessary, and with the sanction and under orders from the Chief of Engineers, make, as a board or through its members, personal examinations of localities. And all facts, information, and arguments which are presented to the board for its consideration in connection with any matter referred to it by the Chief of Engineers shall be reduced to and submitted in writing, and made a part of the records of the Office of the Chief of Engineers. It shall further be the duty of said board, upon a request transmitted to the Chief of Engineers by the Committee on Rivers and Harbors of the House of Representatives, or the Committee on Commerce of the Senate, in the same manner to examine and report through the Chief of Engineers upon any projects heretofore adopted by the Government or upon which appropriations have been made, and report upon the desirability of continuing the same or upon any modifications thereof which may be deemed desirable.

The board shall have authority, with the approval of the Chief of Engineers, to rent quarters, if necessary, for the proper transaction of its business, and to employ such civil employees as may, in the opinion of the Chief of Engineers, be required for properly transacting the business assigned to it, and the necessary expenses of the board shall be paid from allotments made by the Chief of Engineers from any appropriations made by Congress for the work or works to which the duties of the board pertain. *Sec. 3, act of June 13, 1902 (32 Stat. 372).*

The word "five," in this section was superseded by a provision that the board should consist of seven members, a majority of whom should be of rank not less than lieutenant colonel, by sec. 4, act of Mar. 4, 1913 (37 Stat. 826), post, 1515.

The provision for review of reports "so far as in the opinion of the Chief of Engineers may be necessary," was superseded by, post, 1515.

Notes of Decisions.

Power of Congress.—Congress has supreme control of a navigable stream where the commerce thereon is interstate and foreign. U. S. *v.* Rio Grande (1899), 19 Sup. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136; Union Bridge Co *v.* U. S. (1907), 27 Sup. Ct. 367, 204 U. S. 364, 51 L. Ed. 523; Philadelphia *v.* Stimson (1912), 32 Sup. Ct. 340, 223 U. S. 605, 56 L. Ed. 570; Hageria *v.* Mississippi River Power Co. (D. C. 1913), 202 Fed. 776.

1515. Reports on surveys reviewed by a board of Engineer officers.—That all reports on examinations and surveys authorized by law shall be reviewed by the Board of Engineers for Rivers and Harbors as provided for in section three of the river and harbor Act approved June thirteenth, nineteen hundred and two, and all special reports ordered by Congress shall, in the discretion of the Chief of Engineers, be reviewed in like manner by said board; and the said board shall also, on request by resolution of the Committee on Commerce of the Senate or the Committee on Rivers and Harbors of the House of Representatives, submitted to the Chief of Engineers, examine and review the report of any examination or survey made pursuant to any Act or resolution of Congress, and report thereon through the Chief of Engineers, United States Army, who shall submit his conclusions thereon as in other cases: *Provided*, That in no case shall the board, in its report thus called for by committee resolution, extend the scope of the project contemplated in the original report upon which its examination and review has been requested, or in the provision of law authorizing the original examination or survey: *Provided further*, That said board shall consist of seven members, a majority of whom shall be of rank not less than lieutenant colonel. *Sec. 4, act of March 4, 1913 (37 Stat. 826).*

Provisions for the organization of the board of engineers were made by sec. 3, act of June 13, 1902, mentioned in this section, set forth 1514, ante.

1516. Reports by the Chief of Engineers on river and harbor works.—That the Secretary of War shall cause the Chief of Engineers of the United States Army, in submitting his annual reports to Congress with regard to works of river and harbor improvement under his charge, to state what deterioration, if any, has taken place by destruction, decay, obstructions, or otherwise, in connection with any of such works, together with an estimate of the cost of rebuilding, or repairing such works, or removing such obstructions; and he shall also cause the said Chief of Engineers to recommend, with his reasons therefor, the discontinuance of appropriations for any river and harbor work which he may deem unworthy of further improvement. *Sec. 7, act of March 3, 1899 (30 Stat. 1150.)*

1517. Printing of matter relating to river and harbor works.—Section thirteen of the river and harbor appropriation Act approved July twenty-fifth, nineteen hundred and twelve, which authorizes the payment for printing of matter relating to river and harbor works from river and harbor appropriations, is repealed, and hereafter such printing shall be done and paid for out of regular annual appropriations for printing and binding for the War Department. *Act of July 1, 1916 (39 Stat. 330), making appropriations for works on rivers and harbors.*

1518. Employment of civil engineers on western and northwestern rivers.—The Chief of Engineers may, with the approval of the Secretary of War, employ such civil engineers, not exceeding five in number, for the purpose of executing the surveys and improvements of western and northwestern rivers, ordered by Congress, as may be necessary to the proper and diligent prosecution of the same; and the persons so employed may be allowed a reasonable compensation for their services, not to exceed the sum of three thousand dollars a year. *R. S. 3253.*

1518½. Assistant engineers in charge of districts or members of boards.—* * * *Provided further*, That whenever it shall be necessary, in order to properly prosecute works of river and harbor improvement, the Chief of Engineers is authorized to detail for duty in charge of river and harbor districts

or as members of boards of engineers any assistant engineers in the employ of the Engineer Bureau of the War Department. * * * *Sec. 5, act of Feb. 27, 1911 (36 Stat. 957), making appropriations for river and harbor works.*

1519. System of harbors and canals for the defense of the coasts.—The Secretary of War and the Secretary of the Navy are authorized and directed to report to Congress at the earliest practicable date:

First. Specific plans for improvement of the harbors and canals and connecting channels which, in their judgment, will best provide adequate facilities for operations of the fleet for defense of the harbors on the Atlantic, Gulf, and Pacific coasts of the United States.

Second. The feasible extensions requisite to make existing approved projects for improvement of the aforementioned harbors, canals, and channels available for the purposes stated in the foregoing paragraph.

Third. The cost of each such several improvements calculated upon the basis of completion thereof under contract within five years. *Act of Aug. 29, 1916 (39 Stat. 618).*

1520. Water terminals.—It is hereby declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, constructed, owned, and regulated by the municipality, or other public agency of the State and open to the use of all on equal terms, and with the view of carrying out this policy to the fullest possible extent the Secretary of War is hereby vested with the discretion to withhold, unless the public interests would seriously suffer by delay, monies appropriated in this Act for new projects adopted herein, or for the further improvement of existing projects if, in his opinion, no water terminals exist adequate for the traffic and open to all on equal terms, or unless satisfactory assurances are received that local or other interests will provide such adequate terminal or terminals. The Secretary of War, through the Chief of Engineers, shall give full publicity, as far as may be practicable, to this provision. *Act of Mar. 2, 1919 (40 Stat. 1286), making appropriations for works on rivers and harbors.*

1521. Contributions from private parties to funds for river and harbor improvement.—That the Secretary of War is hereby authorized to receive from private parties such funds as may be contributed by them to be expended in connection with funds appropriated by the United States for any authorized work of public improvement of rivers and harbors whenever such work and expenditure may be considered by the Chief of Engineers as advantageous to the interests of navigation: *Provided*, That when contributions heretofore or hereafter made by local interests for river and harbor improvements, in accordance with specific requirements or under general authority of Congress, are in excess of the actual cost of the work contemplated and properly chargeable to such contributions, such excess contributions may, with the approval of the Secretary of War, be returned to the proper representatives of the contributing interests, unless the provision of law under which the contribution is made requires that the entire contribution be retained by the United States. *Sec. 4, act of Mar. 4, 1915 (38 Stat. 1053), making appropriations for works on rivers and harbors.*

1522. River and harbor improvement not entered upon until funds have been appropriated.— * * * *And provided further*, That the Government shall not be deemed to have entered upon any project for the improvement of any waterway or harbor mentioned in this Act until funds for the commencement of the proposed work shall have been actually appropriated by law. * * *

Sec. 2, act of June 5, 1920 (41 Stat. 1010), making appropriations for works on rivers and harbors.

For current allotments see act of March. 3, 1919 (40 Stat. 1285), and act of June 5, 1920 (41 Stat 1010, 1013).

1523. Allotment to separate projects of funds appropriated in the aggregate.—Where separate works or items are consolidated herein and an aggregate amount is appropriated therefor, the amount so appropriated shall, unless otherwise expressed, be expended in securing the maintenance and improvement according to the respective projects adopted by Congress after giving due regard to the respective needs of traffic. The allotments to the respective works so consolidated shall be made by the Chief of Engineers as authorized by the Secretary of War. In case such works or items are consolidated and separate amounts are given to individual projects the amounts so named shall be expended upon such separate projects. Any balances remaining to the credit of the consolidated items shall be carried to the credit of the respective aggregate amounts appropriated for the consolidated items. *Sec. 2, act of Mar. 1, 1919 (40 Stat. 1287), making appropriations for works on rivers and harbors.*

1524. Repair of works of improvement.—That appropriations heretofore or herein made for works of river and harbor improvements, or so much thereof as shall be necessary, may, in the discretion of the Secretary of War, be used for maintenance and for the repair and restoration of said works whenever from any cause they may have become seriously impaired, as well as for the further authorized improvement of said works: *Provided*, That no appropriation shall be diverted from one project to another. *Sec. 7, act of June 5, 1920 (41 Stat. 1014).*

1525. Insufficient appropriations.—In all cases in which appropriations or authorization have heretofore been made, or are herein made, for the completion of river and harbor works, and the amounts appropriated or authorized shall prove insufficient for completion, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply such amounts appropriated or authorized for the prosecution of such work. *Act of Mar. 2, 1907 (34 Stat. 1111), making appropriations for works on rivers and harbors.*

Notes of Decisions.

Expenditure of appropriations.—See, 1531, post, and notes thereunder.

Under sec. 5 of the river and harbor act of June 3, 1896 (29 Stat. 235), which limits the amount that the Secretary of War can obligate the Government for in any fiscal year to $400,000, the contractor may perform in one year the work for which the contract allows him three years to perform, and although he may thus earn a larger sum than the amount stated he may not receive full payment therefor under three years. Where the total amount authorized to be expended is less than $400,000, contractors may be allowed to earn the amounts authorized to be expended in advance of the appropriation by Congress for such work. Appropriation may be expended in the prosecution of work, notwithstanding the total cost may exceed the appropriation. (1911) 29 Op. Atty. Gen. 236.

1525½. Improvement funds available for pay and commutation of quarters of Engineer officers.— * * * *Provided*, That officers of the Corps of Engineers, when on duty under the Chief of Engineers, connected solely with the work of river and harbor improvements may, while so employed, be paid their pay and commutation of quarters from the appropriations for the work or works upon which they are employed: * * * *Sec. 5, act of Feb. 27, 1911 (36 Stat. 557), making appropriations for river and harbor works.*

1523. Expenses of investigations, etc., by Engineer Department.—That expenses incurred by the Engineer Department in all investigations, inspections, hearings, reports, service of notice, or other action incidental to examination of plans or sites of bridges or other structures built or proposed to be built in or over navigable waters, or to examinations into alleged violations of laws for the protection and preservation of navigable waters, or to the establishment or marking of harbor lines, shall be payable from any funds which may be available for the improvement, maintenance, operation, or care of the waterways or harbors affected, or if such funds are not available in sums judged by the Chief of Engineers to be adequate, then from any funds available for examinations, surveys, and contingencies of rivers and harbors. *Sec. 6, act of Mar. 3, 1905 (33 Stat. 1148), making appropriations for works on rivers and harbors.*

1527. Preliminary examinations of projects.—The Secretary of War shall cause to be prepared and submitted to Congress, in connection with the reports of examinations and surveys of rivers and harbors hereafter made by order of Congress, full statements of all existing facts tending to show to what extent the general commerce of the country will be promoted by the several works of improvements contemplated by such examinations and surveys, to the end that public moneys shall not be applied excepting where such improvements shall tend to subserve the general commercial and navigation interests of the United States. *R. S. 231.*

That for examinations, surveys, and contingencies for rivers and harbors for which there may be no special appropriation the sum of $400,000 is hereby appropriated: *Provided*, That no preliminary examination, survey, project, or estimate for new works other than those designated in this or some prior Act or joint resolution shall be made: *Provided further*, That after the regular or formal reports made as required by law on any examination, survey, project, or work under way or proposed are submitted no supplemental or additional report or estimate shall be made unless ordered by a concurrent resolution of Congress: * * *

Every report submitted to Congress in pursuance of this section or of any provision of law for a survey hereafter enacted, in addition to other information which the Congress has heretofore directed shall be given, shall contain a statement of special or local benefit which will accrue to localities affected by such improvement and a statement of general or national benefits, with recommendations as to what local cooperation should be required, if any, on account of such special or local benefit. * * * *Sec. 2, act of June 5, 1920 (41 Stat. 1010), making appropriations for works on rivers and harbors.*

For current list of localities see sec. 2, act of June 5, 1920 (41 Stat. 1010–1013).

1528. Investigations of watersheds.— * * * The surveys of navigable streams herein or hereafter authorized shall include such stream-flow measurements and other investigations of the watersheds as may be necessary for preparation of plans of improvement and a proper consideration of all uses of the stream affecting navigation, and whenever necessary similar investigations may be made in connection with all navigable streams under improvement. * * * *Sec. 3, act of June 25, 1910 (36 Stat. 669), making appropriations for works on rivers and harbors.*

The other provisions of said section were superseded by provisions of sec. 3, act of Mar. 4, 1913 (37 Stat. 825).

1529. Investigations of tributary streams.—The Chief of Engineers, in his discretion, and after approval by the Secretary of War, is hereby authorized to make preliminary examinations and minor surveys and to remove snags and other temporary or readily removable obstructions from tributaries of waterways already under Federal improvement or in general use by navigation, to be paid from the appropriations for the adjoining waterways: *Provided*, That the cost of such work in any single year shall not exceed five hundred dollars per tributary. *Act of July 25, 1912 (37 Stat. 222), making appropriations for works on rivers and harbors.*

1530. Contracts for works on rivers and harbors.—All works of improvement herein or hereafter authorized to be prosecuted or completed under contracts may, in the discretion of the Secretary of War, be carried on by contract or otherwise, as may be most economical or advantageous to the United States. *Act of July 25, 1912 (37 Stat. 222), making appropriations for works on rivers and harbors.*

That the requirements of section thirty-seven hundred and forty-four of the Revised Statutes shall not apply to the lease of lands, or easements therein, or of buildings, rooms, wharves, or rights of wharfage or dockage, or to the hire of vessels, boats, and other floating craft, for use in connection with river and harbor improvements, where the period of any such lease or hire is not to exceed three months. *Sec. 5, act of June 25, 1910 (36 Stat. 676).*

Notes of Decisions.

Discretion of Secretary of War.—The Secretary of War is not required by the act of Mar. 3, 1896, providing that contracts may be entered into by him for the completion of improvements named, to make such contracts, but he may decline to do so in all cases where he is convinced the public interest would not be subserved by making them. (1896) 21 Op. Atty. Gen. 420.

While "may" in any statute is ordinarily to be construed as "shall" or "must" when public rights or interests are concerned, yet the construction depends upon the context of the statute, the test being the intent of the legislature. (1902) 24 Op. Atty. Gen. 594.

The authority conferred on him by the river and harbor act of June 13, 1902 (32 Stat. 371), to prosecute or complete, "by contract or otherwise," all river and harbor improvements which theretofore or therein were authorized to be constructed or completed under contract, vested in him the power to construct the dredge now nearing completion, for use on Lake Michigan, and to pay the cost of the same by allotment from the sums appropriated for the improvement of the various harbors of that lake. (1904) 25 Op. Atty. Gen. 145.

1531. Contracts to be placed with the lowest bidder.—That it shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for improvements of rivers and harbors, other than surveys, estimates and gaugings, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe; and such contracts shall be made with the lowest responsible bidders, accompanied by such securities as the Secretary of War shall require, conditioned for the faithful prosecution and completion of the work according to such contract. *Sec. 3, act of Aug. 11, 1888 (25 Stat. 423), making appropriations for works on rivers and harbors.*

Notes of Decisions.

Statutory authority to make improvements.—An act of Congress making an appropriation for a specific improvement of a navigable stream is sufficient authority

to the Secretary of War to make the improvement. Greenleaf Johnson Lumber Co. *v.* U. S. (D. C. 1913), 204 Fed. 489.

This section does not modify R. S. 3744, ante, 765, 770. to the extent of dispensing with the formal execution of such contracts as a prerequisite to their legality and binding effect after the acceptance of proposals. U. S. *v.* Lamont (1894), 2 App. D. C. 532.

Expenditure of appropriations.—See 1525, ante, 1532, post, and notes thereunder.

In expending the appropriation in the act of Mar. 2, 1889 (25 Stat. 963), "for repairs to draw pier of the Rock Island Bridge," the Secretary of War is not required to use all of the money appropriated or more than is necessary to do the work properly, bearing in mind that temporary repairs are not always most economical or expedient. In case of doubt as to the necessity of any expenditure, due weight should be given to the judgment of the lawmaking power as expressed in the appropriation. Refusal of the Chicago, Rock Island & Pacific Railroad Company to contribute to the expense incurred any sum in excess of one-half of what would be necessary to place the existing pier in as nearly as practicable the condition it was in when the bridge was completed, does not relieve the Secretary of War of his duty to make the repairs directed. (1889) 19 Op. Atty. Gen. 375.

The Secretary of War is authorized under the river and harbor act of Sept. 19, 1890 (26 Stat. 426, 448), to draw his warrant in favor of the city of Galena, Ill., in payment for the improvement of the Galena River contemplated by that act, notwithstanding the fact that the certificate of such work is signed by the surveyor of customs for that port, instead of the collector of the port, as directed by that act, it appearing that there is no collector of the port at Galena, and that all the duties of that office are imposed upon the surveyor of customs. (1894) 20 Op. Atty. Gen. 700.

Under sec. 5 of the river and harbor act of June 3, 1896 (29 Stat. 235), which limits the amount that the Secretary of War can obligate the Government for in any fiscal year to $400,000, the contractor may perform in one year the work which the contract allows him three years to perform and, though he may thus earn a larger sum than the amount stated, he may not receive full payment therefor under three years. The section is not limited in its application to cases in which the total amount authorized to be expended is more than $400,000. (1896) 21 Op. Atty. Gen. 379.

The provisions in the river and harbor act of June 3, 1896, that contracts "may be" entered into by the Secretary of War for the completion of certain improvements, to be paid for out of future appropriations, are not mandatory but discretionary. (1896) 21 Op. Atty. Gen. 420.

The Secretary of War is authorized to award a contract for the construction of a breakwater at San Pedro, Calif., in accordance with the recommendation and the plans and specifications adopted by the board of engineers appointed under the provisions of that portion of the river and harbor act of June 3, 1896 (29 Stat. 213), which provides for a deep-water harbor for commerce and refuge at Port Los Angeles or San Pedro, Calif., the location of the harbor to be determined by the board. The project reported by the board is a breakwater which fulfills the provisions of the law and will make a harbor for commerce and of refuge within the meaning of the statute. It was not the intention of Congress that out of the appropriation made the harbor should be equipped with piers, jetties, and channels necessary for the highest condition of usefulness and efficiency. It was the purpose of Congress to construct a deep-water harbor in the sense of having a sufficient depth of water to accommodate vessels of large draft, but not necessarily vessels of the greatest draft now constructed. The Secretary of War is not called upon to make further plans, specifications, or estimates for other work not included within the plans and specifications adopted by the court board. (1898) 22 Op. Atty. Gen. 138.

The requirements as to time, with reference to the improvement of the outer bar of the harbor at Brunswick, Ga., under the river and harbor acts of 1894 (28 Stat. 342) and 1896 (29 Stat. 208), have been sufficiently complied with in respect to certificate and payment of $100,000, and the certificate may now be authorized. (1898) 22 Op. Atty. Gen. 156.

There is no authority for paying out of the appropriation made by act of Mar. 3, 1899 (30 Stat. 1128), for widening a channel any expenses for making the contract, inspecting or superintending the work, unless it be indirectly through a provision in the contract that these expenses shall be paid by the contractors and charged against their compensation. (1899) 22 Op. Atty. Gen. 489.

The Secretary of War has no authority to use any portion of the amount appropriated by the river and harbor act of Mar 3, 1899 (30 Stat. 1147), for improvement of the Missouri River above Sioux City, for improvements at or in front of that city. (1899) 22 Op. Atty. Gen. 519.

The Secretary of War has discretionary authority, under the act of June 3, 1896 (29

Stat. 213), and subsequent acts, making appropriations for the construction of a tidal canal in Oakland Harbor, Calif., to suspend the work on such improvement when the suspension will best inure to its ultimate completion, but he would not be justified in suspending the work if the only purpose was to delay its completion with the intention of abandoning it. A mere doubt as to the wisdom of carrying out a public work authorized by Congress does not justify its suspension and a refusal to complete it. Until such act is repealed it must be assumed to be the deliberate and continuing expression of the will of Congress, and respected as such. (1901) 23 Op. Atty. Gen. 504.

See, also, (1886) 18 Op. Atty. Gen. 481.

Bids, withdrawal before acceptance, and effect thereof.—A bidder may, before acceptance of his bid, withdraw it, and when he does so neither he nor the sureties on the guaranty accompanying it are liable; but the other bidders are not released, and the contract may be let to the lowest bidder. (1877) 15 Op. Atty. Gen. 649.

Contracts, construction of, in general.—Contractors required to erect and maintain at their own expense a stake light at the end of the new structure while the work was in progress, in accordance with the instructions of the engineer officer in charge, or his agent, and also such other lights as the engineer might direct, must not only maintain lanterns in the required positions, but also see that they were kept trimmed and brightly burning during the hours of darkness, and they are liable for injury to a vessel stranded on the new construction by reason of the extinguishment by the wind of the stake light, where they had knowledge that it was liable to be so extinguished, and had been a number of times previously. Reasonable care and vigilance required the contractors to guard against the probable consequences of the extinguishment of the light or its failure to burn at night, and, if it was impracticable to properly relight the lantern whenever the light was blown out in a storm or high wind, they should, in view of the great danger to navigation resulting from darkness at that point, either have erected an electric light which could have been operated from the shore, or made such disposition of their floating plant as to warn vessels away from the new breakwater. The extinguishment of the stake light by the wind due to its improper adjustment can not be attributed to the act of God or vis major, so as to relieve the contractors from liability, being something which might reasonably have been anticipated, and could have been guarded against in the exercise of reasonable care and vigilance. The provision requiring the contractors to maintain such other lights as the engineer should direct did not necessarily measure their obligations to third persons to whom they owed the duty of maintaining such lights as were necessary or proper in view of the dangerous character of the structure, whether directed by the engineer or not. Harrison *v.* Hughes (1903), 125 Fed. 860, 60 C. C. A. 442, affirming decree (D. C. 1901), 110 Fed. 545, and writ of certiorari denied. Hughes *v.* Harrison (1903), 24 Sup. Ct. 846, 191 U. S. 575, 48 L. Ed. 308.

"Legal representatives," meaning of.—"Legal representatives," in the act of 1896 (27 Stat. 208), refers to those who may be charged with the administration of the contractor's estate, or as equivalent to the "assigns" of the contract as an integral thing. (1898) 22 Op. Atty. Gen. 156.

Right of contractors to compensation.—Where plaintiff contracted to do harbor excavation at a specified price per cubic yard, and was directed to make excavations at a certain place by a Government inspector, it was no defense to its right to recover therefor under the contract that the fill making the excavation necessary was not a natural one, but was occasioned by the negligence of the city. San Francisco Bridge Co. *v.* U. S. (D. C. 1913) 209 Fed. 135.

Liabilities for torts.—One blasting in a harbor, in performance of a contract with the United States, is not liable for injuries to a house by the vibration of the earth and pulsation of the air, unless he is negligent. Benner *v.* Atlantic Dredging Co. (1892), 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220.

Assignments of contracts.—Where there is a question as to the assignment of a contract, all parties may execute an agreement in the nature of a trust to embody a release to the United States as to a present payment and an agreement to release as to future payments, and providing for payment to a trustee for disbursement. As regards the Government and the payment referred to, there is but one valid claim—that of the contractor. (1898) 22 Op. Atty. Gen. 156.

Hours of labor on river and harbor improvements.—Eight-Hour Law (782-786, ante), as originally enacted, applies to the jetty work at the mouth of the Columbia River, which is being conducted directly by the Government, and those employed upon that work, who come fairly within the meaning of the words "laborers and mechanics," should be restricted to eight hours of effective labor in any one calendar day, irrespective of enforced idleness on other days, except in case of a sudden emergency requiring prompt action. (1907) 26 Op. Atty. Gen. 278.

1532. Two or more works combined in one contract.—Whenever the appropriations made by Congress for river and harbor works can be more advantageously expended by combining in one contract two or more works, such combinations shall be made. And whenever the appropriations made, or authorized to be made, for the completion of any river and harbor work shall prove insufficient therefor, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply the funds so appropriated or authorized to the prosecution of such work. *Sec. 8, act of July 25, 1912 (37 Stat. 233), making appropriations for works on rivers and harbors.*

That nothing contained in section thirty-seven hundred and seventeen of the Revised Statutes of the United States, nor in section three of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, shall be so construed as to prohibit or prevent the cumulation of two or more works of river and harbor improvement in the same proposal and contract, where such works are situated in the same region and of the same kind or character. *Sec. 2, act of Sept. 19, 1890 (26 Stat. 452), making appropriations for works on rivers and harbors.*

For R. S. 3717 see 747, ante.

Notes of Decisions.

Expenditure of appropriation.—See 1525, 1531, ante, and notes thereunder.

Appropriation authorized may be expended in the prosecution of the work, notwithstanding the total cost may exceed the amount of the appropriation. (1911) 29 Op. Atty. Gen. 236.

1533. Cost of projects limited by the estimate.—That the last paragraph of section 1 of the River and Harbor Act approved March 2, 1919, which reads: "No work shall be undertaken upon any new project herein adopted unless the Secretary of War shall be of the opinion that, based upon the cost at the time of entering upon the work, the project can be completed at a cost not greater than forty per centum in excess of the estimate of cost in the report upon such project," be, and the same is hereby, repealed. *Sec. 3, act of June 5, 1920 (41 Stat. 1013), making appropriations for works on rivers and harbors.*

For the paragraph repealed see 40 Stat. 1286.

1534. Cost of work on river and harbor projects under private contract.—That no part of the funds herein or hereafter appropriated for works of river and harbor improvement shall be used to pay for any work done by private contract if the contract price is more than 25 per centum in excess of the estimated cost of doing the work by Government plant: *Provided*, That in estimating the cost of doing the work by Government plant, including the cost of labor and materials, there shall also be taken into account proper charges for depreciation of plant and all supervising and overhead expenses and interest on the capital invested in the Government plant, but the rate of interest shall not exceed the maximum prevailing rate being paid by the United States on current issues of bonds or other evidences of indebtedness. *Sec. 8, act of Mar. 2, 1919 (40 Stat. 1290), making appropriations for works on rivers and harbors.*

1535. Cost of projects under private contract increased on account of war conditions.—That if the Secretary of War shall determine that any of the contracts for work of river and harbor improvements entered into but not completed prior to April sixth, nineteen hundred and seventeen, the date of the entrance of the United States into the war with Germany, have become inequitable and unjust

on account of increased costs of materials and labor and other unforeseen conditions arising out of the war, he is hereby authorized, in his discretion and with the consent of the contractors, to modify and readjust the terms of said contracts in such manner as he may deem equitable and just: *Provided*, That such modifications and readjustments shall apply only to work under said contracts remaining to be done hereafter and shall not include any relief for work performed heretofore under said contracts, and any such sum as may be necessary to provide for the increased cost of the contracts due to said modifications and readjustments, not exceeding the sum of $2,000,000, is hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided further*, That as a condition of any such contract being so modified, the Secretary of War shall have the right, at the end of any fiscal year, until the contract is completed, to make such further modifications as in his judgment shall be advantageous to the United States and just to the contractor. *Sec. 8, act of July 18, 1918 (40 Stat. 912), making appropriations for works on rivers and harbors.*

That the Secretary of War is hereby authorized to ascertain whether any of the contracts for work on river and harbor improvements entered into but not completed prior to April 6, 1917, the date of the entrance of the United States into war with Germany, have become inequitable and unjust on account of increased cost of materials, labor, and other unforeseen conditions arising out of the war; and to ascertain and report what amounts, if any, in addition to those fixed by the terms of said contracts, should in justice and equity be paid to contractors, for work performed between April 6, 1917, and July 18, 1918, the date of the approval of an Act entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," on account of the increased cost of labor and materials and other unforeseen conditions arising out of the war during that period: *Provided*, That in every case the amount so ascertained shall not exceed the actual loss sustained by the contractor in performing the work between the said dates: *Provided further*, That when such amount shall have been ascertained, the Secretary of War shall transmit to Congress for consideration a statement or statements of all findings or determinations rendered by authority of this section, the amounts thereof, the names of contractors, and dates of contracts. *Sec. 10, act of Mar. 2, 1919 (40 Stat. 1290), making appropriations for works on rivers and harbors.*

That the time within which applications for relief under the provisions of section 10 of the River and Harbor Act approved March 2, 1919, may be filed by contractors with the Secretary of War, or with district engineers, or other contracting officials of the Engineer Department, is hereby limited to six months after the date of the approval of this Act. *Sec. 5, act of June 5, 1920 (41 Stat. 1014), making appropriations for works on rivers and harbors.*

1536. Acquisition of land for river and harbor improvement.—That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided, however*, That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be

reasonable, he may purchase the same at such price without further delay: *And provided further*, That the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works. *Act of Apr. 24, 1888 (25 Stat. 94), making appropriations for works on rivers and harbors.*

Notes of Decisions.

Authority to condemn property.—See 1027, 1103, ante, and notes thereunder.

The general policy of river and harbor improvement is not an exercise of the right of eminent domain. Friend *v.* U. S. (1895), 30 Ct. Cl. 94.

Construction of statutes.—Under this section, the Secretary of War is intrusted with the power and duty of determining specifically what land, right of way, or material is needed for such works as are authorized by law. U. S. *v.* Certain Lands in Narragansett, R. I. (C. C. 1906), 145 Fed. 654.

The Secretary of War may, under this section and the river and harbor act of Aug. 18, 1894 (28 Stat. 359), condemn land necessary for construction of a boat railway provided for. If a change in the location of an existing railway is a necessity in the building of the boat railway, the acquisition by the Secretary of War of the necessary land to make the change is merely an incident to the enterprise intrusted to him. (1895) 21 Op. Atty. Gen. 221.

See (1853) 6 Op. Atty. Gen. 172.

Of local statutes.—The appropriation by eminent domain of land for the approaches and terminal facilities necessary to the use of a bridge erected, under act Jan. 26, 1901 (31 Stat. 741), over a navigable stream, is not forbidden by that act because the plans submitted to the Secretary of War, and specifically approved by him, although fully subserving the purpose of showing the extent to which navigation would be affected, do not include such terminal and connecting facilities, and can not, under the act, be altered without his consent. Stone *v.* Southern Illinois & M. Bridge Co. (1907), 27 Sup. Ct. 615, 616, 206 U. S. 267, 51 L. Ed. 1057, affirming judgment Southern Illinois & M. Bridge Co. *v.* Stone (1906), 92 S. W. 475, 194 Mo. 175.

Taking of property for which compensation must be made.—The flooding of a plantation by a Government dam, so as to render it unfit for cultivation, is a taking for public use, requiring compensation, although the Government actually occupies no part thereof. King *v.* U. S. (C. C. 1893), 59 Fed. 9; appeal dismissed U. S. *v.* King (1896), 17 Sup. Ct. 1001, 164 U. S. 703, 41 L. Ed. 1182.

The action of Government officers in improving navigation, pursuant to authority from the Government, which resulted in *overflowing* private property is the act of the Government in taking property for which compensation must be made and not the personal act of the officers. U. S. *v.* Lynah (1903), 23 Sup. Ct. 849, 855, 188 U. S. 445, 47 L. Ed. 539.

In order that the flooding of lands resulting from the construction of a dam on a stream by the United States for the improvement of navigation shall constitute a "taking" of the land, it must amount to a permanent flooding and an actual ouster of the owner, the effect of which is the practical destruction of the value of the land. There is not such taking where the land was previously subject to overflow each year in time of freshets to such extent that it had not been cultivated for many years, and the only effect of the dam was to increase such overflows in extent and frequency, the land for the most part being free from water practically all the time; and in such case there can be a recovery only with respect to such portion as is permanently covered. Coleman *v.* U. S. (C. C. 1910), 181 Fed. 599.

The partial destruction of a pier built under lawful State authority by the United States in widening the channel of the stream, held a taking of the property within the fifth amendment. Greenleaf-Johnson Lumber Co. *v.* Garrison (D. C. 1913), 208 Fed. 1022. But the owner of property taken by eminent domain for the approaches and terminal facilities necessary to the use of a bridge erected under act Jan. 26, 1901 (31 Stat. 741), over a navigable stream is denied no Federal right because the erection of the bridge was not begun within the time limit set by Congress, where the bridge has been constructed without complaint by the Federal authorities, Congress having, by act Jan. 18, 1904 (33 Stat. 6), extended the time for its completion. Stone *v.* Southern Illinois & M. Bridge Co. (1907), 27 Sup. Ct. 615, 616, 206 U. S. 267, 51 L. Ed. 1057, affirming judgment Southern Illinois & M. Bridge Co. *v.* Stone (1906), 92 S. W. 475, 194 Mo. 175.

The construction of a log pond in a navigable river below low-water mark held not to give a riparian owner any property right in the water or land beneath for which the United States was required to pay when the inclosure was destroyed in improving the navigation of the river. Greenleaf-Johnson

Lumber Co. v. Garrison (D. C. 1913), 208 Fed. 1022.

The United States may improve or protect the navigation of navigable streams by deepening the channels or by erecting lighthouses, and if, in so doing, incidental injury is done to property below or above the works, this injury gives no claim for compensation against the United States; but where private property is taken by a change in the natural channel of the stream, the owner is entitled to compensation. Brown v. U. S. (C. C. 1897), 81 Fed. 55, 57.

The fact that the volume and force of the current of a navigable stream flowing against the bank on the land of a riparian owner have been increased by the construction of a bridge and the deepening of the channel on the side next his land, rendered necessary because of the construction of a pier in the middle of the stream, resulting in the washing of the bank, does not amount to a taking of his land. Salliotte v. King Bridge Co. (1903), 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620; writ of certiorari denied (1903), 24 Sup. Ct. 841, 191 U. S. 569, 48 L. Ed. 306.

The United States may occupy and use soil within the bed of a river for the improvement of its navigation. (1884) 18 Op. Atty. Gen. 64, citing Transportation Co. v. Chicago (1878), 99 U. S. 635, 25 L. Ed. 336.

The Government has the right to dredge a channel in navigable waters of the United States for the purpose of carrying out improvements authorized and directed by Congress, without making compensation to the owners of oyster beds placed upon the soil under the water originally owned and occupied by them, for the injury to or destruction of their property, reasonable opportunity being given such owners to remove the same. (1909) 27 Op. Atty. Gen. 311.

The opinion of Attorney General Bonaparte in 26 Op. Atty. Gen. 441, must be limited in its application to operations in nonnavigable waters or the willful and unnecessary taking, injury to, or appropriation of property without reasonable opportunity being given to the owner to remove the same. Id.

The rights of owners of land bordering on a navigable river must yield to the powers of the Government on improvements of the same for purposes of navigation, whether by the Federal or the State Governments. Johnson v. State (1909), 116 N. Y. S. 253, 62 Misc. Rep. 15; [C. S. p. 12167].

Petition for condemnation.—Under an act providing for condemnation of land, where the owner refuses a reasonable price offered by the Secretary of War, a petition in condemnation proceedings which alleges that defendant refuses to sell at a reasonable price is good on general demurrer. It is unnecessary to allege or prove that the United States was unable to agree with the owner as to the value of the premises. It is not necessary to allege any fact to show the necessity of appropriating the land involved, except that in the judgment of the Secretary of War the land is necessary, and has been selected by him for that purpose. An allegation as to the value of the premises is not necessary. U. S. v. Oregon Ry. & Nav. Co. (C. C. 1883), 16 Fed. 524.

Assessment of compensation.—The owner of a farm, a part of which is permanently flooded by a Government dam, must be compensated, in addition to the value of the land taken, for the lessened value of the farm, caused by the consequent cutting off of a private way across the lands of others, which is the only practicable outlet from the farm to the county road. U. S. v. Welch (1909), 30 Sup. Ct. 527, 217 U. S. 333, 54 L. Ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680.

The damage to lands and crops of riparian owners along the Mississippi River from the increase of water from the prevention of outflow by work of the Federal Government in its tributaries to deepen the channels is too remote to require compensation. Jackson v. U. S. (1913), 33 Sup. Ct. 1011, 230 U. S. 1, 57 L. Ed. 1363, affirming judgment (1912) 47 Ct. Cl. 579.

Where the Government, before instituting condemnation proceedings by the filing of a petition, had practically completed the end of a breakwater adjoining claimant's property, thus creating under the shelter of the breakwater, a wharf site, which was taken away by the subsequent condemning of part of the upland adjacent to the alleged wharf site, the rule that damages are to be assessed as of the date of condemnation did not apply, so as to entitle the owner of the upland to damages as of the date of condemnation, and as enhanced by the wharf site created by the work; it being certain from the beginning of the work that the upland would be condemned, and the alleged wharf site not being available as such without the approval of the Secretary of War, which could not reasonably be expected in view of the location of the Government improvements. U. S. v. Certain Lands in Town of Narragansett (C. C. 1910), 180 Fed. 500.

Right to decline to complete purchase.—Under a statute providing for condemnation of land by the United States for the purpose of internal improvements, after the value has been ascertained, the United States has the power to decline to complete the purchase. United States v. Oregon Ry. & Nav. Co. (C. C. 1883), 16 Fed. 524.

Title of United States.—When by act of Congress a pier or breakwater is constructed for the improvement of a harbor, no right to the land on which it is constructed accrues to the United States by that fact alone, and without purchase and cession from the States. If, in consequence of any such construction, land is made by accretion such accretion belongs to the owner of the land to which it attaches, and not to the United States. (1855) 7 Op. Atty. Gen. 314.

See, also (1882) 17 Op. Atty. Gen. 453; (1886), 18 Op. Atty Gen. 88, 437.

1537. Land for river and harbor improvement acquired through a person or corporation.—That whenever any person, company, or corporation, municipal or private, shall undertake to secure any land or easement therein, needed in connection with a work of river and harbor improvement duly authorized by Congress, for the purpose of conveying the same to the United States free of cost, or for the purpose of constructing, maintaining, and operating locks, dry docks, or other works to be conveyed to the United States free of cost, and of constructing, maintaining and operating dams for use in connection therewith, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of War may, in his discretion, cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of said land or easement, and it shall be the duty of the Attorney-General of the United States to institute and conduct such proceedings upon the request of the Secretary of War: *Provided*, That all expenses of said proceedings and any award that may be made thereunder shall be paid by the said person, company, or corporation, to secure which payment the Secretary of War may require the said person, company, or corporation to execute a proper bond in such amount as he may deem necessary before said proceedings are commenced. *Act of May 16, 1906 (34 Stat. 196), as amended by act of June 29, 1906 (34 Stat. 632), making appropriations for works on rivers and harbors.*

Provisions regulating improvements of navigable waters by persons or corporations are contained in 1560½, post.

1538. Sale of property acquired for river and harbor improvements.—That when any land or other property which has been heretofore or may be hereafter purchased or acquired for the improvement of rivers and harbors is no longer needed, or is no longer serviceable, it may be sold in such manner as the Secretary of War may direct, and the proceeds credited to the appropriation for the work for which it was purchased or acquired; and the Secretary of War may direct the transfer of any property employed in river and harbor works, and in such event the property so transferred shall be valued and credited to the project upon which it was theretofore used and charged to the project to which it shall be transferred. The Secretary may also direct a temporary transfer of any property employed in the improvement of rivers and harbors whenever, in his judgment, such transfer would secure efficient or economical results, and such adjustments in the way of charges and credits shall be made between the projects affected as may be equitable. *Sec. 5, act of June 13, 1902 (32 Stat. 373), making appropriations for works on rivers and harbors.*

1539. Dredging contracts.—That in all cases where the project for a work of river or harbor improvement, heretofore, herein, or hereafter authorized, provides for the construction or use of Government dredging plant, the Secretary of War may, in his discretion, have the work done by contract if reasonable prices can be obtained. *Sec. 3, act of Mar. 2, 1919 (40 Stat. 1287), making appropriations for works on rivers and harbors.*

1540. Hiring of dredging plants.— * * * Whenever it shall become, in the opinion of the Secretary of War, necessary or desirable to hire a dredging plant or plants for the performance of any of the public work carried on under his direction the said Secretary may, in his discretion, agree for the same, either in the manner now customary or on the basis of an equitable reimbursement for deterioration of plant when in use by the Government, and a reasonable percentage of the total cost of the work. *Sec. 5, act of Mar. 2, 1907 (34 Stat. 1119), making appropriations for works on rivers and harbors.*

Notes of Decisions.

Building or hiring dredges.—The words "is authorized" in the river and harbor act of June 13, 1902 (32 Stat. 342), which confers on the Secretary of War the power to purchase or build a dredge for use in harbor improvement and maintenance in Lake Erie, while equivalent to the word "may," are used in a mandatory sense and are binding upon the executive whose duty it is to carry them into effect. (1902) 24 Op. Atty. Gen. 504.

That Congress has in other instances made specific appropriations for dredging plants, can not be held to limit the meaning of the words "by contract or otherwise," in act of June 13, 1902, by restricting the Secretary to the hiring of a dredge as the only alternative of a contract, nor to forbid that officer from using such dredge on improvements other than those authorized by appropriations from which the moneys for its construction have been taken. (1904) 25 Op. Atty. Gen. 145.

1541. Dredging within harbor lines.—That no money appropriated for the improvement of rivers and harbors in this act or hereafter, shall be expended for dredging inside of harbor lines duly established. *Sec. 5, act of July 13, 1892 (27 Stat. 111), making appropriations for works on rivers and harbors.*

Notes of Decisions.

Expenditure of appropriations under local acts.—The act of June 3, 1896 (29 Stat. 202, 228), authorizing the Secretary of War to contract for the improvement of the Chicago River, "as far as may be permitted by existing docks and wharves," confines the improvements within existing docks and wharves. (1897) 21 Op. Atty. Gen. 471.

1542. Harbor lines established.—That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: *Provided*, That whenever the Secretary of War grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tide water displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tide-water channels between high and low water mark, to such an extent as to create a basin for as much tide water as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him. *Sec. 11, act of March 3, 1899 (30 Stat. 1151), making appropriations for works on rivers and harbors.*

Notes of Decisions.

Constitutionality. — In regulating commerce, Congress may establish harbor lines or limits beyond which deposits shall not be made or structures built in navigable waters, and it has acted within its constitutional power in authorizing the secretary of war to fix the lines. Philadelphia Co. *v.* Stimson (1912), 32 Sup. Ct. 340, 223 U. S. 605, 56 L. Ed. 570.

The power of Congress over navigable waters has been exercised by the enactment of this section. Greenleaf-Johnson Lumber Co. *v.* Garrison (1915), 35 Sup. Ct. 551, 237 U. S. 251, 59 L. Ed. 939.

Congress has the power to establish harbor lines or modify existing ones in navigable waters within the limits of a State, although such State has already established such harbor lines. The power to establish harbor lines in a given harbor is a continuing power, and may be exercised as often as the needs of commerce require it. (1987) 22 Op. Atty. Gen. 501.

Power to establish or modify harbor lines.—Authority of Secretary of War to establish harbor lines may be exercised to widen the Elizabeth River to permit mooring of war vessels in front of Norfolk Navy Yard. Greenleaf-Johnson Lumber Co. *v.* Garrison (1915), 35 Sup. Ct. 551, 237 U. S. 251, 59 L. Ed. 939, affirming decree (1914), 215 Fed. 576, 131 C. C. A. 644.

The Secretary of War is authorized to establish harbor lines when the interests of commerce require them. And he has power to establish a harbor line for the Tacoma harbor. (1899) 22 Op. Atty. Gen. 501.

Act of Secretary of War in fixing a harbor line in an island in a navigable river outside the high-water mark does not prevent him from subsequently changing the lines to coincide with the actual high-water line. Philadelphia Co. *v.* Stimson (1912), 32 Sup. Ct. 340, 223 U. S. 605, 56 L. Ed. 570, affirming decree Same *v.* Dickinson (1909), 33 App. D. C. 338.

That harbor lines have once been established is no bar to the exercise of the same power as often as the needs of commerce require. And the Secretary of War has power to modify the existing one in the harbor of Seattle. (1899), 22 Op. Atty. Gen. 501.

Location of harbor lines.—Harbor lines do not necessarily have to be laid in deep water. State *v.* Sturtevant (1914), 138 P. 650, 76 Wash. 158, denying rehearing (1913) 135 P. 1035, 76 Wash. 158.

Harbor lines defined.—See Engs *v.* Peckham (1875), 11 R. I. 210.

Conclusiveness of action of Secretary of War.—The determination of whether establishment of a harbor line is essential to preservation and protection of a harbor rests, under sec. 12 of the act of September 19, 1890 (26 Stat. 453), in the discretion of the Secretary of War, and his judgment in the matter is final and conclusive until subsequently modified by himself (1894) 20 Op. Atty. Gen. 740.

Protection of property rights.—Action of State in fixing lines of ordinary high and low water in certain rivers held to give riparian owners no rights which will prevent Congress from fixing harbor lines in accordance with the high-water mark as changed by the wearing away of banks in the course of years. One whose property rights have been invaded in fixing harbor lines may sue to enjoin the Secretary of War from causing criminal proceedings to be brought against him, under this section and 1590, post. But lawful building of a dam by the United States to increase depth of water in a harbor in a navigable river, and thereby submerging an island to a greater extent than before, gives subsequent purchaser no right to relief in an action against the Secretary of War. Philadelphia Co. *v.* Stimson (1912), 32 Sup. Ct. 340, 223 U. S. 605, 56 L. Ed. 570, affirming decree. Same *v.* Dickinson (1909), 33 App. D. C. 338.

Jurisdiction of courts.—The courts of District of Columbia because they have jurisdiction over the person of the Secretary of War, have not, by reason of that fact, the right to control his action by injunction, in a case where the effect of his action is to deny the title of the complainant to submerged land in a navigable river in Pennsylvania, outside of harbor lines designated by him under supposed authority of an act of Congress; and, where the question of title to the land is necessarily the fundamental question involved, such question should be tried in the courts of that State. Philadelphia Co. *v.* Dickinson (1909), 33 App. D. C. 338.

Establishment of harbor lines as affecting right of Government to deposit materials.—The establishment of harbor lines on the Hudson River from Troy to below New Baltimore, does not preclude the Government, in the prosecution of improvements in said river in the interest of commerce and navigation, from depositing the excavated material in the areas of shoal water behind and shoreward of the said lines without the consent of the owners and without making compensation. (1910) 28 Op. Atty. Gen. 433.

As affecting power of States.—The establishment of harbor lines did not operate to destroy all State power concerning structures in navigable waters within its border,

or to automatically destroy all vested property rights, though acquired under State authority prior to this section. Gring v. Ives (1912), 32 Sup. Ct. 157, 222 U. S. 365, 56 L. Ed. 235.

The Federal statutes regulating harbors used in interstate commerce are merely restrictive of certain acts, and on their face do not prevent the States from exercising ordinary police control over the conduct of their citizens, or the erection of structures within their limits which would obstruct an inland navigable harbor. City of Milwaukee v. Gimbel Bros. (1906), 110 N. W. 7, 130 Wis. 31.

As affecting right to extend land and wharves.—The extension of wharves beyond harbor lines established by local law, in navigable waters of the United States wholly within the limits of a State, can not be justified by relocation of harbor lines by the Secretary of War acting under the authority of sec. 12, river and harbor act, Sept. 19, 1890 (25 Stat. 409, 425). Montgomery v. Portland (1903), 23 Sup. Ct. 735, 737, 190 U. S. 89, 47 L. Ed. 965, affirming judgment City of Portland v. Montgomery (1900), 62 P. 755, 38 Or. 215 [C. S. p. 12203].

Remedy for establishment of harbor lines in violation of law. If the laying of harbor lines in navigable waters by a commission under Const. Wash. art. 15, is in violation of the acts of Congress concerning navigation and harbor lines the United States, by its proper officers, alone can interfere. Harbor Line Com'rs v. State (1891), 2 Wash. St. 530, 27 Pac. 350; State v. Harbor Line Com'rs (1892), 4 Wash. St. 816, 30 Pac. 734.

1543. Channel depths and dimensions defined.—That in the preparation of projects under this and subsequent river and harbor Acts, unless otherwise expressed, the channel depths referred to shall be understood to signify the depth at mean low water in tidal waters tributary to the Atlantic and Gulf coasts and at mean lower low water in tidal waters tributary to the Pacific coast and the mean depth for a continuous period of fifteen days of the lowest water in the navigation season of any year in rivers and nontidal channels, and the channel dimensions specified shall be understood to admit of such increase at the entrances, bends, sidings, and turning places as may be necessary to allow of the free movement of boats. *Sec. 5, act of March 4, 1915 (38 Stat. 1053).*

1544. Anchorage grounds established. That the Secretary of War is hereby authorized, empowered, and directed to define and establish anchorage grounds for vessels in all harbors, rivers, bays, and other navigable waters of the United States whenever it is manifest to the said Secretary that the maritime or commercial interests of the United States require such anchorage grounds for safe navigation and the establishment of such anchorage grounds shall have been recommended by the Chief of Engineers, and to adopt suitable rules and regulations in relation thereto; and such rules and regulations shall be enforced by the Revenue-Cutter Service under the direction of the Secretary of the Treasury: *Provided*, That at ports or places where there is no revenue cutter available such rules and regulations may be enforced by the Chief of Engineers under the direction of the Secretary of War. In the event of the violation of any such rules and regulations by the owner, master, or person in charge of any vessel, such owner, master, or person in charge of such vessel shall be liable to a penalty of $100; and the said vessel may be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel for the recovery of the same in any United States district court for the district within which such vessel may be and in the name of the officer designated by the Secretary of War. *Sec. 7, act of March 4, 1915 (38 Stat. 1053).*

1545. Shipping statistics.—That owners, agents, masters, and clerks of vessels arriving at or departing from localities where works of river and harbor improvement are carried on shall furnish, on application of the persons in local charge of the works, a comprehensive statement of vessels, passengers, freight, and tonnage. *Sec. 1, act of Feb. 21, 1891 (26 Stat. 766).*

That every person or persons offending against the provisions of this act shall, for each and every offense, be liable to a fine of one hundred dollars, or imprisonment not exceeding two months, to be enforced in any district court in the United States within whose territorial jurisdiction such offense may have been committed. *Sec. 2, act of Feb. 21, 1891 (26 Stat. 766).*

1546. Freight statistics.—In the collection of statistics relating to traffic, the Corps of Engineers is directed to adopt a uniform system of classification for freight, and upon rivers or inland waterways to collate ton-mileage statistics as far as practicable. *Sec. 1, act of July 25, 1912 (37 Stat. 223).*

1547. Refuse in navigable waters.—That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful. *Sec. 13, act of March 3, 1899 (30 Stat. 1152).*

Notes of Decisions.

Constitutionality of statute.—This section was enacted in the exercise of the police power of the Government. Scow No. 36 (1906), 144 Fed. 932, 75 C. C. A. 572. And is within the constitutional power of Congress. The Scow No. 9 (D. C. 1907), 152 Fed. 548.

Congress has power to regulate and improve harbors of the navigable waters of the United States, and this carries with it the right to deposit the material removed in making improvements in any other part of the harbors or navigable waters or other place within its control. (1899) 22 Op. Atty. Gen. 646.

Obstructions to navigation.—Where, by reason of the plastic nature of the substratum of clay under the right of way of a railroad located some distance from a *navigable* river, the track of the road settled, and the additional weight of an embankment built by the company forced the clay into the bed of the river, causing a bar, which obstructed navigation, such bar is the direct result of the building of the embankment, and constitutes a public nuisance, for the creation and maintenance of which the company is liable, unless the obstruction was authorized by Congress, and such authority can not be implied from an act authorizing the building of the road where it was located. Northern Pac. Ry. Co. *v.* U. S. (1900), 104 Fed. 691, 44 C. C. A. 135, 59 L. R. A. 80.

Sec. 7, act of Sept. 19, 1890, forbidding the excavation and filling, the altering and modifying of the course, location, and capacity of the channel of navigable waters, refers to such permanent construction as tends to obstruct navigation, the building

of which must, by the provisions of such section, have the approval and authorization of the Secretary of War, and not to such alteration of the channel as would result from a violation of section 6, prohibiting the casting into any navigable waters of the United States from any ship any substance tending to obstruct navigation. U. S. v. David Burns and Gideon Burns (C. C. 1893), 54 Fed. 351.

Act 1890, making it an offense to obstruct a navigable stream, is directed against casting into or constructing upon the beds thereof anything creating obstructions more or less permanent in character, and does not apply to the floating of logs or rafts which may temporarily obstruct the surface of the stream. U. S. v. Marthinson (D. C. 1893), 58 Fed. 765.

Though the Attorney General can not determine without considering questions of fact whether or not a bar in Flushing Creek formed opposite the mouth of a sewer and offering an obstruction to navigation is such a case as comes within the exception in sec. 6, act of Aug. 18, 1894, the Secretary of War is not precluded from taking such action inviting the attention of the town authorities of Flushing to the matter as may be advisable. (1897) 21 Op. Atty. Gen. 594.

A municipal corporation, given the right to discharge its refuse matter into an adjacent navigable body of water, must exercise it so as not to create a nuisance interfering with navigation or the enjoyment of private docks used for loading and unloading merchandise. Peck v. Michigan City (1898), 49 N. E. 800, 149 Ind. 670.

It is not prima facie a nuisance to cast garbage in one of the Great Lakes 15 miles from shore. Kuehn v. City of Milwaukee (1896), 92 Wis. 263, 65 N. W. 1030.

Designation of grounds for depositing refuse.—It is the duty of the Secretary of War to act on a petition to have designated the portion of a river within which refuse matter may be discharged, in accordance with sec. 6, act of Aug. 18, 1894 (28 Stat. 363), superseded by this section, though the navigability of the river will not be affected. He should be governed only by considerations affecting the navigation of the river, or which may affect future navigation. The discretion given him is very broad, and no principles governing it are declared. There is no appeal from his action. These facts impose the obligation of a careful scrutiny of the considerations which should control his judgment. (1896) 21 Op. Atty. Gen. 305.

The authorities of the city of Chicago have no legal power to prohibit the Government contractors from dumping material dredged from the harbor at Chicago within the limits selected and designated by the Secretary of War, in accordance with the authority conferred upon him by law. (1899) 22 Op. Atty. Gen. 646.

Discharge of contractor.—The Secretary of War has no authority to discharge a dredging company from the performance of its contract with the United States to remove and deposit dredged matter in such places as the United States engineer officer shall direct, because of unforeseen difficulties in selling or even in disposing of the material excavated, which the officers of the engineer corps had represented could be disposed of at a stated price per cubic yard. (1882) 17 Op. Atty. Gen. 368.

Compensation for consequential damages to riparian owner.—Where dredged material in the making of an improvement in the Hudson River under contract with the United States Government is deposited along the shore on lands under water and adjacent to uplands, the owner of such lands is not entitled to compensation for consequential damages to riparian and water rights resulting therefrom. Slingerland v. International Contracting Co. (1899), 60 N. Y. S. 12, 43 App. Div. 215; judgment affirmed (1901), 61 N. E. 995, 169 N. Y. 60, 56 L. R. A. 494.

Damages caused by obstructions.—Evidence considered, and held insufficient to sustain the claim of a libellant that the grounding of a coal barge while being towed in a canal was caused by an obstruction by material deposited and left in the bottom by a dredging company. Susquehanna Coal Co. v. Eastern Dredging Co. (D. C. 1908), 200 Fed. 817.

A dredging company, which left the channel of a river temporarily obstructed by loose rock, without marking the place or giving notice of the obstruction, held liable for the grounding of a barge thereon. Consolidated Coal Co. v. Knickerbocker Steam Towage Co. (D. C. 1912), 200 Fed. 840.

Injunctive relief.—The threatened daily transportation by the sanitary district of Chicago, by artificial means and through an unnatural channel, of large quantities of sewage and of accumulated deposits which will poison the water supply of inhabitants of the State of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi River which lies within its territory, entitles that State to maintain a suit for equitable relief, in advance of any actual injury sustained thereby. State of Missouri v. State of Illinois (1901), 21 Sup. Ct. 331, 180 U. S. 208, 45 L. Ed. 497.

The discharge into the Mississippi River, through an artificial drainage canal, of the sewage of Chicago, mixed with a large volume of pure water from Lake Michigan,

will not be enjoined by the Federal Supreme Court on complaint by the State of Missouri that the result of such action is to poison the water supply of its inhabitants, where the evidence, though disclosing an increase in the deaths from typhoid fever in St. Louis, leaves it doubtful whether the typhoid bacillus can and does survive the journey and reach the intake of St. Louis in the Mississippi, and shows other possible sources of infection in the discharge of sewage above the St. Louis intake from other towns and cities, some of which are situated in Missouri. State of Missouri *v.* State of Illinois (1906), 26 Sup. Ct. 268, 200 U. S. 496, 50 L. Ed. 572.

Complainant established a pulp mill on the Potomac River a few miles below an ore bank which had been worked for many years, and for the last few with washers to free the ore from the clay; the waste water being run into settling pools and allowed to clear before being returned to the river. Subsequently defendant acquired the ore bank, greatly enlarged the works, and ran the waste water from the washers directly into the river, so discoloring the water with clay and ochre that complainant was obliged to stop its mill for about one-half the time. Held that, in the absence of proof by defendant that complainant could avoid the injury at a reasonable expense, the latter was entitled to an injunction restraining defendant from polluting the stream; it further appearing that he could provide settling pools, as formerly done, for a moderate outlay. Thropp *v.* Harpers Ferry Paper Co. (1902), 142 Fed. 690, 74 C. C. A. 22.

Liability to penalties.—To render a vessel subject to penalties it is not essential that some person or corporation should have previously been convicted thereunder. The Scow No. 9 (D. C. 1907), 152 Fed. 548.

Criminal prosecution.—A criminal prosecution for the obstruction of navigable waters of the United States under secs. 6, 7, 10, act of Sept. 19, 1890 (26 Stat. 426), may be maintained, though neither the officers and agents of the United States in charge of works for the improvement of said waters, nor the collectors of customs or other revenue officers, have given information to the district attorney as provided in 1591, post. U. S. *v.* David Burns and Gideon Burns (C. C. 1893), 54 Fed. 351.

1548. Regulation of the deposit of refuse in navigable waters.—That the Secretary of War is hereby authorized and empowered to prescribe regulations to govern the transportation and dumping into any navigable water, or waters adjacent thereto, of dredgings, earth, garbage, and other refuse materials of every kind or description, whenever in his judgment such regulations are required in the interest of navigation. Such regulations shall be posted in conspicuous and appropriate places for the information of the public; and every person or corporation which shall violate the said regulations, or any of them, shall be deemed guilty of a misdemeanor and shall be subject to the penalties prescribed in section sixteen of the river and harbor Act of March third, eighteen hundred and ninety-nine, for violation of the provisions of section thirteen of the said Act: *Provided*, That any regulations made in pursuance hereof may be enforced as provided in section seventeen of the aforesaid Act of March third, eighteen hundred and ninety-nine, the provisions whereof are hereby made applicable to the said regulations: *Provided further*, That this section shall not apply to any waters within the jurisdictional boundaries of any State which are now or may hereafter be used for the cultivation of oysters under the laws of such State, except navigable channels which have been or may hereafter be improved by the United States, or to be designated as navigable channels by competent authority, and in making such improvements of channels, the material dredged shall not be deposited upon any ground in use in accordance with the laws of such State for the cultivation of oysters, except in compliance with said laws: *And provided further*, That any expense necessary in executing this section may be paid from funds available for the improvement of the harbor or waterway, for which regulations may be prescribed, and in case no such funds are available the said expense may be paid from ap-

propriations made by Congress for examinations, surveys, and contingencies of rivers and harbors. *Sec. 4, act of Mar. 3, 1905 (33 Stat. 1147).*

Secs. 13, 16, 17, act of Mar. 3, 1899, mentioned in this section, are set forth, 1547, ante, and 1589, 1590, post.

Notes of Decisions.

Permit by Secretary of War.—A letter from the Secretary of War, informing persons that there is no objection on the part of that department to their dredging and boring wells for the purpose of developing petroleum in the Pacific Ocean, below low-water mark, provided the operations are conducted in such manner as not to produce shoals on the water front or otherwise interfere with navigation, and that, if formal permits to erect wharves and trestles are desired, it will be necessary to furnish drawings showing plan and location of structures, constitutes no authority to the recipients to erect such obstructions in front of the land of a littoral proprietor below ordinary high water, thereby interfering with his access to and use of the ocean highway. San Francisco Sav. Union v. R. G. R. Petroleum & Mining Co. (1904), 77 P. 823, 144 Cal. 134, 66 L. R. A. 242, 103 Am. St. Rep. 72.

Public nuisance.—Filling up the channels and harbors of a navigable river by the deposit of refuse therein is a public nuisance, which no length of time can legalize. City of Ogdensburg v. Lovejoy (N. Y. 1873), 2 Thomp. & C. 83; Id. (1874) 58 N. Y. 662.

1549. Débris deposited in harbors.—That in places where harbor-lines have not been established, and where deposits of débris of mines or stamp works can be made without injury to navigation, within lines to be established by the Secretary of War, said officer may, and is hereby authorized to, cause such lines to be established; and within such lines such deposits may be made, under regulations to be from time to time prescribed by him. *Sec. 2, act of Aug. 5, 1886 (24 Stat. 329.)*

1550. Floating timber in navigable waters.—That the prohibition contained in section fifteen of the river and harbor Act, approved March third, eighteen hundred and ninety-nine, against floating loose timber and logs, or sack rafts, so called, of timber and logs in streams or channels actually navigated by steamboats, shall not apply to any navigable river or waterway of the United States or any part thereof whereon the floating of loose timber and logs and sack rafts of timber and logs is the principal method of navigation. But such method of navigation on such river or waterway or part thereof shall be subject to the rules and regulations prescribed by the Secretary of War as hereinafter provided. *Sec. 1, act of May 9, 1900 (31 Stat. 172).*

Sec. 15, act of Mar. 3, 1899, mentioned in this section, is set forth 1557, post.

Notes of Decisions.

Construction in general. See The Mary (D. C. 1903), 123 Fed. 609, 613.

Floating timber in absence of statute. — The public has a right to float logs on streams which in their natural state are capable of being so used. Heerman v. Beef Slough Mfg., Booming, Log Driving & Transportation Co. (C. C. 1880), 1 Fed. 145; Buckl v. Cone (1889), 25 Fla. 1, 6 South. 160; Goodlin's Ex'rs v. Kentucky Lumber Co. (1890), 90 Ky. 625, 14 S. W. 775; [C. S. p. 12223].

Navigable streams are as much dedicated to the use of rafts as to the use of other vessels. Rafts are included in the general term "vessels." If the privilege of use be abused, the persons so abusing the use are liable for any damages they may occasion. The Marthinson (D. C. 1895), 58 Fed. 765; The Mary (D. C. 1903), 123 Fed. 609.

The use of the Chippewa river by the public as a highway for the transportation of logs and lumber is a right common to all, recognized and protected by the municipal law, and such right must continue so long as the public have any need of its exercise, unless changed or abrogated by the legislature of the State or by Congress. Heerman v. Beef Slough Manufacturing, Booming, Log Driving & Transportation Co. (C. C. 1880), 1 F. 145, 163; Id. (C. C. 1878), Fed. Cas. No. 6,320.

1551. Regulation of floating timber.—That the Secretary of War shall have power, and he is hereby authorized and directed, within the shortest practicable time after the passage hereof, to prescribe rules and regulations, which he may at any time modify, to govern and regulate the floating of loose timber and logs, and sack rafts, (so called) of timber and logs and other methods of navigation on the streams and waterways, or any thereof, of the character, as to navigation, in section one hereof described. The said rules and regulations shall be so framed as to equitably adjust conflicting interests between the different methods or forms of navigation; and the said rules and regulations shall be published at least once in such newspaper or newspapers of general circulation as in the opinion of the Secretary of War shall be best adapted to give notice of said rules and regulations to persons affected thereby and locally interested therein. And all modifications of said rules and regulations shall be similarly published. And such rules and regulations when so prescribed and published as to any such stream or waterway shall have the force of law, and any violation thereof shall be a misdemeanor, and every person convicted of such violation shall be punished by a fine of not exceeding two thousand five hundred dollars nor less than five hundred dollars, or by imprisonment (in case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That the proper action to enforce the provisions of this section may be commenced before any commissioner, judge, or court of the United States, and such commissioner, judge or court shall proceed in respect thereto as authorized by law in the case of crimes or misdemeanors committed against the United States. *Sec. 2, act of May 9, 1900 (31 Stat. 172).*

Notes of Decisions.

Construction in general.—Rules promulgated under this section are in aid of navigation and not for the protection of the owners of the banks of the rivers. Johnson *v.* Irvine Lumber Co. (Wash. 1914), 140 Pac. 577.

See The Mary (D. C. 1903), 123 Fed. 609, defining sack rafts.

1552. Navigable rivers within public lands to be public highways.—All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both. *R. S. 2476.*

1553. Regulation of the use of navigable waters.—That it shall be the duty of the Secretary of War to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department. Such regulations shall be posted, in conspicuous and appropriate places, for the information of the public; and every person and every corporation which shall violate such regulations shall be deemed guilty of a misdemeanor and, on conviction thereof in any district court of the United States within whose territorial jurisdiction such offense may have been committed, shall be punished by a fine not exceeding $500, or by imprisonment (in the case of a natural person) not exceeding six months, in the discretion of the court. *Secs. 4, act of Aug. 18, 1894 (28 Stat. 362), as amended by sec. 7, act of Aug. 8, 1917 (40 Stat. 266).*

That any regulations heretofore or hereafter prescribed by the Secretary of War in pursuance of the fourth and fifth sections of the river and harbor Act of August eighteenth, eighteen hundred and ninety-four, and any regulations hereafter prescribed in pursuance of the aforesaid section four as amended by section eleven of this Act, may be enforced as provided in section seventeen of the river and harbor Act of March third, eighteen hundred and ninety-nine, the provisions whereof are hereby made applicable to the said regulations. *Sec. 6, act of June 13, 1902 (32 Stat. 374).*

That the operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of War. Such rules and regulations may include the maintenance and operation by such licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 25 hereof. *Sec. 18, act of June 10, 1920 (41 Stat. 1073).*

The consent of Congress was given to the construction of a ship canal along the Government right of way connecting the waters of Puget Sound with Lake Washington, said canal, when completed, to be turned over to the United States, by act of June 11, 1906 (34 Stat. 232).

Provisions for the acquisition of lands, etc., between the present Saint Marys Falls Ship Canal and the international boundary line at Sault Sainte Marie, Mich., for purposes of navigation, etc., of said waters, etc., were made by sec. 11, act of Mar. 3, 1909 (35 Stat. 820).

Provisions for conservation of the right to the flow of water and riparian, water power, and other rights in the Saint Marys River, for purposes of navigation and incidentally for development of the water power, were added, by sec. 12, act of Mar. 3, 1909, to provisions of sec. 1, act of June 13, 1902 (32 Stat. 361; 35 Stat. 821).

Sec. 5, act of Aug. 18, 1894, mentioned in this section, authorizing the Secretary of War to prescribe regulations for drawbridges over navigable waters, and prescribing a penalty for violation thereof, is set forth 1571, post.

Sec. 17, act of Mar. 3, 1899, also mentioned in this section, prescribed the duties of the Department of Justice in enforcing regulations relating to navigable waters, authorized by several sections of said act (30 Stat. 1153).

Notes of Decisions.

Validity of statute.—This section is not invalid as a delegation of legislative power. U. S. *v.* Ormsbee (D. C. 1896), 74 Fed. 207; U. S. *v.* Moody (D. C. 1908), 164 Fed. 269.

Prohibited uses of canals of United States.—Regulations made pursuant to this section have the force of law, so that persons violating the same by drawing off water from a canal are subject to criminal punishment under the act. U. S. *v.* Ormsbee (D. C. 1896), 74 Fed. 207.

This section impliedly forbids the use of canals owned by the United States, under penalty of criminal prosecution, except in compliance with rules and regulations made by the Secretary of War. U. S. *v.* Moody (D. C. 1908), 164 Fed. 269.

It is unnecessary to set out regulations made by an executive department in pursuance of authority delegated by Congress in an indictment for their violation or to specify the particular rule violated. Id.

Control and supervision by Secretary of War.—The control and supervision of the navigable waters of the United States is placed in the Secretary of War. (1897) 21 Op. Atty. Gen. 518.

Navigability in general.—A stream running into the sea, and in which the tide ebbs and flows, is "navigable water." U. S. *v.* President, etc., of Jamaica & R. Turnpike Road (C. C. 1910), 183 Fed. 598; decree reversed (C. C. A. 1913), 204 Fed. 759; [C. S. p. 12152].

But tidal channels are navigable in law only when they are navigable in fact for trade and commerce by craft of some kind. State *v.* Pacific Guano Co. (1884), 22 S. C. 50; rehearing denied (1886), 24 S. C. 598. And the doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or, indeed, any test at all, of the navigability of waters. The Daniel Ball (1870), 77 U. S. (10 Wall.) 557, 19 L. Ed. 999; [C. S. p. 12152].

A river which is navigable in fact is navigable in law. Genessee Chief (1851), 12 How. 443, 13 L. Ed. 1058 [C. S. p. 12153].

Diana Shooting Club *v.* Husting (1914), 145 N. W. 816, 156 Wis. 261.

In order to be a navigable stream it is not necessary that the waters shall be deep enough to admit the passage of boats at all portions of the stream. St. Anthony Falls Water Power Co. *v.* Board of Water Commissioners of City of St. Paul, Minn. (1897), 18 Sup. Ct. 157, 168 U. S. 349, 42 L. Ed. 497.

As to navigability, see Charleston & S. Ry. Co. *v.* Johnson (1884), 73 Ga. 306 [C. S. p. 12153]; State *v.* West Tennessee Land Co. (1913), 158 S. W. 746, 127 Tenn. 575, Ann. Cas. 1914B, 1043.

Streams capable of being used for the purpose of carrying boats, passengers, freight, floating logs, timber, wood, or any other product to market are navigable. The Daniel Ball (1870), 77 U. S. (10 Wall.) 557, 19 L. Ed. 999 [C. S. p. 12153].

Judicial notice of navigability.—The courts will take notice of the navigability of streams. King *v.* American Transp. Co. (C. C. 1859), Fed. Cas. No. 7,787; Neaderhouser *v.* State (1867), 28 Ind. 257; Wood *v.* Fowler (1882), 26 Kan. 682, 40 Am. Rep. 330. But Federal courts can not take judicial notice that a stream is navigable because of an apparently irregular traffic in times of high water, employing Indian canoes and small steamboats and gasoline launches, in face of a declaration by the legislature that such stream is not navigable. Donnelly *v.* U. S. (1913), 33 Sup. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, denying rehearing (1913), 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710. Nor can a court take judicial notice of the character of rivers which are in fact navigable for portions of the year, but their capacity is not historical or traditional. As to geographical and similar facts, not historical and traditional—as here, the capacity of Five Mile Run, in Cattaraugus County, for navigation, etc.—the court will not take judicial notice. Buffalo Pipe Line Co. *v* New York, L. E. & W. R. Co. (1880), 10 Abb. N. C., 107. See as to Straight Creek, in Bell County, Hoskins *v.* Archer (1885), 6 Ky. Law Rep. 671.

Law determining navigability.—What shall be deemed a navigable stream within the local rules of property in the bed of a stream is for the determination of the several States. Donnelly *v.* U. S. (1913), 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710; rehearing denied (1913), 33 Sup. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035.

Presumptions as to navigability.—A stream will not be presumed to be navigable. Leihy *v.* Ashland Lumber Co. (1880), 49 Wis. 165, 5 N. W. 471.

That a stream was not meandered by the United States surveyors or their deputies raises the presumption that it is not navigable. Clute *v.* Briggs (1868), 22 Wis. 607.

A stream neither meandered nor declared navigable by the Legislature is prima facie nonnavigable. Allaby *v.* Mauston Electric Service Co. (Wis. 1908), 116 N. W. 4; contra, Sumner Lumber & Shingle Co. *v.* Pacific Coast Power Co. (1913), 131 P. 220, 72 Wash. 631.

Evidence of navigability.—See Idaho Northern R. Co. *v.* Post Falls Lumber Co. (1911) 119 P. 1098, 20 Idaho 695, 38 L. R. A. (N. S.) 114; People *v.* Economy Light & Power Co. (1909) 89 N. E. 760, 241 Ill. 290; Holden *v.* Robinson Mfg. Co. (1876), 65 Me. 215; Burroughs *v.* Whitwam (1886), 59 Mich. 279, 26 N. W. 491; State *v.* Twiford (1904), 48 S. E. 586, 136 N. C. 603.

Question for court or jury as to navigability.—Whether a body of water is navigable is a question of fact for the jury. Jeremy *v.* Elwell (1890), 5 Ohio Cir. Ct. R. 379; Jones *v.* Johnson (1894), 6 Tex. Civ. App. 262, 25 S. W. 650 [C. S. p. 12155].

Navigable waters as common highways.—It is fundamental law throughout the United States that all navigable waters are common highways, forever free to the use of all citizens of the United States, without any tax, impost, or duty therefor. Leverich *v.* City of Mobile (C. C. 1867), 110 Fed. 170.

Waters navigable.—An estuary which was not a natural harbor, but has been made a harbor by Government works, is navigable. City of Oakland *v.* Oakland Water-Front Co. (1897), 50 P. 277, 118 Cal. 160. [C. S. p. 12155.]

Waters held not navigable.—[C. S. p. 12156.]

It does not follow that, because a stream or body of water was once navigable, it has

continued and remains so; and whenever, from any natural or other cause its practical utility as a means of transportation has been permanently destroyed, it should cease to be classed among those waters that are charged with a public use. Harrison v. Fite (1906), 148 Fed. 781, 78 C. C. A. 447.

1554. Regulations for the use of navigable waters near target practice.—That in the interest of the national defense, and for the better protection of life and property on said waters, the Secretary of War is hereby authorized and empowered to prescribe such regulations as he may deem best for the use and navigation of any portion or area of the navigable waters of the United States or waters under the jurisdiction of the United States endangered or likely to be endangered by Coast Artillery fire in target practice or otherwise, or by the proving operations of the Government ordnance proving grounds at Sandy Hook, New Jersey, or at any Government ordnance proving ground that may be established elsewhere on or near such waters, and of any portion or area of said waters occupied by submarine mines, mine fields, submarine cables, or other material and accessories pertaining to seacoast fortifications, or by any plant or facility engaged in the execution of any public project of river and harbor improvement; and the said Secretary shall have like power to regulate the transportation of explosives upon any of said waters: * * * *Sec. 1, chap. XIX, act of July 9, 1918 (40 Stat. 892).*

That the regulations made the Secretary of War pursuant to this Chapter shall be posted in conspicuous and appropriate places, designated by him, for the information of the public; and every person who and every corporation which shall willfully violate any regulations made by the said Secretary pursuant to this Chapter shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine not exceeding $500, or by imprisonment (in the case of a natural person) not exceeding six months, in the discretion of the court. *Sec. 3, chap. XIX, act of July 9, 1918 (40 Stat. 893).*

1555. Protection of the food fishing industry.— * * * the authority hereby conferred shall be so exercised as not unreasonably to interfere with or restrict the food fishing industry, and the regulations prescribed in pursuance hereof shall provide for the use of such waters by food fishermen operating under permits granted by the War Department. *Sec. 1, chap. XIX, act of July 9, 1918 (40 Stat. 892), making appropriations for the support of the Army.*

1556. Vessels employed to regulate the use of waters near target practice.—That to enforce the regulations prescribed pursuant to this chapter, the Secretary of War may detail any public vessel in the service of the War Department, or, upon the request of the Secretary of War, the head of any other department may enforce, and the head of any such department is hereby authorized to enforce, such regulations by mean of any public vessel of such department. *Sec. 2, chap. XIX, act of July 9, 1918 (40 Stat. 893), making appropriations for the support of the Army.*

1557. Obstructions in navigable channels.—That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation,

And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for. *Sec. 15, act of March 3, 1899 (30 Stat. 1152).*

Notes of Decisions.

Construction in general.—This act, being in aid of commerce and navigation, should receive a sensible construction to further that end; so far as concerns any liability in case of collision, it probably only emphasizes the previously existing maritime law. The Caldy (D. C. 1903), 123 Fed. 802, 804; affirmed (1907), 153 Fed. 837, 83 C. C. A. 19.

While this section was not intended to absolutely prohibit the anchoring in navigable channels, it makes it unlawful whenever the result is to obstruct other vessels in passing to such extent as to make such passing a dangerous maneuver; and the fact that other vessels have succeeded in passing one so anchored in safety is not proof that her anchorage was not in violation of the statute, or that she was not in fault for a collision with another vessel which was attempting to pass. The Caldy (1907), 153 Fed. 837, 83 C. C. A. 19, affirming decree (D. C. 1903), 123 Fed. 802. It places duty on the owner, and no one else, and he can not shift the responsibility for an injury to another vessel resulting from his failure to perform it upon tugs which caused the wreck by their fault, when he had notice of the situation in ample time to have performed the duty before damage resulted. The Anna M. Fahy (1907), 153 Fed. 866, 83 C. C. A. 48. It does not apply to vessels anchored in a bay where there is navigable water 4 miles in width, though they are in the usual course of passing vessels. The Northern Queen (D. C. 1902), 117 Fed. 906. It was not intended to prevent the aiding of a vessel grounded or in difficulty, even if it involves the temporary obstruction of a channel. The Waverley (D. C. 1907), 155 Fed. 436.

An ocean-going vessel may lawfully lie at anchor in the nighttime in the deep channel of a navigable river if not so placed as to prevent or obstruct the passage of other vessels, in violation of this section. The Europe (1911), 190 Fed. 475, 111 C. C. A. 307.

This section should be construed and enforced strictly in the interest of safe navigation, the duty being not negatively, but affirmatively and positively, imposed on vessels coming to anchor in navigable channels to see that they do not under any circumstances, accidents excepted, prevent or obstruct the passage of other vessels. The Margaret J. Sanford (D. C. 1913), 203 Fed. 331; The Pocahontas (D. C. 1914), 217 Fed. 135.

Meaning of words or clauses.—Respondent, a coal company, having in its possession a loaded coal flat moored to its float in the Allegheny River in Pittsburgh, with the right to retain it until it was unloaded, cast it loose during a flood to avoid injury to its float and other vessels, and it sank some distance below. The place was not marked, and some three weeks later libelant's vessel ran into it and was injured. Held, that respondent stood in the place of the owner within this section. Second Pool Coal Co. *v.* People's Coal Co. (1911), 188 Fed. 892, 110 C. C. A. 526, affirming judgment People's Coal Co. *v.* Second Pool Coal Co. (D. C. 1910), 181 Fed. 609; writ of certiorari denied (1911), 32 Sup. Ct. 526, 223 U. S. 727, 56 L. Ed. 632.

The words "prevent or obstruct" are positive words, indicative of limited restraint and of legislative intent not to interfere with the right use of waterways by imposing an absolute or unreasonable prohibition. The Europe (1911), 190 Fed. 475, 111 C. C. A. 307.

A log raft is a "vessel." A raft of logs held not a "sack raft." The Mary (D. C. 1903), 123 Fed. 609, 613. See The City of Birmingham (1905), 138 Fed. 555, 71 C. C. A. 115, and The Belfast (D. C. 1914), 226 Fed. 362 defining an obstruction.

Superseding State legislation.—[C. S. p. 12212.]

Care required in the anchorage of vessels.—The precautions taken by a vessel anchoring in a dangerous position should be commensurate with the perils assumed. The John H. Starin (1903), 122 Fed. 236, 58 C. C. A. 600; writ of certiorari denied (1903), 23 Sup. Ct. 854, 190 U. S. 559, 47

L. Ed. 1184; The City of Birmingham (1905), 138 Fed. 555, 71 C. C. A. 115; The Europe (D. C. 1909), 175 Fed. 598; The Director (D. C. 1910), 180 Fed. 606.

Vessels mooring, or anchoring, especially in a busy harbor, should do so having regard to the fact that others have the right to navigate the waters; and this obligation should be measured by the increased risk arising from the circumstances of the particular case. The Washington (D. C. 1910), 182 Fed. 885.

The duty is imposed on vessels coming to anchor in navigable channels to see that they do not under any circumstances, accidents excepted, prevent or obstruct the passage of other vessels. The Pocohontas (D. C. 1914), 217 Fed. 135.

A tug and an anchored steamship both held in fault for collision in North River at night between a barge in the tow of the tug and the steamship; the tug for careless navigation, and the steamship for anchoring so that she swung into the fairway. Id.; [C. S. p. 12212].

Vessels lawfully anchored.—This section does not condemn a lighter which, compelled to anchor in the Hudson River because of a dense fog, made her way to the side on which were the anchorage grounds, as far as was considered safe, and anchored after taking soundings which indicated that she was within the grounds; the exercise of precautions commensurate with the danger being all that is required. The Newburgh (1904), 130 Fed. 321, 64 C. C. A. 567, reversing decree (D. C. 1903), 124 Fed. 954.

An ocean going vessel may lawfully lie at anchor in the nighttime in the deep channel of a navigable river if not so placed as to prevent or obstruct the passage of other vessels, in violation of this section. The Europe (1911), 190 Fed. 475, 111 C. C. A. 307.

An anchoring place designated by the harbor master of Boston is a proper anchorage though in the channel. The Lady Franklin (D. C. 1873), Fed. Cas. No. 7984.

The place of anchorage of vessel anchored in the middle of a river about 1,900 feet wide, where vessels were frequently passing, leaving room on either side for them to pass, was not improper. The Ogemaw (D. C. 1887), 32 Fed. 919.

A barge may properly anchor for the night near the middle of the channel of Delaware Bay, inside the capes, where it is four or five miles wide. Phinney v. The Le Lion (D. C. 1898), 84 Fed. 1011.

Where the bulkhead line of a dock is where it has been maintained for years, and since a time before there was any statute on the subject, persons using the bulkhead for mooring vessels in the customary manner, with the consent of the city, can not be deemed in fault therefor, although it extends farther into the river than the line as established by law. The Harry B. Hollins (D. C. 1903), 125 Fed. 430.

A steamer which had been disabled, and which was moored on the inside of the Erie Basin Breakwater at the port of Buffalo, some 25 to 30 feet from the channel used by vessels passing from a dock to the open lake, and opposite a bend in such channel, was in a proper place. Reibstock v. Gilchrist Transp. Co. (D. C. 1904), 132 Fed. 174.

A vessel anchored at night in calm weather as the result of a previous collision in Hampton Roads in the middle of the channel, which was there a mile or more wide for seagoing vessels, was not chargeable with violation of this section. The Job H. Jackson (D. C. 1906), 144 Fed. 896, decree affirmed The Ann J. Trainer (1907), 152 Fed. 1021, 82 C. C. A. 332 [C. S. p. 12213].

Vessels unlawfully anchored.—Anchoring vessels of the United States in an unusual and improper position in a harbor, in total disregard of the usages and regulations of the port requiring notice to the harbor master of the intention to anchor, constitutes negligence on the part of the officers of the vessel, which will render the United States liable in the Court of Claims for damages thereby caused to other vessels navigating the harbor. U. S. v. St. Louis & M. V. Transp. Co. (1902), 22 Sup. Ct. 350, 184 U. S. 247, 46 L. Ed. 520.

A dredge, anchored at night within 200 feet of the center of the narrow channel of the Savannah River, held to obstruct the passage of other vessels, in violation of this section. The City of Birmingham (1905), 138 Fed. 555, 71 C. C. A. 115; writ of certiorari denied, P. Sanford Ross v. The City of Birmingham (1905), 26 Sup. Ct. 747, 199 U. S. 607, 50 L. Ed. 331, reversing decree (D. C. 1903), 125 Fed. 506.

A lighter held in fault for deliberately anchoring in a channel during a fog when in the vicinity of the anchorage grounds, which could easily have been reached. The Newburgh (D. C. 1903), 124 Fed. 954; decree reversed (1904), 130 Fed. 321, 64 C. C. A. 567.

A schooner anchored outside the legal limits and too near the channel courses held in fault. The Vera (D. C. 1912, 1914), 224 Fed. 908; judgment affirmed (1915), 226 Fed. 369, 141 C. C. A. 199.

As to vessels unlawfully anchored see Ross v. Cornell Steamboat Co. (1906), 143 Fed. 190, 79 C. C. A. 514, affirming decree

(D. C. 1906), 143 Fed. 166; [C. S. p. 12214].

Wrecks, duty to mark.—The owner of a canal boat which sank in New York Bay, who received notice of the sinking at once, and could have had it marked within an hour, is liable for damages caused by a collision six hours later, when it remained unmarked. The Anna M. Fahy (1907), 153 Fed. 806, 83 C. C. A. 48.

The word "immediately" in this section means within a reasonable time, and the word should be construed in view of the circumstances of the particular situation, and what might be justifiable delay in one case would be culpable delay in another. Id.

This section places on the owner the duty of marking a sunken craft, and he can not shift responsibility for an injury to another vessel resulting from his failure to perform it on tugs which caused the wreck by their fault, when he had notice of the situation in ample time to have performed the duty before the damage resulted. Id.

The owner of a canal boat which was sunk in the channel of the Hudson River, who failed for two days without good excuse to mark the place, as required by this section, did not act within a reasonable time, and was liable for damage done to another vessel by collision with the wreck. The Macy (1909), 170 Fed. 930, 96 C. C. A. 146.

In a dangerous place, some notice of the presence of a wreck is a reasonable obligation on the part of the owner of such wreck; but, no special signals being prescribed, any plain signals that naturally serve as a warning to keep off are sufficient. Du Bois *v.* The H. S. Nichols and The Ceres (D. C. 1893), 53 Fed. 665.

The use of pieces of wood and two partly submerged buckets, together with a white pocket handkerchief attached to the end of a bamboo pole, held insufficient as danger signals to indicate the presence of a yacht sunk under 18 feet of water in a frequented channel. The Fred. Schlesinger (D. C. 1896), 71 Fed. 747.

A loaded scow owned by libelants sank in the night, lying across the edge of the harbor channel as dredged, which was 20 feet deep, while the anchorage basin adjacent, 300 feet wide, was 16 feet deep. Libelants did not mark the position of the sunken vessel, except by an ordinary spar buoy, placed near its center, which was insufficient to give warning of the wreck. On the second morning thereafter the oyster steamer Lewis, coming in, ran into the sunken scow, both vessels being injured. Held, that libelants were in fault for failing to properly mark the place of the wreck. The Mary S. Lewis (D. C. 1903), 126 Fed. 948.

Under this section the neglect to mark a sunken craft as required is not a prima facie abandonment, nor is the failure to remove it an abandonment until the expiration of 30 days, and during all of such time it is the duty of the owner to keep the place marked, and if he does not he is liable for injuries caused to others thereby, unless there has been an actual abandonment. People's Coal Co. *v.* Second Pool Coal Co. (D. C. 1911), 181 Fed. 609; judgment affirmed Second Pool Coal Co. *v.* People's Coal Co. (1911), 188 Fed. 892, 110 C. C. A. 526; writ of certiorari denied (1911), 32 Sup. Ct. 526, 223 U. S. 727, 56 L. Ed. 632.

Owner of a sunken vessel, not abandoned, but not properly marked, is liable for an injury to another vessel, under this section. Lehigh & Wilkes-Barre Coal Co. *v.* Hartford & New York Transp. Co. (D. C. 1914), 220 Fed. 348.

See The Swan (C. C. 1855), Fed. Cas. No. 13,667; Boston & H. Steamboat Co. v. Munson (1875), 117 Mass. 34.

Duty to remove.—In Missouri River P. Co. *v.* Hannibal & St. J. R. Co. (C. C. 1880), 2 Fed. 285, it is held that those navigating a river are under no obligation to remove wrecks which may be made in the proper and ordinary course of navigation, but he who, for his own benefit, uses any part of a navigable river, is liable in damages to any party injured, if such use causes a change in the ordinary course of the channel.

If defendant had a right to keep the pontoon in the river in connection with the bridge, and it was sunk by unavoidable accident, defendant was entitled to a reasonable time in which to raise and remove it, but was not at liberty to leave it in the channel for an indefinite period. Missouri River P. Co. *v.* Hannibal & St. J. R. Co. (C. C. 1880), 2 Fed. 285.

A loaded lighter was sunk in a dock. Although 48 hours would have sufficed to remove her, she was allowed to remain for six days, during which two vessels successively entered and used the dock. Upon the lighter being raised it was found that she had been injured by one of the vessels, and a libel was thereupon filed against the second vessel. Held, that the libelant's delay, coupled with the fact that another vessel had previously occupied the dock, rendered ascertainment of the injury inflicted by the second vessel impracticable, and the libel should therefore be dismissed. Semble, that, after a reasonable time for the removal of the lighter had elapsed, she might have been treated as a nuisance. The Atlee (D. C. 1882), 12 Fed. 734.

And see (1876) 15 Op. Atty. Gen. 71, holding that where a vessel put into harbor in a furious storm, and, leak[illegible] badly, was

run ashore, thereupon becoming a wreck, which formed an obstruction to navigation, and it appeared that the wreck was caused by stress of weather, and not through any fault or misconduct of the master and crew, the owners of the vessel were under no legal obligation to remove it.

Abandonment.—An abandoned vessel, which was sunk through the fault of the person in possession, is a nuisance, which he may be compelled to abate. Board of Water Com'rs of Detroit v. City of Detroit (1898), 76 N. W. 70, 117 Mich. 458, 5 Detroit Leg. N. 305.

Damages, liability for.—After the sinking of a sloop by collision with a tug in a narrow channel, the tug made fast to the broken mast, boom, and sails of the sloop, and towed them several hundred feet, and also dragged the hull along the bottom by the wire shrouds. Held, that the tug was liable for the damage thus done, her removal of the sloop not being justifiable as the abatement of a public nuisance, or for the protection of the sloop herself, or for the safety of navigation generally. The Brinton (1895), 66 Fed. 71, 13 C. C. A. 331, reversing decree (D. C. 1893), 59 Fed. 714.

The owner of a canal boat which was sunk in New York Bay, who received notice of the sinking at once, and could have had it marked as required by statute within an hour, is liable for the damages caused by a passing vessel coming into collision with the wreck six hours later, when it was still unmarked. The Anna M. Fahy (1907), 153 Fed. 866, 83 C. C. A. 48.

Where it was alleged that a sunken pontoon, placed and kept in the channel by the defendant, had caused a change in the current of the river which had thrown plaintiff's vessel over against a pier of defendant's bridge, and that the accident was the result of two causes combined, to wit, the presence in the channel of the pontoon, and of the bridge pier, both unlawful structures, held, that these facts being established plaintiff could recover. Missouri River F. Co. v. Hannibal & St. J. R. Co. (C. C. 1880), 2 Fed. 285.

The fact that portions of a yacht sunk in a channel came to the surface shortly after a certain steamer passed, does not raise so strong a presumption that she ran upon the wreck as to overcome the testimony of those upon the steamer, and a tug towing her, that they passed from 70 to 100 feet to one side of the flag marking the wreck. The Fred. Schlesinger (D. C. 1896), 71 Fed. 747.

Libelant's tug was injured in the East River, in the night, by reason of a line becoming entangled in its screw. On the same night a line used by respondent in raising a sunken vessel, which had been securely made fast to a pier and weighted to the bottom, in some unknown manner became loosened from the pier. Held that, assuming that such line was the one which caused the injury, of which there was no direct proof, it did not appear that there was any negligence on the part of respondent, which alone could render it liable for the injury. Moran v. Merritt & Chapman Derrick & Wrecking Co. (D. C. 1905), 135 Fed. 863; decree affirmed (1906), 142 Fed. 1038, 71 C. C. A. 685.

A dredging company held not liable for injury to a grounded coal barge by settling partly in an excavation temporarily left in the bottom of the canal in which the stranding occurred. Susquehanna Coal Co. v. Eastern Dredging Co. (D. C. 1908), 209 Fed. 817.

Owner of sunken vessel, not abandoned nor properly marked, held liable for an injury to another vessel. Lehigh & Wilkesbarre Coal Co. v. Hartford & New York Transp. Co. (D. C. 1914), 220 Fed. 348.

A master, seeing no danger signal displayed, held entitled to suppose that danger from a sunken scow had been removed, and not negligent in assuming that there was no danger where there was no danger signal. But if, at the time of the accident, the master knew of the danger, or if, under all the circumstances, he ought to have known of it, and he failed to take reasonable and proper care to avoid it, and thus met with the accident, no recovery can be had against the owners of the scow. (1900) 23 Op. Atty. Gen. 43.

See, also, Taylor v. Atlantic Mut. Ins. Co. (1862), 22 N. Y. Super. Ct. (9 Bosw.) 369.

Rafts obstructing navigation.—If a log raft accidentally becomes grounded, or otherwise obstructs navigation, other vessels are required to submit to a reasonable delay until the owner has had time to remove it, in the exercise of proper skill and reasonable diligence and dispatch, before they are entitled to destroy it as a nuisance. The Mary (C. C. 1903), 123 Fed. 699.

1558. Removal of obstructions to navigation. That whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel,

boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same: *Provided*, That in his discretion, the Secretary of War may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of War may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided*, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States. *Sec. 19, act of March 3, 1899 (30 Stat. 1154).*

Notes of Decisions.

Authority of Secretary of War.—This section did not invest the Secretary of War with exclusive jurisdiction of the removal of obstructions, but was intended to clothe him with discretionary power, which he might exert or leave to the enforcement of the local authorities; and, if he fails or declines to act, the local authorities may protect their domestic commerce by keeping navigable waters in their jurisdiction unobstructed. Hagan *v.* City of Richmond (1905), 52 S. E. 385, 104 Va. 723, 3 L. R. A. (N. S.) 1120. See (1877) 15 Op. Atty. Gen. 284, holding that Congress having made an appropriation for the improvement of the Connecticut River, to be expended under the direction of the Secretary of War, the latter has power, under this legislation, to remove a wrecked vessel lying in that river, without waiting until it is abandoned, if in his judgment it constitutes an obstruction to navigation.

Navigable waters of United States.—See 1560, post, and notes thereunder.

Act of June 14, 1880 (21 Stat. 197), and act of Aug. 2, 1882 (22 Stat. 208), which authorize the Secretary of War to remove sunken vessels or craft which obstruct the navigation of a "navigable" water of the United States, do not apply to the coastal waters of Cuba, as such waters do not become waters of the United States *by reason* of the temporary jurisdiction of the United States over that island. (1900) 23 Op. Atty. Gen. 76.

Removal of sunken vessels as obstructions to navigation.—See 1557, ante, and notes thereunder.

Owners of a vessel, who scuttle and sink her in a harbor while on fire, for the purpose of saving her rigging and spars and abandoning her to the underwriters, may be compelled to remove the hull, as an obstruction to navigation, under sec. 10, act of Sept. 19, 1890. U. S. *v.* Hall (1894), 63 Fed. 472, 11 C. C. A. 294.

Where the War Department has taken charge of the removal of a sunken wreck its jurisdiction is exclusive, and a city can not be held negligent in failing to take action for its removal. McCaulley *v.* City of Philadelphia (1903), 119 Fed. 580, 56 C. C. A. 100, affirming decrees (D. C. 1900), 103 Fed. 661, and McCauley *v.* City of Philadelphia (D. C. 1902), 116 Fed. 438.

This section and the following set forth the procedure in cases where there has been an abandonment of a sunken craft, or where the Government takes over the control of the sunken craft because of obstruction or danger to navigation. Lehigh & W. Coal Co. *v.* Hartford & N. Y. Transp. Co. (D. C. 1914), 220 Fed. 348.

Where Congress appropriated money, to be expended under the Secretary of War, for removal of a wreck, and the Secretary of War contracted with a company to remove

the wreck, the contractors could proceed with the work as against any persons employed by the owners, and the Secretary of War could aid it with necessary force for removal of the obstruction. (1868) 12 Op. Atty. Gen. 494.

1559. Removal of grounded boats, etc.—That under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section nineteen, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of War, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of War or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessay injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

Such sum of money as may be necessary to execute this section and the preceding section of this Act is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be paid out on the requisition of the Secretary of War. * * * *Sec. 20, act of March 3, 1899 (30 Stat. 115)*.

That the last paragraph of section twenty of the river and harbor Act of March third, eighteen hundred and ninety-nine, is hereby amended to read as follows:

"That all laws or parts of laws inconsistent with the foregoing sections nine to twenty, inclusive, of this Act are hereby repealed: *Provided*, That no action begun or right of action accrued prior to the passage of this Act shall be affected by this repeal: *Provided further*, That nothing contained in the said foregoing sections shall be construed as repealing, modifying, or in any manner affecting the provisions of an Act of Congress approved June twenty-ninth, eighteen hundred and eighty-eight, entitled 'An Act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City, by dumping or otherwise, and to punish and prevent such offenses,' as amended by section three of the river and harbor Act of August eighteenth, eighteen hundred and ninety-four." *Sec. 20, act of March 3, 1899 (30 Stat. 115), as amended by sec. 12, act of June 13, 1902 (32 Stat. 375)*.

Notes of Decisions.

Removal of vessels.—Where a vessel ran into a bank at the entrance to the West Neebish Channel, so as to completely obstruct navigation between the Lakes Superior and Huron, and the engineer officer of the Government thereupon took immediate possession of the vessel under this section as originally enacted, and employed a wrecking company to swing it from the channel, the vessel, on the failure of the owners thereof to pay for this service, may be regarded as having been abandoned and forfeited to the United States. The subsequent action of the wrecking company in raising the vessel and removing it from the jurisdiction of the United States, and in re-

fusing to turn it over to the War Department, thus placing it beyond the power of the United States to enforce its lien, may not relieve the Government of its responsibility to that company for the expense incurred by it in removing the vessel from the channel, but it would seem to justify the Government in refusing to pay such claim unless the vessel is brought within the jurisdiction of the United States, so that it may be attached and sold for the benefit of all claimants, including the United States, according to their respective rights and priorities. The liens acquired by the wrecking company on the vessel are superior to that which the United States would have if it paid the company for removing the vessel. The authority of the Secretary of War to pay the claims of the wrecking company, other than for the expenses incurred in removing the vessel from the channel, doubted. (1911) 28 Op. Atty. Gen. 626.

1560. Private construction of wharves, breakwaters, etc.—That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same. *Sec. 10, act of Mar. 3, 1899 (30 Stat. 1151).*

This section and sec. 9 of this act, 1561, post, superseded provisions of sec. 7, act of Sept. 19, 1890 (26 Stat. 454), as amended by sec. 3, act of July 13, 1892 (27 Stat. 88), which prohibited the erection of obstructions to navigation, and prohibited the erection of bridges over navigable waters under State legislation before the approval of the plans by the Secretary of War, and prohibited the alteration of channels unless authorized by said Secretary. They also superseded provisions of sec. 10, act of Sept. 19, 1890 (26 Stat. 454), which prohibited the creation of any obstruction, not affirmatively authorized by law to the navigable capacity of any waters under the jurisdiction of the United States; but they did not supersede the provisions of said sec. 10, act of Sept. 19, 1890, making the continuance of any such obstruction, except bridges, piers, docks, and wharves, and similar structures, an offense, and prescribed a penalty for violations thereof.

Notes of Decisions.

Power of States in absence of Federal statute.—In the absence of the exercise by Congress of authority to the contrary, the States may authorize the erection of works in navigable streams wholly within their jurisdiction. Willson v. Black Bird Creek March (1829), 2 Pet. 245, 7 L. Ed. 412; [C. S. p. 12187].

In the absence of legislation by Congress, a State statute authorizing the erection of a dam across a navigable river which is wholly within her limits is not unconstitutional. Pound v. Turck (1877), 95 U. S. 459, 24 L. Ed. 525.

The common-law doctrine as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; and in this country such dominion, sovereignty, and ownership belongs to the States, respectively, within whose borders such lands are situated, subject always to the right of Congress to control the navigation so far as may be necessary for the regulation of foreign and interstate commerce. Illinois Cent. R. Co. v. State of Illinois (1892), 13 Sup. Ct. 110, 146 U. S. 387, 36 L. Ed. 1018, affirming decree State of Illinois v. Illinois Cent. R. Co. (C. C. 1888), 33 Fed. 730.

The power of a State, if it existed at all, to obstruct or close entirely a navigable stream wholly within a State, depended solely on the absence of congressional legislation asserting the reserved authority of the general government over all navigable streams, including even those wholly within a State, and therefore ceased to exist from the enactment by Congress of act September 19, 1890 (26 Stat. 454). Egan v. *Hart* (1897), 17 Sup. Ct. 300, 301, 165 U. S. 188, 41 L. Ed. 680.

In the absence of any statute by Congress, a State has plenary power over a navigable stream entirely within its limits, and obstructions in the stream may be offenses against the laws of the State, but not an offense against the United States. North Shore Boom & Driving Co. v. Nicomen Boom Co. (1909), 29 Sup. Ct. 355, 357, 212 U. S. 408, 53 L. Ed. 574.

State legislation to aid commerce by improving a navigable river, by deepening its channel or removing obstructions, does not encroach on power of Congress, if not in conflict with any system for improvement of navigable waters provided by Congress. Faust v. City of Cleveland (1903), 121 Fed. 810, 58 C. C. A. 194, citing Mobile County v. Kimball (1880), 102 U. S. 691, 26 L. Ed. 238.

A bridge across a navigable stream built under authority given by the State prior to the enactment of any Federal legislation on the subject is a lawful structure. Rogers Sand Co. v. Pittsburgh, Ft. W. & C. Ry. Co. (1905), 139 Fed. 7, 71 C. C. A. 419.

All State laws and regulations with respect to navigable waters, and all rights acquired under them, are subject to the paramount right of the United States to appropriate any portion of the submerged soil for the purposes of navigation. Garrison v. Greenleaf Johnson Lumber Co. (1914), 215 Fed. 576; 131 C. C. A. 644, reversing decree Greenleaf-Johnson Lumber Co. v. Garrison (D. C. 1913), 208 Fed. 1022, appeal to Supreme Court granted (1914), 221 Fed. 1021, 136 C. C. A. 663, and decree affirmed (1915), 35 Sup. Ct. 551, 237 U. S. 251, 59 L. Ed. 939.

Until Congress assumes control of a navigable river wholly within the limits of the State, a State may legislate in reference to its commercial use as a public highway, and authorize the obstruction of a navigable river by a private corporation. Heerman v. Beef Slough Manufacturing, Booming, Log Driving & Transp. Co. (C. C. 1878), Fed. Cas. No. 6,320; Id. (C. C. 1880), 1 Fed. 145, 154.

In absence of Federal statute States bordering on the Mississippi River could authorize improvements on their side of the river, but could not justify the destruction or substantial impairment of navigation of the river. Rutz v. St. Louis (C. C. 1882), 10 Fed. 338, 339.

States may assert the same ownership to the beds and shores of navigable fresh water lakes and streams as they may properly assert to the beds and shores of tidal waters. McGilvra v. Ross (C. C. 1907), 161 Fed. 398; decree affirmed (1908), 164 Fed. 604, 90 C. C. A. 398, which is reversed (1909), 30 Sup. Ct. 27, 215 U. S. 70, 54 L. Ed. 95. But the right so granted is held subject to the right of Congress at any time to require the removal or alteration of such structure as an obstruction to navigation, where such waterway is used as a means for carrying on interstate or foreign commerce. U. S. v. Union Bridge Co. (D. C. 1905), 143 Fed. 377; judgment affirmed, Union Bridge Co. v. U. S. (1907), 27 Sup. Ct. 367, 204 U. S. 364, 51 L. Ed. 523.

Where a dike was being constructed in the Ohio River, leading from the shore to deep water, which it was apprehended by persons engaged in navigating the river would obstruct its navigation, and application was made by the latter to the engineer officers of the United States to interfere, the authorities of the United States had no power, in the absence of congressional legislation. (1880) 15 Op. Atty. Gen. 526.

In the absence of legislation by Congress on the subject of the improvement of the harbor of St. Louis, or of the navigation of the Mississippi River at that point, no one is authorized to institute judicial proceedings in behalf of the United States against the city of St. Louis for the abatement as a nuisance of the Bryan Street dike, constructed by that city in said river. The anticipation that, should such legislation hereafter be adopted, the dike will be an obstacle, is no ground for interference. (1875) 15 Op. Atty. Gen. 515.

The filling of a navigable waterway for the purpose simply of enabling riparian owners to reach the point of navigability by means of docks, piers, etc., when not forbidden by any statute of the United States or of a State, is neither unauthorized nor unlawful. But the filled in land is subject to the servitude of navigation, and any obstruction to navigation arising therefrom could be abated by Congress, even if made under the authority of the State. (1911) 29 Op. Atty. Gen. 139. The right of the State to regulate and control the beds of navigable streams does not imply a right to relinquish its control over a river bed or permit its use so as to interfere with navigation. State v. Southern Sand & Material Co. (Ark. 1914), 167 S. W. 854.

Constitutionality of Federal statute. - Congress has power to close one of several channels in a navigable stream if in its judgment the navigation of the river will be thereby improved. South Carolina v. Georgia (1876), 93 U. S. 4, 23 L. Ed. 782.

No act of or grant by an executive department of the United States can affect the right of the public to use the waters of a navigable stream for purposes of navigation, nor the power of Congress to control the same. Carver v. San Pedro, L. A. & S. L. R. Co. (C. C. 1906), 151 Fed. 334.

The statute is within the power of Congress so far as navigation comes within the

provisions of interstate commerce or within the admiralty and maritime jurisdiction. U. S. v. Banister Realty Co. (C. C. 1907), 155 Fed. 583, and cases cited.

The constitutional jurisdiction of the United States to legislate over navigable waters applies to the entire body of water where the tide ebbs and flows, over which water, or through the channels of which, interstate or foreign commerce might ordinarily or reasonably be transacted, or which is subject to the admiralty jurisdiction; and the power of the War Department over obstructions to such waters is coextensive with such general jurisdiction. U. S. v. President, etc., of Jamaica & R. Turnpike Road (C. C. 1910), 183 Fed. 598; decree reversed (1913), 204 Fed. 759, 123, C. C. A. 128.

Congress has supreme control of a navigable stream where the commerce thereon is interstate and foreign. Hagerta v. Mississippi River Power Co. (D. C. 1913), 202 Fed. 776; [C. S. p. 12188].

It is not an unconstitutional delegation of the legislative function for Congress to intrust to the Secretary of War the power to declare what is an unreasonable obstruction to navigation. (1889) 21 Op. Atty. Gen. 431.

See Frost v. Washington County R. Co. (1901), 51 A. 806, 96 Me. 76, 59 L. R. A. 68.

Construction and operation of statute in general.—Where there is a Federal law which applies to the subject of obstruction of a navigable stream entirely within a State, there is a concurrent or joint jurisdiction of the State and National Governments over the erection of a structure obstructing navigation. North Shore Boom & Driving Co. v. Nicomen Boom Co. (1909), 29 Sup. Ct. 355, 357, 212 U. S. 406, 53 L. Ed. 574.

The authority of a State to prohibit the erection, without its permission, of a structure in a navigable river wholly within its limits, was not superseded by this section, and both the State and Federal Governments must act conjointly. Cummings v. Chicago (1903), 23 Sup. Ct. 472, 477, 188 U. S. 410, 47 L. Ed. 525; Calumet Grain & Elevator Co. v. Same (1903), 23 Sup. Ct. 477, 188 U. S. 431, 47 L. Ed. 532; Montgomery v. Portland (1903), 23 Sup. Ct. 735, 190 U. S. 89, 47 L. Ed. 965; The Margaret J. Sanford (D. C. 1913), 203 Fed. 331.

The delegation to the Secretary of War by act of Sept. 12, 1890 (26 Stat. 453, secs. 4, 5, 7), of authority to direct changes in existing bridges over any navigable waters of the United States, or of bridges to be erected under legislative authority of any State, for the purpose of preventing obstructions to navigation, showed no intention by Congress to exercise exclusive control over navigable waters entirely within the jurisdiction of a State; and consequently this act did not deprive the States of power to compel the removal or alteration of bridges erected over such waters without authority. Lake Shore & M. S. Ry. Co. v. Ohio (1897), 17 Sup. Ct. 357, 358, 165 U. S. 365, 41 L. Ed. 747.

This section and sec. 1561, post, merely provide that, under circumstances described, the Secretary of War may withdraw all objections on the part of the United States to the erection of structures mentioned therein over navigable streams, but Congress did not assume to deprive a State in which such stream may be situated of all jurisdiction thereover. (1909) 27 Op. Atty. Gen. 327. And does not transfer exclusive control over navigable waters within the limits of a State to the Federal Government, but the right to erect structures in such waters is dependent upon the concurrent consent of both the State and Federal Governments. Minnesota Canal & Power Co. v. Pratt (1907), 112 N. W. 395, 101 Minn. 197, 11 L. R. A. (N. S.) 105.

By expending money in improving the Willamette River in Oregon, and making Portland a port of entry, Congress did not assume police power over that stream so as to deprive the State of the power to authorize the erection of a bridge over that river without the consent of Congress. Willamette Iron Bridge Co. v. Hatch (1888) 8 Sup. Ct. 811, 125 U. S. 1, 31 L. Ed. 629, reversing decree Willamette Iron Bridge Co. v. Same (C. C. 1884), 19 Fed. 347.

The establishment of harbor lines did not operate to destroy all State power concerning structures in navigable waters within its border, or to automatically destroy all vested property rights, though acquired under State authority prior to this section. Gring v. Ives (1912), 32 Sup. Ct. 167, 222 U. S. 365, 56 L. Ed. 235.

Acts of Congress making appropriations for the improvement of a river do not prevent the construction under State authority of booms, dams, piers, or bridges on the river. U. S. v. Bellingham Bay Boom Co. (1897), 81 Fed. 658, 661, 26 C. C. A. 547.

The provision in the act of admission of California into the Union, that all the navigable waters in the State should be common highways, and forever free, without tax therefor, does not refer to physical obstructions, but to political regulations. Pacific Gas Imp. Co. v. Ellert (C. C. 1894), 64 Fed. 421.

Filled-in land is subject to the servitude of navigation, and any obstruction to navigation arising therefrom could be abated by Congress, even if made under authority of a State. The filling of a navigable wa-

such temporary structures in the stream as may be necessary to prevent the interruption of the operation of the railroad, and to maintain the same for a reasonable length of time. Rogers Sand Co. v. Pittsburgh, Ft. W. & C. Ry. Co. (1905), 139 Fed. 7, 71 C. C. A. 419.

In passing on whether permission shall be given for the erection of a dolphin off the coast of Santa Barbara, Calif., the Chief of Engineers and the Secretary of the Treasury should not consider the incidental injury to the bathing beach or the impairment of bathing facilities in that vicinity, or any other similar reason not having direct relation to the navigable capacity of the waters and their use for interstate and foreign commerce. Such considerations should not prevent the approval of the plan, provided it would otherwise have their approval. (1909) 27 Op. Atty. Gen. 285.

Complaint held not to show that a bridge across a navigable stream was a public nuisance where it did not show whether it was built since the passage of this section or section 1561, post, or whether it was built without the approval of the War Department as required by that act. Mauldin v. Central of Georgia Ry. Co. (Ala. 1913), 61 So. 947.

No right to obstruct navigation passes to the purchasers under the laws for the sale of swamp and overflowed lands. Taylor v. Underhill (1871), 40 Calif. 471.

The owner of a lot abutting on the waters of Lake Michigan does not acquire the right to construct a wharf over submerged lands, not owned by him, immediately in front of his property, by obtaining a license to build such wharf from the Secretary of War under this section. Cobb v. Lincoln Park Com'rs (1903), 67 N. E. 5, 202 Ill. 427, 63 L. R. A. 264, 95 Am. St. Rep. 258.

A water pipe across the Kennebec River, if built according to plans recommended by the chief of engineers and authorized by the Secretary of War, is deemed authorized by Congress, and is a lawful structure without any further action by the courts. Maine Water Co. v. Knickerbocker Steam Towage Co. (1905), 59 A. 953, 99 Me. 473.

That title of the bed of a navigable slough has been vested in a person by purchase from the State as tide lands gives him no right to obstruct navigation. Dawson v. McMillan (1904), 75 P. 807, 34 Wash. 269.

A sale by the State of tide lands is subject to the paramount right of the public in the navigable waters thereof, and confers no right to obstruct navigation. Judson v. Tide Water Lumber Co. (1908), 98 P. 877, 51 Wash. 164.

The city of Chicago was empowered, without the approval of the Secretary of War, to require the lowering of a street railway tunnel under the Chicago River to give a clear depth of 21 feet of water above it, or, in the alternative, to compel its removal, by the declaration in river and harbor act of March 3, 1899 (30 Stat. 1156), that all the work of removing and reconstructing bridges and piers and lowering tunnels, necessary to permit a navigable channel with the prescribed "project" depth of 21 feet in the Chicago River, should be done by the city without expense to the United States. West Chicago St. R. Co. v. Illinois ex rel. Chicago (1906), 26 Sup. Ct. 518, 524, 201 U. S. 506, 50 L. Ed. 845, affirming judgment (1905) 73 N. E. 393, 214 Ill. 9.

Where the Secretary of War authorized the construction of improvements in the Chicago River so as to secure a flowage capacity of 300,000 cubic feet per minute with a velocity of 1¼ miles an hour, but reserving the right at any time, when it became apparent that the current created in the river was an unreasonable obstruction to navigation, to close the connection between the river and the canal of the sanitary district, the grant was not conditioned on the district's keeping the current within the stated velocity. Corrigan Transit Co. v. Sanitary Dist. of Chicago (1905), 137 Fed. 851, 70 C. C. A. 381.

Surrender of authority to prevent obstructions of navigable waters.—That the Government permits a structure in some degree interfering with navigation of an inland harbor does not work a surrender of the Government's authority to prevent other obstructions on the same spot. City of Milwaukee v. Gimbel Bros. (1905), 110 N. W. 7, 130 Wis. 31.

Authorization of excavations.—Inasmuch as plans for a proposed excavation in a river have not been submitted to the Secretary of War for his approval and authorization, he is not required by law to give the proceedings consideration. (1891) 20 Op. Atty. Gen. 101.

Rights of riparian owners to erect structures on navigable water.—Riparian owners, in order to secure access to navigable water, may lawfully erect wharves or other structures. Weems Steamboat Co. of Baltimore City v. People's Steamboat Co. (1899), 29 Sup. Ct. 661, 214 U. S. 345, 53 L. Ed. 1024, 16 Ann. Cas. 1222, reversing decree (1897), 152 Fed. 1022, 82 C. C. A. 276; [C. S. p. 12194].

And provided that such structures are so adapted as not to obstruct navigation. Dutton v. Strong (1861), 66 U. S. (1 Black) 23, 17 L. Ed. 29; [C. S. p. 12194]. But no person may impair the paramount right of unobstructed navigation. Lallande v. The

carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. The Daniel Ball (1870), 10 Wall. 557, 563, 19 L. Ed. 999; The Montello (1874), 20 Wall. 430, 22 L. Ed. 391; [C. S. p. 12192].

The more capacity to pass in a boat of any size, however small, from one stream or rivulet to another, is not sufficient to constitute a navigable water of the United States, which act of Sept. 19, 1890, makes it a misdemeanor to obstruct unless the channel is substantially useful to some purpose of interstate commerce. Leovy *v.* U. S. (1900), 20 Sup. Ct. 797, 177 U. S. 621, 44 L. Ed. 914, reversing judgment (1899), 92 Fed. 344, 34 C. C. A. 392.

"Navigable waters of the United States" applies, first, to all waters capable of sustaining or being used for interstate or foreign commerce, covering every part of any body of water, tidal or otherwise, any portion of which is capable of such use; and, second, to all waters under the admiralty and maritime jurisdiction of the United States and over which the district court of the United States can exercise its peculiar admiralty jurisdiction. U. S. *v.* Banister Realty Co. (C. C. 1907), 155 Fed. 583.

Waters held not navigable waters of the United States.—A pass or crevasse caused by the overflow of the Mississippi River making a channel to the Gulf through which a few fishermen had occasionally gone with small vessels carrying oysters for planting, and through which one or two cargoes of timber may have passed, but which had not been used for any purpose of interstate commerce, and the Gulf end of which became closed. Leovy *v.* U. S. (1900), 20 Sup. Ct. 797, 798, 177 U. S. 621, 44 L. Ed. 914. Coastal waters of Cuba. (1900) 23 Op. Atty. Gen. 76. A stream in a swamp. Jeremy *v.* Elwell (1890), 5 Ohio Cir. Ct. R. 379. A stream which is only navigable for 3 or 4 miles from its mouth at high tide by small boats drawing from 3 to 4 feet of water, and floatable for its entire length. State *v.* Superior Court of Chehalis County (Wash. 1910), 109 P. 340.

Bank and bed of river defined.—The bank of a river is that elevation of land which confines the waters of the river in their natural channel when they rise to their highest, but do not overflow the banks. A river does not include lands beyond the banks, which are covered in times of freshet or extreme floods, or swamps or low grounds which are liable to overflow, but are reclaimable for meadows or agriculture, or which being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. The bed of a river is a definite, and commonly a permanent, channel, and is the characteristic which distinguishes the water of the river from mere surface drainage, and from water percolating through the strata of the earth. Paine Lumber Co. *v.* U. S. (C. C. 1893), 55 Fed. 854.

Affirmatively authorized obstructions or improvements.—Obstructions not affirmatively authorized by Congress are prohibited, but the case of the State assent remains with the State for its sole adjudication. North Shore Boom & Driving Co. *v.* Nicomen Boom Co. (1909), 29 Sup. Ct. 355, 357, 212 U. S. 406, 53 L. Ed. 574. The word "affirmatively" in this section is used to distinguish the two kinds of authority referred to, and the section should be construed to require that the initial authorization to create an obstruction must rest on affirmative congressional authority, and not on a mere premit of the Secretary of War. The word "authorize" is used in the sense of to approve of and formally sanction, and the section does not confer on the Secretary of War authority to grant original authorization for the construction of any work constituting an obstruction of the navigable waters of the United States. Hubbard *v.* Fort (C. C. 1911), 188 Fed. 987. And a log boom constructed in the manner conformable to a State statute at the time Congress had not assumed jurisdiction over the waters in question is "affirmatively authorized by law" within act 1890, sec. 10. U. S. *v.* Bellingham Bay Boom Co. (1900), 20 Sup. Ct. 343, 344, 176 U. S. 211, 44 L. Ed. 437.

At common law no right to wharf out to navigable waters attached to the ownership of shore lands, and such right, if it exists, must be based on some legislation of the State. Western Pac. Ry. Co. *v.* Southern Pac. Co. (1907), 151 Fed. 376, 80 C. C. A. 606.

That a log boom constructed under authority of a State statute on a river lying wholly within the State may not conform to the regulations prescribed by the State statute does not make it an unlawful structure, under act September 19, 1890 (26 Stat. 426). U. S. *v.* Bellingham Bay Boom Co. (1897), 81 Fed. 658, 26 C. C. A. 547, affirming judgment (C. C. 1896), 72 Fed. 585; judgment reversed (1900), 20 Sup. Ct. 343, 176 U. S. 211, 44 L. Ed. 437.

This section does not apply to the rebuilding of a bridge which was lawfully in existence when passed. The right to maintain a railroad bridge lawfully built across a navigable stream carries the right to rebuild the same in whole or in part when required for the safety of travel and transportation, and also the right to build

such temporary structures in the stream as may be necessary to prevent the interruption of the operation of the railroad, and to maintain the same for a reasonable length of time. Rogers Sand Co. v. Pittsburgh, Ft. W. & C. Ry. Co. (1905), 139 Fed. 7, 71 C. C. A. 419.

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Where the Secretary of War authorized the construction of improvements in the Chicago River so as to secure a flowage capacity of 300,000 cubic feet per minute with a velocity of 1¼ miles an hour, but reserving the right at any time, when it became apparent that the current created in the river was an unreasonable obstruction to navigation, to close the connection between the river and the canal of the sanitary district, the grant was not conditioned on the district's keeping the current within the stated velocity. Corrigan Transit Co. v. Sanitary Dist. of Chicago (1905), 137 Fed. 851, 70 C. C. A. 381.

Surrender of authority to prevent obstructions of navigable waters.—That the Government permits a structure in some degree interfering with navigation of an inland harbor does not work a surrender of the Government's authority to prevent other obstructions on the same spot. City of Milwaukee v. Gimbel Bros. (1903), 110 N. W. 7, 130 Wis. 31.

Authorization of excavations.—Inasmuch as plans for a proposed excavation in a river have not been submitted to the Secretary of War for his approval and authorization, he is not required by law to give the proceedings consideration. (1891) 20 Op. Atty. Gen. 101.

Rights of riparian owners to erect structures on navigable water.—Riparian owners, in order to secure access to navigable water, may lawfully erect wharves or other structures. Weems Steamboat Co. of Baltimore City v. People's Steamboat Co. (1909), 29 Sup. Ct. 661, 214 U. S. 345, 53 L. Ed. 1024, 16 Ann. Cas. 1222, reversing decree (1907), 152 Fed. 1022, 82 C. C. A. 276; [C. S. p. 12194].

And provided that such structures are so adapted as not to obstruct navigation. Dutton v. Strong (1861), 66 U. S. (1 Black) 23, 17 L. Ed. 29; [C. S., p. 12194]. But no person may impair the paramount right of unobstructed navigation. Lallande v. The

C. D. Jr. (D. C. 1855), Fed. Cas. No. 8,000; [C. S., p. 12194]. While in other jurisdictions he can extend his wharf to, but not beyond, low-water mark. Prior *v.* Swartz (1892), 62 Conn. 132; 25 A. 798, 18 L. R. A. 668, 36 Am. St. Rep. 333.

A right to obstruct navigation can not be obtained by user or prescription. Olive *v.* State (1888), 86 Ala. 88, 5 South. 653, 4 L. R. A. 33; Blackman *v.* Mauldin (Ala. 1909), 51 So. 23; Ingram *v.* Police Jury of Parish of St. Tammany (1868), 20 La. Ann. 226; Knox *v.* Chaloner (1856), 42 Me. 150; Gifford *v.* McArthur (1885), 55 Mich. 535, 22 N. W. 28. Subject to such rules and regulations as may be prescribed by statute. Sullivan Timber Co. *v.* City of Mobile (C. C. 1901), 110 Fed. 186; Groner *v.* Foster (1897), 94 Va. 650, 27 S. E. 493.

Under the common law as it obtains in some jurisdictions, the riparian owner can not erect a wharf or other structure below high-water mark. Revell *v.* People (1898), 52 N. E. 1052, 177 Ill. 468, 43 L. R. A. 790, 69 Am. St. Rep. 257; Trustees, etc., of Town of Brookhaven *v.* Smith (1904), 90 N. Y. S. 646, 98 App. Div. 212; reversed (1907), 80 N. E. 665, 188 N. Y. 74, 9 L. R. A. (N. S.) 326.

The owner of land bounded by a navigable river has the right of access to the navigable part of the river in front of his premises, and the right to use of the waters for all purposes not inconsistent with the public right of navigation therein. Hobart-Lee Tie Co. *v.* Stone (1909), 117 S. W. 604, 135 Mo. App. 438.

This section not only includes the kind of structures specifically referred to in 1561, post, but all others that may be an obstruction to the navigable capacity of the waters of the United States, without reference to whether the obstruction is but slight, and only temporary. Hubbard *v.* Fort (C. C. 1911), 188 Fed. 987.

Criminal prosecution.—The obstruction of navigable rivers under the laws of the original States is not punishable as a crime, unless contrary to some clause in the Federal Constitution, or a treaty or an act of Congress. U. S. *v.* New Bedford Bridge (C. C. 1847), Fed. Ca. No. 15,867.

Information in name of Attorney General of United States.—Obstructions to navigation in the navigable waters of the United States, whether by States or by individuals, constitute acts of purpresture. There is remedy in such case by ex officio information in the name of the Attorney General of the United States. (1853) 6 Op. Atty. Gen. 172.

Proceedings by War Department.—It is the duty of the War Department to direct proceedings to be taken to enjoin the construction of a "dock line" which will obstruct, encroach upon, or interfere with harbor improvement. (1882) 17 Op. Atty. Gen. 279, citing U. S. *v.* Duluth (C. C. 1871), Fed. Cas. No. 15,001.

1560½. Improvement of rivers by private parties.—Any person or persons, corporations, municipal or private, who desire to improve any navigable river, or any part thereof, at their or its own expense and risk may do so upon the approval of the plans and specifications of said proposed improvement by the Secretary of War and Chief of Engineers of the Army. The plan of said improvement must conform with the general plan of the Government improvements, must not impede navigation, and no toll shall be imposed on account thereof, and said improvement shall at all times be under the control and supervision of the Secretary of War and Chief of Engineers. *Act of June 13, 1902 (32 Stat. 371).*

1561. Private construction of bridges, dams, dikes, and causeways.—That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secre-

tary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War. *Sec 9, act of Mar. 3, 1899 (30 Stat. 1151).*

Notes of Decisions.

Necessity of statutory authority for construction of bridges.—The right to cross navigable water by a bridge must be given by statute. Works v. Junction R. R. (C. C. 1853), Fed. Cas. No. 18,046; Inhabitants of Arundel v. McCulloch (1813), 10 Mass. 70; Commonwealth v. Inhabitants of Charlestown (1822), 18 Mass. (1. Pick.) 180, 11 Am. Dec. 161; Fort Plain Bridge Co. v. Smith (1864), 30 N. Y. 44; People v. Gutchess (1867), 48 Barb. 656. But see Chenango Bridge Co. v. Paige (1880), 83 N. Y. 178, 38 Am. Rep. 407, holding that a person owning land on both sides of a river can maintain a bridge for his own use, although without authority of the legislature or even in defiance of legislative prohibition, providing he does not thereby interfere with the public easement; but he can not without legislative authority, maintain such bridge for public use. And see Works v. Junction R. R. (C. C. 1853), Fed. Cas. No. 18,046; [C. S. p. 12257].

Power of States in absence of Federal legislation. See 1560, ante, and notes thereunder

In the absence of Federal legislation, a State may, by authorizing the erection of a bridge, obstruct a navigable river. Willson v. The Black Bird Creek March Co. (1829), 2 Pet. 245, 7 L. Ed. 412; Gilman v. Philadelphia (1865), 3 Wall. 713, 18 L. Ed. 96; Escanaba Co. v. Chicago, (1882), 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; [C. S. p. 12257].

Where, under authority of the legislature of West Virginia, it is proposed to construct a bridge over a navigable river within the State, which bridge, if built, will be an obstruction to navigation, but its construction is neither expressly nor impliedly forbidden by any law of Congress, there is no warrant for judicial proceedings to prevent the threatened obstruction to navigation. (1886) 18 Op. Attv. Gen. 425.

The power depends solely on the absence of congressional legislation asserting the reserved authority of the General Government over all navigable streams, including even those wholly within a State, and ceased to exist from the enactment of act Sept. 19, 1890 (26 Stat. 454). Egan v. Hart (1897), 17 Sup. Ct. 300, 301, 165 U. S. 188, 41 L. Ed. 680. **And expenditure of money by Congress in improving a river and making a port of entry held not an assumption by Congress of power over the river,** and the State is not deprived of the power of authorizing a bridge over the river without the assent of Congress. An act admitting a State into the Union, and providing that all the navigable waters of said State shall be highways and forever free, did not prohibit obstructions by bridges to the navigation of such waters as authorized by State law where Congress had not assumed control. Gilman v. Philadelphia (1865), 3 Wall. 713, 18 L. Ed. 96; Cardwell v. Bridge Co. (1885), 5 Sup. Ct. 425, 113 U. S. 205, 28 L. Ed. 959; Hamilton v. Vicksburg, S. & P. R. Co. (1886), 7 Sup. Ct. 206, 119 U. S. 280, 30 L. Ed. 383; Willamette Iron Bridge Co. v. Hatch (1888), 8 Sup. Ct. 811, 125 U. S. 1, 31 L. Ed. 629 (reversing decree Willamette Iron Bridge Co. v. Same [C. C. 1884], 19 Fed. 347); Schwurer v. Columbia St. Bridge Co. (C. C. 1886), 27 Fed. 172; People v. Potrero & B. V. R. Co. (1885), 7 Pac. 445, 67 Cal. 166. But see Hatch v. Willamette Iron Bridge Co. (C. C. 1881), 6 Fed. 326, holding that the provision is paramount; and a bridge impeding or obstructing free navigation, is unlawful, and parties constructing it may be enjoined at the suit of riparian owners injured thereby.

The erection of a bridge within a State across a navigable river running partly within and partly without the State is not under the exclusive control of Congress, and, in the absence of congressional action, the State has authority to regulate the same. Rhea v. Newport N. & M. V. R. Co. (C. C. 1892), 50 Fed. 16.

A State statute can not give a right to use a bridge across a river beyond low water mark constituting a boundary of the State. Evansville & H. Traction Co. v. Henderson Bridge Co. (C. C. 1904), 134 Fed. 973.

Power of Congress. Congress may regulate or prohibit the construction of bridges across navigable waters of the United States. U. S. v. Milwaukee & St. P. Ry. Co. (C. C. 1873), Fed. Cas. No. 15,778. It may determine the location, plan, and mode of construction of bridges. Texarkana & Ft. S. Ry. Co. v. Parsons (1896), 74 Fed. 408, 20 C. C. A., 481, and cases cited. It has supreme control of a navigable stream where the commerce thereon is interstate and foreign. U. S. v. Rio Grande Dam & Irrigation Co. (1899), 19 Sup. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136; [C. S. p. 12278].

The United States has power to confer authority on a municipal corporation to

build and maintain an interstate bridge over a navigable stream, and to that end to condemn land for approaches in another State. Latinette *v.* City of St. Louis (1912), 201 Fed. 676, 120 C. C. A. 638. But a grant of power to build a bridge may be withdrawn under a reservation where Congress determines that other requirements than those prescribed were essential to protect navigation. Bridge Co. *v.* U. S. (1881), 105 U. S. 470, 26 L. Ed. 1143; [C. S. p. 12258].

Delegation of power on Secretary of War.—Congress having authorized the construction of a bridge of a given height, over navigable water, may empower the Secretary of War to determine whether the proposed structure will be a serious obstruction to navigation, and to authorize changes in the plan of the structure. Miller *v.* Mayor of New York (1883), 3 Sup. Ct. 228, 109 U. S. 385, 27 L. Ed. 971.

Congress may delegate to one of the chiefs of a department authority to regulate or prohibit the construction of bridges across the navigable waters of the United States. U. S. *v.* Milwaukee & St. P. Ry. Co. (C. C. 1873), Fed. Cas. No. 15,778.

An act of Congress authorizing the erection of a bridge over navigable waters may lawfully devolve upon the Secretary of War the duty of determining, from a plan of the proposed bridge to be submitted by the bridge company, whether or not it conforms to a condition in the act that the navigation of the river shall not be injured; there being an express reservation to Congress of power to amend or repeal the act. People *v.* Kelly (1879), 76 N. Y. 475, 5 Abb. N. C. 383.

See (1891) 20 Op. Atty. Gen. 101; (1899) 22 Op. Atty. Gen. 343.

Construction and operation of statutes permitting bridges.—A statute granting permission for the constructing of a bridge across navigable water of the United States is a grant of a privilege, and must be constructed most strictly in favor of the United States. Hannibal & St. J. R. Co. *v.* Missouri River Packet Co. (1888), 8 Sup. Ct. 874, 880, 125 U. S. 260, 31 L. Ed. 731. That a bridge has been constructed under an act of Congress does not render it a legal structure, except in so far as it conforms to the terms and limitations of the act. If the powers granted by the act were exceeded, or were exercised in a manner different from that provided in the grant of authority, the grant will be no protection. Missouri River Packet Co. *v.* Hannibal & St. J. R. Co. (C. C. 1880), 2 Fed. 285.

This section and 1560, ante, merely provided that, under circumstances described, the Secretary of War may withdraw objections on the part of the United States to the erection of structures mentioned therein over navigable streams, but Congress did not assume to deprive a State in which such stream may be situated of all jurisdiction thereover. (1909) 27 Op. Atty. Gen. 327. They do not transfer exclusive control over navigable waters within a State to the Federal Government, but the right to erect structures in such waters is dependent on the concurrent consent of both the State and Federal Governments. Minnesota Canal & Power Co. *v.* Pratt (1907), 112 N. W. 395, 101 Minn. 197, 11 L. R. A. (N. S.) 105.

No one may build a bridge over a navigable river within the limits of one State without the concurrent permission of the State and National Governments. Gulf, C. & S. F. Ry. Co. *v.* Meadows (Tex. Civ. App. 1909), 120 S. W. 521, citing Montgomery *v.* Portland (1903), 23 Sup. Ct. 735, 190 U. S. 89, 47 L. Ed. 965.

A bridge could be built across navigable parts of a stream lying wholly within a single State, if authorized by the State or a subdivision thereof, and the location and plans of the bridge were first approved by the Chief of Engineers and Secretary of War; a special act of Congress consenting to the erection of the bridge not being required by bridge act, post, 1562, 1569, or otherwise. In re City of Seattle (1911), 66 Wash. 277, 119 P. 798.

Conflict with treaties.—This section is not in conflict with Webster-Ashburton Treaty 1842, art. 2. Minnesota Canal & Power Co. *v.* Pratt (1907), 112 N. W. 395, 101 Minn. 197, 11 L. R. A. (N. S.) 105.

Interstate and intrastate waters within statute.—Secs. 7, 10, act of September 19, 1890 (26 Stat. 454), and this section are not limited to waters wholly within a State, but apply to interstate waters as well. Hubbard *v.* Fort (C. C. 1911), 188 Fed. 987.

Navigable waters of the United States.—See 1560, ante, and notes thereunder.

The terms "navigable waters of the United States" defined. U. S. *v.* Banister Realty Co. (C. C. 1907), 155 Fed. 583.

Secs. 7, 10, act of September 19, 1890 (26 Stat. 454), and this section, relating to the obstruction of navigable waters, and providing for the construction of wharves, dams, weirs, bridges, etc., are not limited to waters wholly within a State, but apply to interstate waters as well. Hubbard *v.* Fort (C. C. 1911), 189 Fed. 987.

A stream is not navigable requiring the assent of the War Department of the United States to the construction of a bridge, where it is not capable of bearing either for the whole or a part of a year boats loaded with freight in the regular

course of trade. Brantley v. Lee (1913), 77 S. E. 788, 139 Ga. 600.

The navigable waters of the United States are those which form in their ordinary conditions, by themselves, or by uniting with other waters a continued highway over which commerce is, or may be carried on, with other States or foreign countries in the customary mode. People v. Board of Supervisors (1905), 122 Ill. App. 40, and cases cited.

Waters held navigable.—[C. S. p. 12260.]

Waters held not navigable.—Where a canal constructed over private ground to shorten a navigable river route had never been dedicated to the public, the owner was entitled to close it at his election; and the Government could not compel the removal of a bridge as an obstruction to navigation, under act September 19, 1890, as amended by act July 13, 1892 (this section), and act February 20, 1900. U. S. v. Jamaica & R. Turnpike Co. (1913), 204 Fed. 759, 123 C. C. A. 128; reversing decree (C. C. 1910), 183 Fed. 598.

Duty and authority of Secretary of War under this section.—A condition, attached to the approval by the Secretary of War of the erection of a bridge by a city over a canal under the jurisdiction of the Federal Government, to the effect that the bridge should be removed or rebuilt when the work of constructing the canal might render such action necessary, did not contemplate that the Secretary of War might, subsequently, arbitrarily order the bridge removed and prohibit the erection of another in its place, but that the city might afterwards elect to rebuild at the same place if its plans for rebuilding were approved by the Secretary of War. In re City of Seattle (Wash. 1911), 119 P. 798.

Under local acts.—Where Congress by resolution gave its assent that a bridge across the Ohio River at Cincinnati might be constructed in accordance with the State charter, reserving the right to withdraw such assent if the free navigation of the river should be materially obstructed, a judicial decision that the bridge would interfere with navigation was not first necessary to exercise the right to withdraw the assent. Newport & C. Bridge Co. v. U. S. (1881), 105 U. S. 470, 26 L. Ed. 1143.

Under acts of Apr. 1 and June 4, 1872, the Secretary of War is authorized to determine whether the construction of a bridge over the Mississippi at a given point would seriously affect navigation, and to prohibit the building of the bridge there, and will not be disturbed. U. S. v. Milwaukee & St. P. Ry. Co. (C. C. 1873), Fed. Cas. No. 15779.

Under act of Dec. 17, 1872 (17 Stat. 398), and act Feb. 14, 1883 (22 Stat. 414), authorizing and construction of bridges over the Ohio River, the Secretary of War has power to disapprove of the plans of the bridges where he is of the opinion that they would unduly obstruct the navigation of the river. (1886) 18 Op. Atty Gen. 512. He should not approve the plans for the bridge authorized by the act of Mar. 3, 1887 (24 Stat. 501), to be built across the Missouri River between the cities of Omaha and Council Bluffs, unless they provide for a structure of sufficient strength to bear trains of cars drawn by locomotives. (1887) 19 Op. Atty. Gen. 29. It is not his duty under the act of Feb. 28, 1891 (26 Stat. 789), incorporating the Washington & Arlington Railroad Co., to select or approve of the exact location of the bridge to be built across the Potomac River, but rather to approve the plans, specifications, and materials used, and the manner of construction of such bridge. It is his duty to refuse to approve the plans for the construction of a bridge at a place so far removed from the point indicated in the act as to be plainly beyond its scope. He has authority to relocate the bridge as requested by the company, provided the place designated is a reasonable compliance with the terms of the act. (1893) 20 Op. Atty. Gen. 549.

The Hudson Highland Bridge and Railway Co., a corporation created by the legislature of the State of New York, with authority to construct a bridge across the Hudson River between two points in the State of New York can not lawfully build such bridge without first obtaining the consent of Congress, as required by this section. (1905) 25 Op. Atty. Gen. 601.

Notification of approval of plans.—The notification required by act Mar. 3, 1869, to be given by the Secretary of War, that he approved the plan of the New York and Brooklyn bridge, was sufficient if made through one of his subordinates. People v. Kelly (1879), 76 N. Y. 475.

Question of approval.—The courts of the State have no judicial knowledge as to whether the plans and specifications for bridges across navigable streams were submitted to and approved by the Chief of Engineers and the Secretary of War as required by Federal statutes; this being a question of fact and not of law. Mauldin v. Central of Georgia Ry. Co. (Ala. 1913), 61 So. 947.

Eminent domain, right to exercise.—Under this section a public service corporation will not be permitted to exercise the power of eminent domain in furtherance of an enterprise involving interference with navigable waters within the State without having first procured the approval of the Federal Government. Minnesota Canal &

Power Co. v. Pratt (1907), 112 N. W. 395, 101 Minn. 197.

The appropriation by eminent domain of land for the approaches and terminal facilities necessary to the use of a bridge erected, under act of Jan. 26, 1901 (31 Stat. 741), over a navigable stream, is not forbidden by that act because the plans submitted to the Secretary of War, and specifically approved by him, though subserving the purpose of showing the extent to which navigation would be affected, do not include such terminal and connecting facilities, and can not, under the act, be altered without his consent. Stone v. Southern Illinois & M. Bridge Co. (1907), 27 Sup. Ct. 615, 616, 206 U. S. 267, 51 L. Ed. 1057, affirming judgment Southern Illinois & M. Bridge Co. v. Stone (1906), 92 S. W. 475, 194 Mo. 175.

Act June 25, 1906, authorizing the city of St. Louis to build and maintain a bridge over the Mississippi River, held to confer power on the city to maintain proceedings in a Federal court to condemn land for approaches in the State of Illinois. Latinette v. City of St. Louis (1912), 201 Fed. 676, 120 C. C. A. 638.

Contracts for construction of bridge as violative of statute.—Only the United States Government can raise the question that a contract providing for the construction of a bridge across a navigable stream is in violation of the Federal statute requiring the consent of the Secretary of War to the erection of such a bridge. People v. Board of Sup'rs of Whiteside County (1905), 122 Ill. App. 40.

Bridge a nuisance or unlawful obstruction.—The public benefit arising from the construction of a bridge over a navigable river is no defense to a bill in equity for an injunction to abate it as an obstruction to the free navigation of the river. State of Pennsylvania v. Wheeling & B. Bridge Co. (1851), 54 U. S. (13 How.) 518, 14 L. Ed. 249.

A bridge must be clearly shown to be a nuisance before it can be decreed so. Mississippi & M. R. Co. v. Ward (1862), 67 U. S. (2 Black) 485, 17 L. Ed. 311. See Hannibal & St. J. R. Co. v. Missouri River Packet Co. (1888), 8 Sup. Ct. 874, 125 U. S. 260, 31 L. Ed. 731 [C. S. p. 12262].

Question for jury.—See Cantrell v. Knoxville, C. G. & L. R. Co. (1891), 90 Tenn. (6 Pickle) 638, 18 S. W. 271; Selman v. Wolfe (1863), 27 Tex. 68.

Bridge not nuisance or unlawful obstruction.—A bridge constructed over a navigable river in accordance with the act of Congress authorizing it is a lawful structure, however much it may interfere with navigation. Texarkana & Ft. S. Ry. Co. v. Parsons (1896), 74 Fed. 408, 20 C. C. A. 481, and cases cited.

A bridge constructed under the authority of Congress and of a State legislature, in the manner authorized by law, is not a nuisance. Miller v. City of New York (C. C. 1880), 10 Fed. 513; decree affirmed (1883), 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971; Easton v. New York & L. B. R. Co. (1873), 24 N. J. Eq. (9 C. E. Green) 49; People v. Kelly (1879), 76 N. Y. 475.

A bridge of sufficient elevation, or with a proper draw, is not necessarily an impediment to navigation; nor is any structure such an impediment which facilitates commerce, instead of being a hindrance. Jolly v. Terre Haute Draw-Bridge Co. (C. C. 1853), Fed. Cas. No. 7,441.

A drawbridge over navigable water, although it unavoidably occasions some delay in passing it, is not necessarily such an obstruction to the navigation as to amount to a nuisance. Works v. Junction R. R. (C. C. 1853), Fed. Cas. No. 18,046.

The measurement of the length of a draw, within the meaning of the act of Congress authorizing the building of a drawbridge over the Mississippi River at Keokuk, Iowa, and requiring the draw to be 160 feet in length, must be on a line at right angles to the piers, upon the surface of the water at low-water mark. St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co. (C. C. 1887), 31 Fed. 755.

A drawbridge constructed and maintained according to proper authority over navigable waters is not an unlawful obstruction to navigation, the owner being bound to provide for the safe and prompt passage of vessels through the draw. Southern Ry. Co. v. Reeder (Ala. 1907), 44 So. 699; [C. S. p. 12263].

Obligation of owner of bridge in general.—A bridge across a navigable stream is an obstruction to navigation tolerated only because of necessity and the convenience of commerce on land, and, the right of navigation being paramount, it is incumbent on the owner of the bridge to so construct it that it may be readily opened to permit the passage of vessels, to place it in charge of persons competent to operate it, and to equip it with lights and signals giving warning of its position in opening and closing, and to give timely warning to approaching vessels if for any reason it can not be opened. Clement v. Metropolitan West Side Elevated Ry. Co. (1903), 123 Fed. 271, 59 C. C. A. 289. He must adequately guard vessels navigating in its vicinity from any concealed danger to which the bridge exposes navigation. Southern Transp. Co. v. Philadelphia, B. & W. Co. (D. C. 1912), 196 Fed. 548, affirmed (1913), 205 Fed. 732, 124

26. Though licensed by Congress to maintain it, he has no right unnecessarily to make it or its approaches dangerous to vessels passing through the draw. Id.

In an action for damages for detention of plaintiff's steamer by a bridge erected by defendant, and by driftwood accumulated against its piers, it appeared that the bridge was constructed under an act requiring that the openings in the draw should be 130 feet in the clear, and that the plans should be approved by the Secretary of War, but the openings were only 125 feet and there was no evidence to show that the plans had ever been submitted to, or approved by the Secretary of War. The court charged the jury that, if they found that the narrowing of the space in the draw caused the driftwood to accumulate, the railway company was responsible therefor, and, if that was the natural result of the narrowing, they need not particularly investigate any theory that it did not cause the accumulation. Held, that this instruction was more favorable to the railway company than it had a right to ask, and it could not complain of it as error. Texarkana & Ft. S. Ry. Co. v. Parsons (1896), 74 Fed. 408, 20 C. C. A. 481.

Abatement of bridge.—In proceedings to abate a bridge across a navigable stream as a nuisance, defendant is entitled to the benefit of every reasonable doubt, the same as in proceedings under an indictment. Mississippi & M. R. Co. v. Ward (1862), 67 U. S. (2 Black) 485, 17 L. Ed. 311. See Thomas v. Wade (1904), 37 So. 743, 48 Fla. 311.

Injunctive relief.—The erection of a bridge across the Hudson River between the city of Troy and the village of West Troy, in accordance with the provisions of act N. Y. April, 1872, held not to result in a material obstruction to navigation, and an injunction refused. Silliman v. Troy & W. T. Bridge Co. (C. C. 1873), Fed. Cas. No. 12,853.

A bridge constructed across navigable stream, as authorized by act of Congress and the local legislature, can not be enjoined as a public nuisance. Miller v. New York (C. C. 1876), Fed. Cas. No. 9,585.

Where a bridge to be constructed over navigable waters, with the draws as proposed, will not cause any appreciable obstruction to commerce, the Federal courts will not act to enjoin the same. United States v. Railroad Bridge Co. (C. C. 1855), Fed. Cas. No. 16,114.

Complainant held to fail to show either that its bridge was properly constructed, or that defendant's navigation of the river was dangerous to the bridge, and hence an injunction would be denied. Texas & P. Ry. Co. v. Interstate Transp. Co. (C. C. 1890), 42 Fed. 261.

Criminal prosecution.—Where a bridge over a navigable stream is built for public uses and produces a public benefit, and leaves a reasonable space for the passage of vessels, it is not indictable. Mississippi & M. R. Co. v. Ward (1862), 67 U. S. (2 Black), 485, 17 L. Ed. 311.

A criminal prosecution for the obstruction of navigable waters of the United States under secs. 6, 7, 10, act of Sept. 19, 1890 (26 Stat. 426), may be maintained, though neither the officers and agents of the United States in charge of works for the improvement of said waters, nor the collectors of customs or other revenue officers, have given information to the district attorney as provided in sec. 9923, U. S. v. David Burns and Gideon Burns (C. C. 1893), 54 Fed. 351.

Jurisdiction of courts.—The courts of the United States have jurisdiction in equity to abate a bridge over a navigable river, although authorized by statute of the State in which it is situated, and although Congress has not legislated on the subject, at the suit of any other State, or of any party residing in another State in danger of irreparable injury. Pennsylvania v. Wheeling & B. Bridge Co. (1851), 54 U. S. (13 How.) 518, 14 L. Ed. 249. See Silver v. Missouri Pac. Ry. Co. (1890), 101 Mo. 79, 13 S. W. 410; Lincks v. Amend (N. J. Ch. 1895), 32 Atl. 755.

1562. Plans of bridges to be approved and adhered to.—That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall

not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War. *Sec. 1, act of Mar. 23, 1906 (34 Stat. 84).*

That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all bridges which may be built in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any bridge which shall have been constructed in accordance with its provisions. *Sec. 8, act of Mar. 23, 1906 (34 Stat. 86).*

For definition of "persons," see post, 1566.

Notes of Decisions.

Power of Congress.—See 1560, 1561, ante, and notes thereunder.

Duty and authority of Secretary of War.—See notes under 1561, ante.

The Secretary of War would not be prohibited from approving the plan and location of a bridge across boundary waters if acts of authorization were passed by the legislatures of the States interested. (1899) 22 Op. Atty. Gen. 332.

Necessity of statutory authority for construction of bridges.—See 1561, ante, and notes thereunder.

Construction of bridge act in general.—Bridge act, Mar. 23, 1906, this section and 1563, 1566, 1569, 1570, post, relate only to bridges the construction of which was authorized since its enactment. State v. White River Valley Ry. Co. (1911), 129 N. W. 1034, 27 S. D. 65. And has no application to the construction of bridges across navigable waters which lie wholly within the limits of a single State. In re City of Seattle (Wash. 1911), 119 Pac. 798.

Under 1561, ante, a bridge could be built across navigable parts of a stream lying wholly within a single State, if authorized by the State or a subdivision thereof, and the location and plans of the bridge were first approved by the Chief of Engineers and Secretary of War.

"Bridge" defined.—The word "bridge" in act of Apr. 2, 1888 (25 Stat. 74), prescribing regulations to govern the building of bridges across a river, requiring any bridge thereafter erected to have at least one channel span of stated width and stated height above the water, and providing that any person or corporation having lawful authority "may hereafter erect bridges across said river for railroad or other uses upon compliance with the provisions and requirements of this act," but not otherwise, comprehended not only the span or roadway, but also the abutments and piers upon which it was supported, and the replacing of the wooden superstructure of a bridge, which had become unsafe from decay and long use, by a new superstructure of iron, did not constitute the erection of a new bridge. U. S. *v.* Cincinnati & M. V. R. Co. (1904), 134 Fed. 353, 67 C. C. A. 335.

1563. Limit of time for commencement and for completion of bridge.—That whenever Congress shall hereafter by law authorize the construction of any bridge over or across any of the navigable waters of the United States, and no time for the commencement and completion of such bridge is named in said Act, the authority thereby granted shall cease and be null and void unless the actual construction of the bridge authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act. *Sec. 6, act of Mar. 23, 1906 (34 Stat. 86).*

1564. Alterations to facilitate passage under a bridge.—That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporation

controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided*, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants. *Sec. 18, act of Mar. 3, 1899 (30 Stat. 1153).*

See also 1568, post.

The words "or from the existing circuit courts," in this section, were superseded by the abolition of the circuit courts and the transfer of their jurisdiction to the district courts, by Jud. Code (36 Stat. 1167).

Notes of Decisions.

Constitutionality of statute.—This section is within the power of Congress. U. S. v. Union Bridge Co. (D. C. 1906), 143 Fed. 377; judgment affirmed, Union Bridge Co. v. U. S. (1907), 27 Sup. Ct. 367, 204 U. S. 364, 51 L. Ed. 523. It is not unconstitutional, as delegating legislative or judicial power to the Secretary of War. Wisconsin v. Duluth (1877), 96 U. S. 379, 24 L. Ed. 668; [C. S. p. 12251].

A bridge over an interstate waterway, though erected under the sanction of a State, and not an illegal structure, or an unreasonable obstruction to navigation in the condition of commerce and navigation when erected, must be taken as having been constructed with knowledge of the paramount power of Congress to regulate commerce among the States, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions. President, etc., of Monongahela Bridge Co. v. U. S. (1910), 30 Sup. Ct. 356, 360, 216 U. S. 177, 54 L. Ed. 435, affirming judgment U. S. v. Monongahela Bridge Co. (D. C. 1908), 160 Fed. 712.

A company which built a bridge over the Allegheny River under a charter from the State of Pennsylvania containing no specifications as to the character of the structure, but expressly providing that it should not obstruct the navigation of the river, and that the piers should be constructed in such manner as to meet the requisitions of the law in regard to obstruction of navigation, holds the franchise granted subject to such conditions, and may be required at any time by any authority having lawful jurisdiction to so alter its bridge as to meet the enlarged requirements of navigation. U. S. v. Union Bridge Co. (D. C. 1906), 143 Fed. 377; judgment affirmed, Union Bridge Co. v. U. S. (1907), 27 Sup. Ct. 367, 204 U. S. 364, 51 L. Ed. 523. See, U. S. v. President, etc., Jamaica & R. T. R. (C. C. 1910), 183 Fed. 598, defining the power to legislation over navigable waters.

Construction of statute in general.—This section was enacted to secure navigation against unreasonable obstruction. The Secretary of War is not invested by this section with arbitrary power, since he is bound, before making any decision or taking final action, to notify the parties interested of any proposed investigation by him, to

give them an opportunity to be heard, and to allow reasonable time to make such alterations as he finds to be necessary to free navigation. President, etc., of Monongahela Bridge Co. *v.* U. S. (1910), 30 Sup. Ct. 356, 360, 216 U. S. 177, 54 L. Ed. 435, affirming judgment U. S. *v.* Monongahela Bridge Co. (D. C. 1908), 160 Fed. 712.

[C. S. p. 12251.]

This section does not delegate to the Secretary of War all the power of Congress in regard to the construction of bridges over navigable waters, and to declare where bridges shall be built, but it delegates the power only to determine whether an existing bridge is an unreasonable obstruction to navigation and to direct the manner in which the injury can be obviated. E. A. Chatfield Co. *v.* City of New Haven (C. C. 1901), 110 Fed. 788.

This section applies to bridges constructed under the authority of acts of Congress, provision having been made in the previous sections of the act for structures of that nature unauthorized by Congress. The power conferred is administrative. Obstructions to navigation must be material obstructions. (1904) 25 Op. Atty. Gen. 195.

Removal or alteration of bridges.—The right of the United States to require the removal or alteration of a bridge as an obstruction to navigation of an interstate waterway is not affected by the fact that it made no objection when the bridge was built, or that it was built under authority from the State, nor do such facts render the Government liable to compensate the owner for his loss, where the consent of Congress was not asked; the owner being chargeable with notice of its power over such waters and its right to exercise the same at any time. A company which built a bridge over the Allegheny River under a charter from the State of Pennsylvania containing no specifications as to the character of the structure, but expressly providing that it should not obstruct the navigation of the river, and that the piers should be constructed in such manner as to meet the requisitions of the law in regard to obstruction of navigation, holds the franchise granted subject to such conditions, and may be required at any time by any authority having lawful jurisdiction to so alter its bridge as to meet the enlarged requirements of navigation. U. S. *v.* Union Bridge Co. (D. C. 1906), 143 Fed. 377; judgment affirmed, Union Bridge Co. *v.* U. S. (1907), 27 Sup. Ct. 367, 204 U. S. 364, 51 L. Ed. 523. But see (1904) 25 Op. Atty. Gen. 194, holding that whether a bridge was so constructed as not to interrupt navigation must be determined by the requirements of navigation at that time, and can not be made dependent on the interests of future navigation.

The widening of the channel of the South Branch of the Chicago River by the sanitary district of Chicago, under licenses granted by the Secretary of War, does not connect the Federal Government with that project in such a way as will authorize the Secretary of War, under this section, to require the alteration of the bridge of the Metropolitan West Side Elevated Railway Co. until the widening of the channel and the removal of the filled-in land adjoining the west abutment of the bridge shall have caused that structure to become an actual obstruction to the free navigation of the river. 29 Op. Atty. Gen. 139.

Conclusiveness of determination of Secretary of War.—Determination of the Secretary of War in the due exercise of authority that a bridge is an obstruction is conclusive. U. S. *v.* Monongahela Bridge Co. (D. C. 1908), 160 Fed. 712; judgment affirmed, President, etc., of Monongahela Bridge Co. *v.* U. S. (1910), 30 Sup. Ct. 356, 216 U. S. 177, 54 L. Ed. 435. But a decree in a suit by the United States by procurement of the Secretary of War after enactment of river and harbor act, Mar. 3, 1899, refusing to enjoin replacement of a bridge over the Ohio River, conformably to act of July 14, 1862, held a conclusive determination as against the Secretary of War, when attempting under supposed authority of this section to compel alterations in the bridge, that in the absence of changed conditions the structure was not subject to that act. U. S. *v.* Baltimore & O. R. Co. (1913), 33 Sup. Ct. 850, 229 U. S. 244, 57 L. Ed. 1169.

Whether a bridge over a navigable water of the United States is an "unreasonable" obstruction to navigation must be determined in the first instance by the Secretary of War, whose decision is probably subject to review by the courts. (1890) 19 Op. Atty. Gen. 676.

Notice of alteration, on whom served.—A State is not a person, corporation, or association within secs. 4 and 5 of the act of Sept. 19, 1890 (26 Stat. 453). Consequently the Secretary of War is not authorized to serve notice on a State requiring it to alter a bridge which is the property of the State. (1893) 20 Op. Atty. Gen. 606.

Requisites.—A notice to a bridge company to make alterations in a bridge over an interstate waterway, conformably to this section, enacted to secure navigation against unreasonable obstructions, is not insufficient as the basis of a criminal prosecution in case of noncompliance because it bears the signature of the Assistant Secretary of War, instead of the Secretary him-

self, who is the official named in the statute as the one to give such notice, where the communication shows upon its face that it was from the War Department, and from the Secretary of War, and that the latter, without abrogating his authority under the statute, only used the hand of the Assistant Secretary in order to give the owners of the bridge notice of what was required of them. Hannibal Bridge Co. v. U. S. (1911), 31 Sup. Ct. 603, 606, 221 U. S. 194, 55 L. Ed. 699.

Assuming that secs. 9, 10, act of August 11, 1888, are valid, a notice given by the Secretary of War must point out what alterations are required to be made; and a notice is not sufficient which requires the owners "to so alter said bridge as to render navigation through or under it free, easy, and unobstructed," though the notice contains a recital that "the bridge was an obstruction to free navigation by reason of its location, which at stages of water permitting navigation over the Des Moines rapids renders difficult the passage of boats, rafts, etc., through its west draw rest pier." U. S. v. Keokuk & H. Bridge Co. (D. C. 1911), 45 Fed. 178.

Hearing.—A bridge company convicted for failure to make the alterations in a bridge over an interstate waterway which the Secretary of War, acting under this section requires, was afforded the reasonable opportunity to be heard, contemplated by that law, upon the question whether the bridge was, in fact, an unreasonable obstruction to navigation, where the company had full notice of the action of the officer of engineers, who, under the order of the Secretary, made a tentative examination of the facts, and appeared at the regular final hearing before that officer, with liberty to contest the facts, and introduce any evidence pertinent to the case, and the decision of the Secretary of War was based on the Engineer officer's report of all the facts adduced before him, and which constituted the basis of his conclusion that the bridge was an unreasonable obstruction to navigation. President, etc., of Monongahela Bridge Co. v. U. S. (1910), 30 Sup. Ct. 356, 360, 216 U. S. 177, 54 L. Ed. 435.

Time for compliance. Where county commissioners of M. County, Ohio, were notified by the Secretary of War, Feb. 25, 1891, to provide a State bridge over the M. River, with a "draw" for the passage of boats, on or before Sept. 30, 1891, but the commissioners had no funds with which to provide the "draw," nor could make a levy for that purpose until March or June, 1891, which levy would not be collectible in full before December 20 of the year following, and they had applied to the legislature for the necessary funds without success, and had no opportunity to submit the question of the necessary expenditure, which exceeded $10,000, to a popular vote, as required in case of such excess, the notice did not give a reasonable time in which to provide the "draw." U. S. v. Rider (D. C. 1892), 50 Fed. 406.

Alterations or changes in bridges as taking of property.—A railroad bridge over a navigable stream, built under authority of an act of Congress which contained no reservation as to repeal, modification, or alteration, can only be required to be removed or replaced by a new bridge constructed in accordance with act of Mar. 3, 1899 (30 Stat. 1121), by an act of Congress authorizing the same and providing for just compensation. U. S. v. Parkersburg Branch R. Co. (1908), 143 Fed. 224, 74 C. C. A. 354, affirming decree (C. C. 1905), 134 Fed. 969.

The making of alterations or changes in a bridge erected under the sanction of a State over an interstate waterway which the Secretary of War, acting under this section, requires to secure navigation against an unreasonable obstruction, is not a taking of private property for public use for which the Federal Constitution requires compensation to be made, but is merely incidental to the exercise by the Government of its power to regulate commerce among the States. Union Bridge Co. v. U. S. (1907), 27 Sup. Ct. 367, 375, 204 U. S. 364, 51 L. Ed. 523, affirming judgment U. S. v. Union Bridge Co. (D. C. 1906), 143 Fed. 377.

The action of the Secretary of War in requiring changes in a bridge over an interstate waterway within a specified time, and after the parties have been heard, conformably to this section, enacted to secure navigation against unreasonable obstruction, is not such a taking of private property for public use as must, under the Federal Constitution, be preceded by making, or sufficiently securing, compensation to the owners of the bridge. President, etc., of Monongahela Bridge Co. v. U. S. (1910), 30 Sup. Ct. 356, 360, 216 U. S. 177, 54 L. Ed. 435, affirming judgment U. S. v. Monongahela Bridge Co. (D. C. 1908), 160 Fed. 712.

It is the duty of the Secretary of War, under sec. 4 of the act of 1890, to ascertain whether, in his judgment, the Canal Street Bridge across the south branch of the Chicago River is an unreasonable obstruction to the free navigation of that river, and, in case he decides that it is, to proceed as directed by that statute and require such an alteration of the bridge as will render navigation through and under

it safe, easy, and unobstructed. (1891) 20 Op. Atty. Gen. 101.

Where a bridge was erected by authority of a State before Congress assumed actual jurisdiction over the river for the purposes of navigation, and it was declared an obstruction to navigation by the Secretary of War, the owners or parties controlling the bridge may be required to alter it without compensation by the United States for the expenses incurred. (1896) 21 Op. Atty. Gen. 430. See, also, Union Bridge Co. *v.* U. S. (1907), 27 Sup. Ct. 367, 204 U. S. 364, 51 L. Ed. 523.

Structures which are unauthorized by law may be summarily removed and without compensation. Those which are authorized by law can only be removed upon making just compensation, unless the authorization by the Federal Government was accompanied with a reservation of a right to change, modify, or remove. The Secretary of War is not authorized by sec. 4 of the act of 1890 to require changes to be made in the bridge of the Baltimore & Ohio Railroad Co. over the Ohio River at the expense of the owner without compensation, as this act applies only to such bridges as are constructed under the authority of an act of Congress which expressly reserved to Congress the right to require changes or modifications in the structure. But, when the company itself voluntarily prostrates its bridge with the intention of constructing another in its place, the Secretary of War has the right to prescribe conditions as to height, length of span, etc. (1899) 22 Op. Atty. Gen. 343.

The Secretary of War can not require county commissioners to tear down a bridge over a navigable river wholly within State on the ground that it is an unreasonable obstruction to the free navigation of such river without tendering compensation therefor. State *v.* Ashtabula County Com'rs (1905), 28 Ohio Cir. Ct. R. 212.

Compelling elevation of bridge, approval of plans as condition precedent.—A drainage district can not compel elevation of railroad bridges across a river until reasonable plans therefor are approved by the proper Federal authorities. Kaw Valley Drainage Dist. of Wyandotte County *v.* Kansas City Terminal Ry. Co. (1912), 123 P. 991, 87 Kan. 272.

Equitable relief.—Where a private canal constructed and used as a cut-off to take the place commercially of the tortuous channel of a navigable stream has been abandoned, and its uses for such purpose entirely destroyed by the owner of the rights therein, the rights of the public revert to the original channel of the stream, and the United States may maintain a suit to enjoin the obstruction of such channel by a bridge. U. S. *v.* President, etc., of Jamaica & R. Turnpike Road (C. C. 1910), 183 Fed. 598; decree reversed (1913), 204 Fed. 759, 123 C. C. A. 128. See U. S. *v.* Baltimore & O. R. Co. (1913), 33 Sup. Ct. 850, 229 U. S. 244, 57 L. Ed. 1169. And see notes under 1561, ante.

Liability to fine under statute.—A verdict of guilty against a bridge company in a prosecution under this section for failure to comply with an order of the Secretary of War requiring the defendant to alter a bridge over the Monongahela River at Brownsville, 50 miles above Pittsburgh, held sustained by the evidence, where it appeared that, prior to the time the bridge was built in 1832, the river had been declared a navigable stream by the legislatures of both Pennsylvania and Virginia, and was to a small extent then navigated at that point; that surveys looking to its improved navigation as it has since been improved had been made by both the State and Federal Governments; and that defendant's charter granted by the State of Pennsylvania expressly provided that the bridge to be erected should not obstruct the navigation of the river. It is not a defense that the bridge was adopted and recognized by the executive department of the Government as an integral part of the national pike and post route over which the mails were carried. U. S. *v.* Monongahela Bridge Co. (D. C. 1908), 160 Fed. 712; judgment affirmed, President, etc., of Monongahela Bridge Co. *v.* U. S. (1910), 30 Sup. Ct. 356, 216 U. S. 177, 54 L. Ed. 435.

1565. Booms, piers, etc., to facilitate passage under a bridge.—That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now or hereafter to be constructed over any of the navigable waters of the United States, under authority of the United States or of any State or Territory, is an obstruction to the free navigation of such waters, by reason of difficulty in passing the draw-opening or the raft-span of said bridge, by rafts, steamboats, or other water-craft, it shall be the duty of the said Secretary, on satisfactory proof thereof, to require the company or persons owning, controlling, or operating said bridge to cause such aids to the passage of said draw-opening or of said raft-span, or of both said draw-opening and raft-span

to be constructed, placed, and maintained, at their own cost and expense, in the form of booms, dikes, piers, or other suitable and proper structures for the guiding of said rafts, steamboats, and other water-craft safely through said opening or span, or both said opening or span, as shall be specified in his order in that behalf; and on failure of the company or persons aforesaid to make and establish such additional structures within a reasonable time, the said Secretary shall proceed to cause the same to be built or made at the expense of the United States, and shall refer the matter without delay to the Attorney-General of the United States, whose duty it shall be to institute, in the name of the United States, proceedings in any circuit or district court of the United States in which such bridge, or any part thereof, is located, for the recovery of the cost thereof; and all moneys accruing from such proceedings shall be covered into the Treasury of the United States: *Provided*, That no greater sum than fifteen thousand dollars shall be required to be expended upon any one bridge in a single year: *Provided further*, That such sum of money as may be necessary to execute the provisions of this act is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, to be paid on the requisition of the Secretary of War. *Sec. 8, act of July 5, 1884 (23 Stat. 148).*

The words "circuit or" in this section were superseded by the abolition of the circuit courts and the transfer of their jurisdiction to the district courts by Jud. Code (36 Stat. 1167).

1566. Government to remedy obstruction of navigation at the cost of the owner of a bridge.—That any persons who shall fail or refuse to comply with the lawful order of the Secretary of War or the Chief of Engineers, made in accordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any persons who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such bridge and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such bridge and accessory works at the expense of the persons owning or controlling such bridge, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction; and the removal of any structures erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary of War or Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the circuit court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States at the request of the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any bridge under this Act, the cause or question arising may be tried before the circuit court of the United States in any district which any portion of said obstruction or bridge touches. *Sec. 5, act of Mar. 23, 1906 (34 Stat. 85).*

That the word "persons" as used in this Act shall be construed to import both the singular and the plural, as the case demands, and shall include munici-

palities, quasi municipal corporations, corporations, companies, and associations. *Sec. 7, act of Mar. 23, 1906 (34 Stat. 86).*

Notes of Decisions.

Construction of statute in general.—This section relates only to bridges the construction of which was authorized since the enactment of the bridge act, of which this section is a part. State *v.* White River Valley Ry. Co. (1911), 129 N. W. 1034, 27 S. D. 65.

1567. Deflection of currents by bridges.—That whenever complaint shall be made to the Secretary of War that by reason of the placing in any navigable waters of the United States of any bridge pier or abutment, the current of such waters has been so deflected from its natural course as to cause by producing caving of banks or otherwise serious damage or danger to property, it shall be his duty to make inquiry, and if it shall be ascertained that the complaint is well founded, he shall cause the owners or persons operating such bridge to repair such damage or prevent such danger to property by such means as he shall indicate and within such time as he may name, and in default thereof the owners or persons operating such bridge shall be liable in any court of competent jurisdiction to the persons injured in a sum double the amount of said injury: *Provided, however*, That nothing herein contained shall be construed so as to affect any rights of action which may exist at the time of the passage of this act. *Sec. 2, act of Aug. 11, 1888 (25 Stat. 423).*

Notes of Decisions.

Bridge pier as nuisance.—This section does not treat as a nuisance a bridge pier deflecting the current, but treats it as lawfully existing. Adams *v.* Ulmer (1897), 39 Atl. 347, 91 Me. 47.

Liability for deflecting currents by obstructions.—See South Carolina *v.* Georgia (1876), 93 U. S. 4, 23 L. Ed. 782 [C. S. p. 12271].

1568. Lights and toll rates of bridges.—That no bridge erected or maintained under the provisions of this Act shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of this Act shall, in the opinion of the Secretary of War, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of War, after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of this Act; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain at their own expense, such lights and other signals thereon as the Secretary of Commerce and Labor shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall

be charged for the transit over any bridge constructed under the provisions of this Act, of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of War may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit. *Sec. 4, act of Mar. 23, 1906 (34 Stat. 85).*

See also 1564, ante.

The words "and Labor," in this section, were superseded by the creation of the Department of Labor and the change of the designations of the Department of Commerce and Labor, and of the Secretary thereof, to the Department of Commerce and the Secretary of Commerce, by sec. 1, act of Mar. 4, 1913 (37 Stat. 736).

Notes of Decisions.

Bridge tender at fault.—A city held liable for injury to a schooner which drifted in a high wind against a drawbridge which the city maintained over the Detroit River for failure of those in charge to open the draw on signal in violation of this section. Dorrington v. City of Detroit (1915), 223 Fed. 232, 138 C. C. A. 474.

Injury to a schooner by collision with a bridge held due solely to the negligence of the bridge tenders. O'Keefe v. Staples Coal Co. (D. C. 1911), 201 Fed. 135.

And see, also, notes under 1540, ante.

Power to fix tolls.—Congress may confer on a Federal court authority to fix the amount of toll chargeable by a bridge company for the use of a bridge constructed by it, under an act of the legislatures of Canada and New York, over public navigable waters of the United States, as the exercise of judicial functions is alone involved in determining the amount of such compensation. Canada Southern Ry. Co. v. International Bridge Co. (D. C. 1881), 8 Fed. 190.

Removal or alteration of bridges.—See 1564, ante.

1569. Bridges considered post routes.—That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct, maintain, and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies. *Sec. 2, act of Mar. 23, 1906 (34 Stat. 85).*

1570. Use of railroad bridges.—That all railroad companies desiring the use of any railroad bridge built in accordance with the provisions of this Act shall be entitled to equal rights and privileges relative to the passage of railway trains or cars over the same and over the approaches thereto upon payment of a reasonable compensation for such use; and in case of any disagreement between the parties in regard to the terms of such use or the sums to be paid all matters at issue shall be determined by the Secretary of War upon hearing the allegations and proofs submitted to him. *Sec. 3, act of Mar. 23, 1906 (34 Stat. 85).*

Notes of Decisions.

Railroads within statute.—The word "railroad" in its broadest sense includes a street railroad, while in its technical sense it does not apply to street railroads. The meaning of the word in a statute depends on the context and legislative intent. Massachusetts Loan & Trust Co. v. Hamilton (1898), 88 Fed. 588, 32 C. C. A. 46; (1905) 25 Op. Atty. Gen. 389.

Determination of compensation.—The act of June, 1870, which refers the question of the conditions upon which railway com-

panies shall enjoy the use of the international bridge to the district court of the United States for decision after hearing the proofs and allegations of the parties, implies that the decision shall proceed upon settled principles of law and equity, and not upon arbitrary discretion. Canada Northern Ry. *v.* International Bridge Co. (D. C. 1880), 7 Fed. 653. But does not confer on the court jurisdiction over a controversy relating solely to the compensation which is due the corporation for the use of the bridge, nor confer authority to fix the amount of such charges or tolls. And it will not be inferred that Congress intended to interfere with the judgment of the officers. Canada Southern Ry. Co. *v.* International Bridge Co. (D. C. 1881), 8 Fed. 190.

1571. Opening drawbridges.—That it shall be the duty of all persons owning, operating, and tending the drawbridges now built, or which may hereafter be built across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of War the public interests require to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law. Every such person who shall willfully fail or refuse to open, or cause to be opened, the draw of any such bridge for the passage of a boat or boats, or who shall unreasonably delay the opening of said draw after reasonable signal shall have been given, as provided in such regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two thousand dollars nor less than one thousand dollars, or by imprisonment (in the case of a natural person) for not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That the proper action to enforce the provisions of this section may be commenced before any commissioner, judge, or court, of the United States, and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States: *Provided further*, That whenever, in the opinion of the Secretary of War, the public interests require it, he may make rules and regulations to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law, and any violation thereof shall be punished as hereinbefore provided. *Sec. 5, act of Aug. 18, 1894 (28 Stat. 362.)*

Notes of Decisions.

Effect of statute.—Regulations for operation of drawbridges over navigable streams construed. The Yucatan (C. C. A. 1915), 226 Fed. 437.

This section does not add anything to the law on the subject, except to authorize the Secretary of War to adopt rules to govern the opening of drawbridges for vessels and other water crafts, which rules, when made and published, have the force of law. And it does not, of its own force, prohibit a railroad company from exercising its privilege under a State statute of closing its drawbridge over a river a reasonable time for repairs. (1899) 22 Op Atty. Gen. 312.

Publication of rules—Necessity.—Rules made pursuant to this section have no force until published, so that a steamboat owner would not be negligent in not observing rules not published. Fugina *v.* Chicago & N. W. Ry. Co. (1910), 125 N. W. 981, 142 Wis. 144.

Sufficiency.—Where rules were given to the Government officer in charge of improvements of a river at a port, with instructions to deliver copies thereof to the commanding officers of every vessel entering it, but four steamboat captains testified that they never received a copy thereof, it could not be said, as a matter of law, that the rules were published, so as to make it negligent for a boat not to whistle on approaching a drawbridge, as required by the rules. Fugina *v.* Chicago & N. W. Ry. Co. (1910), 125 N. W. 981, 142 Wis. 144.

Obstructions interfering with draw.—The erection of a drawbridge across a navigable stream is an incident to navigation, which can not be defeated by an obstruction

erected between high and low water mark, or so near the bridge as to interfere with the draw. Lenoir County v. Crabtree (1912), 74 S. E. 105, 158 N. C. 357.

Municipal corporations operating drawbridges.—A city, in operating a drawbridge forming a part of one of its streets, acts in its private or corporate capacity, and for injury to a vessel from the negligent operation of such draw, the city is liable. Lehigh Valley Transp. Co. v. City of Chicago (1909), 86 N. E. 1093, 237 Ill. 581, affirming judgment (1908), 141 Ill. App. 618.

Care required in maintaining drawbridges.—Proprietors of drawbridges over navigable streams are bound to use reasonable means to avoid accidents, and not to obstruct navigation, including the use of available signals to avoid misunderstanding and collision, though not expressly required by statute. Pennsylvania R. Co. v. Central R. Co. of New Jersey (D. C. 1892), 59 Fed. 190; decree affirmed, Central R. Co. of New Jersey v. Pennsylvania R. Co. (1893), 59 Fed. 192, 8 C. C. A. 86. And must exercise reasonable care, not only not to impede the safe navigation of passing vessels, but to obviate any unnecessary delay thereto. Central R. Co. of New Jersey v. Pennsylvania R. Co. (1893), 59 Fed. 192, 8 C. C. A. 86, affirming decree Pennsylvania R. Co. v. Central R. Co. of New Jersey (D. C. 1892), 59 Fed. 190.

The duty to take proper care of a bridge includes the duty to make proper provision for the passage of vessels through the draw. The custodians of the bridge are bound to the use of ordinary diligence to avoid accidents to vessels going through the draw in a customary manner, as one of the incidents of the management of the bridge. They are therefore responsible for the want of ordinary care on the part of their servants. Edgerton v. The Mayor (D. C. 1886), 27 Fed. 230. See, also (1899) 22 Op. Atty. Gen. 314, holding that operators of drawbridges must open them in a reasonable manner and at a reasonable time for the passage of vessels consistent with the uses for which drawbridges are built.

Repairs.—The repair of draws and of the bridges with which they are connected is necessary for their maintenance. A sufficient time should be allowed for repairs, and if they can not be prosecuted without closing the bridge for a number of successive days, such closing can not be considered an unreasonable interference with navigation. (1899) 22 Op. Atty. Gen. 312.

A county is not liable for detention of vessels in a river by breakage of the machinery operating a draw in a county bridge, where it does not appear that there was any negligence by the county's agents or servants, or any unreasonable delay in making repairs. Pettit v. Board of Chosen Freeholders of Camden County (D. C. 1898), 87 Fed. 768; decree affirmed (1899), 91 Fed. 998, 34 C. C. A. 159.

Evidence held not to show negligence in failing to promptly repair the draw of a bridge. New Haven Towing Co. v. City of New Haven (D. C. 1903), 126 Fed. 882.

1572. Approval of water power projects.— * * * *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate of foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to the passage of this Act: * * * *Sec. 4 (d), act of June 10, 1920 (41 Stat. 1066).*

* * * "Government dam" means a dam or other work, constructed or owned by the United States for Government purposes, with or without contribution from others. * * * *Sec. 3, act of June 10, 1920 (41 Stat. 1064).*

It was probably the intention to use the word "or" instead of the word "of" in the phrase "interstate of foreign commerce," used in eighth line of first citation.

1573. Investigations of streams to be dammed.— * * * Whenever permission for the construction of dams in navigable streams is granted, or is under consideration by Congress, such surveys and investigations of the sections of the streams affected may be made as are necessary to secure conformity with rational plans for the improvement of the streams for navigation. *Sec. 3, act of June 25, 1910 (36 Stat. 669).*

1574. Issue of a license to develop water-power.— * * * *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: * * * *Sec. 4 (d), act of June 10, 1920 (41 Stat. 1065–1066).*

That hereafter no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as now constituted of any national park or national monument shall be granted or made without specific authority of Congress, and so much of the Act of Congress approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," approved June 10, 1920, as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission is hereby repealed. *Act of Mar. 3, 1921 (41 Stat. 1353–1354).*

* * * *Provided further*, That no portion of this appropriation shall be available for any expense connected with the leasing of any water-power facilities in any national park and national monuments. *Act of Mar. 4, 1921 (41 Stat. 1380), making appropriations for sundry civil expenses: Federal Power Commission.*

1575. Dams constructed by private parties.—That when authority has been or may hereafter be granted by Congress, either directly or indirectly or by any official or officials of the United States, to any persons, to construct and maintain a dam for water power or other purpose across or in any of the navigable waters of the United States, such dam shall not be built or commenced until the plans and specifications for such dam and all accessory works, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and the Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such dam and accessory works; and when the plans and specifications for any dam to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans or specifications either before or after completion of the structure unless the modification of such plans or specifications has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War: *Provided*, That in approving the plans, specifications, and location for any dam, such conditions and stipulations may be imposed as the Chief of Engineers and the Secretary of War may deem necesssary to pro-

tect the present and future interests of the United States, which may include the condition that the persons constructing or maintaining such dam shall construct, maintain, and operate, without expense to the United States, in connection with any dam and accessory or appurtenant works, a lock or locks, booms, sluices, or any other structure or structures which the Secretary of War and the Chief of Engineers or Congress at any time may deem necessary in the interests of navigation, in accordance with such plans as they may approve, and also that whenever Congress shall authorize the construction of a lock or other structures for navigation purposes in connection with such dam, the persons owning such dam shall convey to the United States, free of cost, title to such land as may be required for such constructions and approaches, and shall grant to the United States free water power or power generated from water power for building and operating such constructions: *Provided further*, That in acting upon said plans as aforesaid the Chief of Engineers and the Secretary of War shall consider the bearing of said structure upon a comprehensive plan for the improvement of the waterway over which it is to be constructed with a view to the promotion of its navigable quality and for the full development of water power; and, as a part of the conditions and stipulations imposed by them, shall provide for improving and developing navigation, and fix such charge or charges for the privilege granted as may be sufficient to restore conditions with respect to navigability as existing at the time such privilege be granted or reimburse the United States for doing the same, and for such additional or further expense as may be incurred by the United States with reference to such project, including the cost of any investigations necessary for approval of plans and such supervision of construction as may be necessary in the interests of the United States: *Provided further*, That the Chief of Engineers and the Secretary of War are hereby authorized and directed to fix and collect just and proper charge or charges for the privilege granted to all dams authorized and constructed under the provisions of this Act which shall receive any direct benefit from the construction, operation, and maintenance by the United States of storage reservoirs at the headwaters of any navigable streams, or from the acquisition, holding, and maintenance of any forested watershed, or lands located by the United States at the headwaters of any navigable stream, wherever such shall be, for the development, improvement, or preservation of navigation in such streams in which such dams may be constructed. *Sec. 1, act of June 21, 1906 (34 Stat. 386), as amended by act of June 23, 1910 (36 Stat. 593).*

That the word "persons" as used in this Act shall be construed to import both the singular and the plural, as the case demands, and shall include corporations, companies, and associations. The word "dam" as used in this Act shall be construed to import both the singular and the plural, as the case demands. *Sec. 8, act of June 21, 1906 (34 Stat. 387), as amended by act of June 1910, (36 Stat. 596).*

That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all dams which may be constructed in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any dam which shall have been constructed in accordance with its provisions. *Sec. 7, act of June 21, 1906 (34 Stat. 387), as amended by act of June 23, 1910 (36 Stat. 596).*

Notes of Decisions.

Power of States in absence of Federal legislation.—See 1560, ante, and notes thereunder.

A party is not liable for obstructing the navigation of a river wholly within the limits of a State by means of a dam which he has erected under authority of a State statute and pursuant to the requirements thereof. Pound *v.* Turck (1877), 95 U. S. 459, 24 L. Ed. 525.

In the absence of Federal statute, a State may by statute authorize the erection of a dam across a navigable river within its limits. Id.; Manigault *v.* Springs (1905), 26 Sup. Ct. 127, 199 U. S. 473, 50 L. Ed. 274. Though it may involve a partial obstruction to navigation. Woodman *v.* Kilbourn Mfg. Co. (C. C. 1867), Fed. Cas. No. 17,978. And a constitutional provision that all navigable waters shall remain public highways does not prevent the State from authorizing a dam across a navigable stream for drainage. Manigault *v.* Springs (1905), 26 Sup. Ct. 127, 99 U. S. 473, 50 L. Ed. 274. See U. S. *v.* Rio Grande Dam & Irrigation Co. (1899), 19 Sup. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136, for a discussion of the powers of States in absence of congressional action.

Power of Congress.—See 1560, ante, and notes thereunder.

Congress has supreme control of a navigable stream where the commerce thereon is interstate and foreign. U. S. *v.* Rio Grande Dam & Irrigation Co. (1899), 19 Sup. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136; Union Bridge Co. *v.* U. S. (1907), 27 Sup. Ct. 367, 204 U. S. 364, 51 L. Ed. 523; Philadelphia Co. *v.* Stimson (1912), 32 Sup. Ct. 340, 223 U. S. 605, 56 L. Ed. 570; Hagerta *v.* Mississippi River Power Co. (D. C. 1913), 202 Fed. 776.

Statutory authority for dams.—The right of a riparian owner on a stream notoriously navigable, or declared so by legislative enactment, to dam for milling purposes, must be conferred by an exercise of the legislative will amounting to a license. York Haven Water & Power Co. *v.* York Haven Paper Co. (1912), 201 Fed. 270, 119 C. C. A. 508, reversing decree York Haven Paper Co. v. York Haven Water & Power Co. (C. C. 1911), 194 Fed. 255.

Quære if the legislature of one State can authorize a dam locally in that State to be raised, so as to flow back a public river running into another State, to the injury of mill privileges locally situate in the latter State. Farnum *v.* Blackstone Canal Corp. (C. C. 1830), Fed. Cas. No. 4,675. See (1909) 27 Op. Atty. Gen. 327, declaring that Congress has authorized no one to give assent for the United States to the construction of the dam, though the legislature of a State should, so far as it has power to do, authorize its construction.

Meaning of "assent."—The word "assent," as used in an act of Congress of Feb. 9, 1905, granting the right to a company to build a dam across the Mississippi River, held equivalent in meaning to "authorize." Hagerla *v.* Mississippi River Power Co. (D. C. 1913), 202 Fed. 776.

Navigable waters of the United States.—See 1560, 1561, ante, and notes thereunder.

A finding that a stream is navigable up to the junction with it of another stream, but that the portion above the junction, on which it was proposed to build a dam, is not navigable, has no channel, and is "nothing but a high-water outlet, going dry every summer at many places, choked with rafts, and filled with sand, reefs, etc.," is, in effect, a finding that the navigability of the stream below the junction is not influenced by the flow of water from that portion above and hence that such navigability would not be injured by the erection of a dam. Egan *v.* Hart (1897), 17 Sup. Ct. 300, 165 U. S. 188, 41 L. Ed. 680.

A pass or crevasse caused by the overflow of the Mississippi River, making a channel to the Gulf of Mexico, through which a few fishermen have occasionally gone with small vessels carrying oysters for planting, and through which one or two cargoes of willows and timber may have passed, but which has not been used for any purpose of interstate commerce, and the gulf end of which has become closed, does not constitute a navigable water of the United States in such a sense that a dam erected therein for the purpose and with the effect of reclaiming overflowed lands and rendering them fit for cultivation will constitute an obstruction in navigable waters, within the prohibition of the act of September 19, 1890, against such obstructions without authority of the Secretary of War. Leovy *v.* U. S. (1900), 20 Sup. Ct. 797, 177 U. S. 621, 44 L. Ed. 914, reversing judgment (1899), 92 Fed. 344, 34 C. C. A. 392.

The St. Louis and Cloquet Rivers are navigable waters of the United States, and the Secretary of War has authority to authorize their obstruction by dams, but he can not revoke his permit after large expenditures have been made on the faith thereof. (1894) 20 Op. Atty. Gen. 713; (1894) 21 Op. Atty. Gen. 41.

Waters held not navigable.—A meandered slough, dry during the greater portion of the year, except during high tide,

at which time it was navigable for a short distance for small craft and floating logs, held not navigable, so as to require the consent of the Federal Government for the construction of a dam at its mouth. State v. Superior Court of Skagit County (1906), 85 P. 264, 42 Wash. 491.

And see, 1560, 1561, ante, and notes thereunder.

Compensation for privilege of constructing dams.—The Chief of Engineers and the Secretary of War are not authorized to require as a condition to a license for the construction of a dam across a navigable river, the payment of a sum or sums by way of compensation for the privilege granted, although they may require such payments or assumption of expenses as are necessary or proper to insure the navigability of the stream. Within the scope of the powers granted by Congress in this regard the discretion of the Chief of Engineers and the Secretary of War is not limited. (1909) 27 Op. Atty. Gen. 462.

Dams as obstruction.—The construction of a dam in a river at a point where it is not navigable, which so retards the flow of water as to affect the navigability at a point where it was navigable before, is prohibited. U. S. v. Rio Grande Dam & Irrigation Co. (1899), 19 Sup. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136.

The construction of a dam in a river was not objectionable as an obstruction to navigation where there was no present navigation on the river in fact. People v. Economy Light & Power Co. (1909), 89 N. E. 760, 241 Ill. 290.

Where no provision was made by an apron or sluiceway to pass logs around or over a milldam constructed in a navigable stream, and a rise of 4 or 5 feet is required to pass the logs over the dam, whereas they could be floated on a depth of from 2 to 3 feet, so that more water was required to float them over the dam than on the natural stream, the dam was an obstruction. Trullinger v. Howe (Or. 1908), 97 P. 548; decree modified on rehearing (1909), 99 P. 880.

As nuisance.—No one has a right to maintain a dam across a navigable stream, so as to obstruct its flow and cause salt water to overflow on the land of another and stagnate, thereby causing the death of trees on the land; and such action constitutes a nuisance, for which the owner of the land has a cause of action for its abatement. Clement v. Louisiana Irrigation & Mill Co. (1911), 56 So. 902, 129 La. 825.

1576. Limit of time for completing a dam.—That whenever Congress shall hereafter by law authorize the construction of any dam across any of the navigable waters of the United States, and no time for the commencement and completion of such dam is named in said Act, the authority thereby granted shall cease and be null and void unless the actual construction of the dam authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act. *Sec. 6, act of June 21, 1906 (34 Stat. 387), as amended by act of June 23, 1910 (36 Stat. 596).*

1577. Locks in dams.—That if the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the commission may, in so far as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

(a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of War and made part of such license.

(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights of way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities,

(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States. *Sec. 11, act of June 10, 1920 (41 Stat. 1070).*

That whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures can not, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in section 11, subsection (a) hereof, the commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures. *Sec. 12, act of June 10, 1920 (41 Stat. 1070).*

1578. Locks constructed by the Government in a privately owned dam.—That the right is hereby reserved to the United States to construct, maintain, and operate, in connection with any dam built in accordance with the provisions of this Act, a suitable lock or locks, booms, sluices, or any other structures for navigation purposes, and at all times to control the said dam and the level of the pool caused by said dam to such an extent as may be necessary to provide proper facilities for navigation. *Sec. 2, act of June 21, 1906 (34 Stat. 386), as amended by act of June 23, 1910, (36 Stat. 594).*

1579. Dams suited to development of water power.—In order to make possible the economical future development of water power the Secretary of War, upon recommendation of the Chief of Engineers, is hereby authorized, in his discretion, to provide in the permanent parts of any dam authorized at any time by Congress for the improvement of navigation such foundations, sluices, and other works, as may be considered desirable for the future development of its water power. *Sec. 12, act of July 25, 1912 (37 Stat. 233).*

1580. Revocation of a dam privilege.—That all rights acquired under this Act shall cease and be determined if the person, company, or corporation acquiring such rights shall, at any time, fail, after receiving reasonable notice thereof, to comply with any of the provisions and requirements of the Act, or with any of the stipulations and conditions that may be prescribed as aforesaid by the Chief of Engineers and the Secretary of War, including the payment into the Treasury of the United States of the charges provided for by section one of this Act: *Provided*, That Congress may revoke any rights conferred in pursuance of this Act whenever it is necessary for public use, and, in the event of any such revocation by Congress, the United States shall pay the owners of any dam and appurtenant works built under authority of this Act, as full compensation, the reasonable value thereof, exclusive of the value of the authority or franchise granted, such reasonable value to be determined by mutual agreement between the Secretary of War and the said owners, and in case they cannot agree, then by proceedings instituted in the United States circuit court for the condemnation of such properties: *And provided also*, That the authority granted under or in pursuance of the provisions of this Act shall terminate at the end of a period not to exceed fifty years from the date of the original approval of the project under this Act, unless sooner revoked as herein provided or Congress shall otherwise direct: *Provided, however*, That this limitation shall not apply to

any corporation or individual heretofore authorized by the United States, or by any State, to construct a dam in or across a navigable waterway, upon which dam expenditures of money have heretofore been made in reliance upon such grant or grants. *Sec. 4, act of June 21, 1906 (34 Stat. 386), as amended by act of June 23, 1910 (36 Stat. 595).*

The word "circuit," in this section, was superseded by the abolition of the circuit courts and the transfer of their jurisdiction to the district courts, by Jud. Code (36 Stat. 1167).

1581. Removal of a dam.—That any persons who shall fail or refuse to comply with the lawful order of the Secretary of War and the Chief of Engineers, made in accordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any persons who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such dam and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such dam and accessory works as an obstruction to navigation at the expense of the persons owning or controlling such dam, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction. Said provision as to recovery of expense shall not apply wherever the United States has been previously reimbursed for such removal; and the removal or any structures erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary of War or the Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the circuit court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States at the request of the Chief of Engineers or the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any dam under this Act the cause or question arising may be tried before the circuit court of the United States in any district in which any portion of said obstruction or dam touches. *Sec. 5, act of June 21, 1906 (34 Stat. 386), as amended by act of June 23, 1910 (36 Stat. 595).*

See notes to sec. 1 of this act, 1575, ante.

The word "circuit," in the two places where it occurs in this section was superseded by the abolition of the circuit courts and the transfer of their jurisdiction to the district courts, by Jud. Code (36 Stat. 1167).

Notes of Decisions.

Remedy for unauthorized dams.—Remedy of the United States in case of an unauthorized erection of a dam across navigable waters is by injunction, under sec. 10 of the act of Sept. 19, 1890 (26 Stat. 454), and if the dam has been constructed, also by criminal prosecution. (1897) 21 Op. Atty. Gen. 518.

If waters confined by a dam were wholly inclosed by plaintiffs' land, and were navigable, and the dam was a purpresture, it could only be abated at the instance of the State or National Government; plaintiffs having color of title to the water covered lands. Boise Land Co. v. Burdick (Cal. 1907), 90 P. 532.

1582. Requisition of water power developments by the United States.—That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee. *Sec. 16, act of June 10, 1920 (41 Stat. 1072).*

1583. Composition of the Federal Power Commission.—That a commission is hereby created and established, to be known as the Federal Power Commission (hereinafter referred to as the commission), which shall be composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. Two members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal, which shall be judicially noticed. The President shall designate the chairman of the commission. *Sec. 1, act of June 10, 1920 (41 Stat. 1063).*

That the commission shall appoint an executive secretary, who shall receive a salary of $5,000 a year, and prescribe his duties, and the commission may request the President of the United States to detail an officer from the United States Engineer Corps to serve the commission as engineer officer, his duties to be prescribed by the commission. * * * *Sec. 2, act of June 10, 1920 (41 Stat. 1063).*

1584. Powers of the Federal Power Commission.—To perform any and all acts, to make such rules and regulations, and to issue such orders not inconsistent with this Act as may be necessary and proper for the purpose of carrying out the provisions of this Act. *Sec. 4 (h), act of June 10, 1920 (41 Stat. 1067).*

1585. Federal Power Commission to act through the War Department, etc.—* * * The work of the commission shall be performed by and through the Departments of War, Interior, and Agriculture and their engineering, technical, clerical, and other personnel except as may be otherwise provided by law. * * * *Sec. 2, act of June 10, 1920 (41 Stat. 1063).*

1586. Lands and waters under control of the Federal Power Commission.—* * * "Reservations" means national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws; also lands and interests in lands acquired and held for any public purpose. * * *

"Navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce

with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids; together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority. * * * *Sec. 3, act of June 10, 1920 (41 Stat. 1063–1064).*

1587. Injuries to works of the United States.— * * * Any person who shall willfully and unlawfully injure any pier, breakwater, or other work of the United States for the improvement of rivers or harbors, or navigation in the United States, shall, on conviction thereof, be punished by a fine not exceeding one thousand dollars. *Sec. 3, act of Aug. 14, 1876 (19 Stat. 139).*

Notes of Decisions.

Protection of harbor improvement works.— Lawful authority exists for the protection of harbor improvement works from pillage or appropriation by individuals or corporations. (1853) 6 Op. Atty. Gen. 172.

1588. Use by private parties of Government works.—That it shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: *Provided*, That the Secretary of War may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest. *Sec. 14, act of March 3, 1899 (30 Stat. 1152).*

Sec. 8 of this act required the Secretary of War to report to Congress a list of all piers, wharves, and other structures or property pertaining to river and harbor works of the Government then occupied by private persons or corporations, together with the terms of such occupancy.

Notes of Decisions.

Applicability of statute.—This section applies to a levee built to prevent overflow of the Mississippi, although several miles from the bank of the river, and whether completed or not. Houck v. U. S. (1912), 201 Fed. 862, 120 C. C. A. 200; Cape Girardeau & T. R. R. Co. v. Jordan (1912), 201 Fed. Cas. 868, 120 C. C. A. 206.

1589. Punishment for obstruction of navigable waters, injury to Government works, etc.—That every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprison-

ment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section thirteen of this Act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of War, or who shall willfully injure or destroy any work of the United States contemplated in section fourteen of this Act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this Act, shall be deemed guilty of a violation of this Act, and shall upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof. *Sec. 16, act of March 3, 1899 (30 Stat. 1153).*

Secs. 13–15 of this act, mentioned in this section, are set forth 1547, 1588, 1557, ante.

Notes of Decisions.

Validity of statute.—This section was enacted in the exercise of the police power of the Government. Scow No. 36 (1906), 144 Fed. 932, 75 C. C. A. 572. And is within the constitutional power of Congress. The Scow No. 9 (D. C. 1907), 152 Fed. 548.

Penalties.—To render a vessel subject to penalties it is not essential that some person or corporation should have previously been convicted thereunder. The Scow No. 9 (D. C. 1907), 152 Fed. 548.

Where the person placed in charge of a scow by the owner, for the purpose of dumping her load, in the business in which she was used, and in which the owner was engaged, discharged such load into the waters of a harbor, in violation of 1547, ante, such act was in a sense within the scope of his employment, though contrary to the owner's general instructions, and the scow was "used" for the unlawful purpose, within this section, and subject to penalty. Scow No. 36 (1906), 144 Fed. 932, 75 C. C. A. 572.

Where the owners of a dumping scow placed a man in sole charge, with power to dump her load, and he becoming unnecessarily alarmed at the roughness of the sea while being towed to the dumping grounds, dumped a part of the load in violation of 1547, ante, the scow is subject to the penalty imposed by this section. The Scow No. 9 (D. C. 1907), 152 Fed. 548.

Criminal prosecution.—See 1590, post, and notes thereunder.

Jurisdiction of courts.—Under 14 Stat. 244, providing that, "in case of any litigation arising from any obstruction * * * to * * * navigation of said river, the cause may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches," held, that the United States courts had only concurrent jurisdiction with the State courts. Missouri River Packet Co. *v.* Hannibal & St. J. R. Co. (1883), 79 Mo. 478.

1590. Arrest of offenders by officers in charge of river and harbor works.—That the Department of Justice shall conduct the legal proceedings necessary to

enforce the foregoing provisions of sections nine to sixteen, inclusive, of this Act; and it shall be the duty of district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter designated, and it shall furthermore be the duty of said district attorneys to report to the Attorney-General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney-General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers, shall have power and authority to swear out process and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid section of this Act, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under the provisions of this Act, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States. *Sec. 17, act of March 3, 1899 (30 Stat. 1153).*

Notes of Decisions.

Enjoining criminal prosecutions.—One whose property rights have been invaded in fixing harbor lines may sue to enjoin the Secretary of War from causing criminal proceedings to be brought against him, under 1542, ante (as originally enacted), and this section. Philadelphia Co. *v.* Stimson (1912), 32 Sup. Ct. 340, 344, 223 U. S. 605, 56 L. Ed. 570, affirming decree. Same *v.* Dickinson (1909), 33 App. D. C. 338.

1591. Information given to district attorneys; Duty of officers and agents.—That it shall be the duty of officers and agents having the supervision, on the part of the United States, of the work in progress for the preservation and improvement of said navigable waters, and, in their absence, of the United States collectors of customs and other revenue officers to enforce the provisions of this act by giving information to the district attorney of the United States for the district in which any violation of any provision of this act shall have been committed: *Provided*, That the provisions of this act shall not apply to Torch Lake, Houghton County, Michigan. *Sec. 11, act of Sept. 19, 1890 (26 Stat. 455).*

Secs. 4–9 of this act relating to obstructions to navigation by bridges, deposits of refuse, construction of wharves, wrecks, and injuries to Government works, were superseded by secs. 9, 10, 13–16, 18–20, act of Mar. 3, 1899, which contained provisions more or less similar to those contained in these superseded sections. Said secs. 9 and 18 are set forth post, 1561, 1564. Said secs. 10, 13–16, 19, and 20 are set forth 1560, 1547, 1548, 1557, 1589, 1558, 1559, ante. This section may be regarded as applicable to the provisions of the later act so far as it contained substitutes for the previous sections of this act.

As to operation of sec. 10 of this act, see notes to sec. 10, act of Sept. 19, 1890. (26 Stat. 454).

Notes of Decisions.

Failure of officers to perform duty not preventing criminal prosecution.—A criminal prosecution for the obstruction of navigable waters of the United States under act of Sept. 19, 1890, secs. 6, 7, 10 (26 Stat. 426), may be maintained though neither the officers and agents of the United States in charge of works for the improvement of said waters, nor the collectors of customs or other revenue officers, have given information to the district attorney as provided in this section. U. S. *v.* David Burns and Gideon Burns (C. C. 1893), 54 Fed. 351.

1592. International Waterways Commission.—International Waterways Commission: * * * And retired officers of the Corps of Engineers of the United States Army shall be eligible for service on said commission. *Sec. 1, act of June 30, 1906 (34 Stat. 743).*

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